

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



AUG 18 2003

FILE: WAC 02 052 52443 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center denied the nonimmigrant visa petition. The matter is now before the AAO on appeal. The AAO will dismiss the appeal.

The petitioner, [REDACTED] imports and exports motorcycles, motorcycle parts, and motorcycle accessories. The parent company, [REDACTED] manufactures motorcycles, scooters, and related parts. The parent is incorporated and located in the [REDACTED] [REDACTED] owns 51 percent of the petitioner's stock. The petitioner incorporated itself in the State of California in April 1998.

The petitioner seeks authorization to employ the beneficiary temporarily in the United States as its quality control manager. The director determined, however, that the beneficiary would not be employed in a primarily managerial or executive capacity. In short, the director concluded that the beneficiary will have no subordinates able to relieve him of his non-managerial tasks. On appeal, the petitioner asserts that the Bureau may approve an intracompany transferee who supervises no employees, even if the beneficiary is not opening a new office.

The sole issue in this case whether the beneficiary will primarily work as a manager or an executive. To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act. (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

Moreover, 8 C.F.R. § 214.2(1)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

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- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

In regard to managerial or executive capacity, section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner initially used Form I-129 to describe the beneficiary's proposed duties at the U.S. entity. Those duties were:

To perform the responsibilities of a quality control manager, which include: To plan, coordinate and manage quality control activities to ensure consistent product[] quality. To hire and train quality control employees. To investigate and adjust customer complaint[s] regarding products['] quality. To confer with sales personnel on customers' specification of quality of company products.

Additionally, in a November 21, 2001 letter and in the appellate brief, the petitioner described the beneficiary's proposed responsibilities in somewhat more detail:

To plan, coordinate and manage [a] quality control program designed to ensure continuous production of products consistent with established standards or [which] meet the required standards[.] To develop and analyze statistical data and product specifications to

determine present standards and proposed quality and reliability expectancy of finished product[s]. To formulate and maintain quality control objectives and coordinate objectives with production procedures in cooperation with marketing personnel in the United States and plant managers in China to maximize product reliability and minimize costs. To hire and train quality control employees. To manage quality control employees in inspection and testing activities. To investigate and adjust customers' complaints regarding products['] quality.

Counsel's brief added, "Upon report[ing] to his office [in the United States], the beneficiary will be required to implement the quality control department." The petitioner's proposed organizational chart depicted the beneficiary as reporting directly to the U.S. entity's president (Kou Jung Shen) and as supervising two employees, namely, a clerk (Chien Yu Sheng) and a warehouse sales person (Chanh Dam).

On appeal, the petitioner's counsel raises inconsistent arguments confusing the new office regulations, see 8 C.F.R. § 214.2(1)(3)(v), with the managerial and executive requirements described above. On one hand, petitioner argues:

The [Immigration & Nationality Act] does not require that the beneficiary of an "L" classification be coming to an existing office . . . in order for the petition to be approved.

* * *

Even on Form I-129, Supplement-L, under Section 1, the last question of the form asked "Is the alien coming to the U.S. to open a new office?" (Emphasis in petitioner's brief.) By asking this questions, it [is] revealed that there is no requirement of pre[-]existing subordinates in order for . . . managerial personnel to be qualified for a[n] L-1A visa to come to the United States to hold a managerial positions.

On the other hand, the petitioner's counsel maintains:

Not only the U.S. subsidiary has had its physical office premises, the company has been in operation for over one year. The submitted evidentiary documents and the history of business has proved that the petitioner had all the logical reasons and circumstances which prompted the petition of the beneficiary to be necessary.

The questions here are not whether the Chinese parent has been in business for more than one year, whether the petitioner has obtained sufficient premises to be a qualifying organization under 8 C.F.R. § 214.2(1)(3)(v), or whether the U.S. entity has existed for more than one year. The evidence establishes that the U.S. obtained sufficient premises and that the Chinese and U.S. entities have been in business more than one year. Accordingly, the petitioner may not qualify as a "new office," and thereby avail itself of the regulations 8 C.F.R. § 214.2(1)(3)(v). Furthermore, the regulations at 8 C.F.R. § 214.2(1)(3)(v)(C) state, "The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position . . ."; therefore, if the beneficiary were coming to the United States to open a new office, the Bureau would not necessarily expect him to have any subordinates during the office's first year. The question in this case is simply whether the beneficiary would be assuming primarily managerial or executive duties at the U.S. entity.

An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Moreover, as previously noted, "A first-line supervisor is not considered to be acting in a managerial capacity by virtue of the supervisor's supervisory duties unless the employees supervised are professional." 8 C.F.R. § 214.2(1)(1)(ii)(B)(4). The beneficiary's proposed duties essentially track the regulatory definition of a first-line supervisor of non-professional employees. For example, as cited above, the beneficiary's primary responsibility will be "coordinat[ing] and manag[ing] a quality control program designed to ensure continuous production of products" Furthermore, the beneficiary will be "develop[ing] and analyz[ing] statistical data and product specifications to

determine present standards and proposed quality and reliability expectancy of finished product[s]." In other words, the petitioner defines the beneficiary's work completely in terms of performing tasks necessary to produce a product. In short, the beneficiary's proposed functions are not primarily managerial or executive.

Additionally, the petitioner has not demonstrated that the beneficiary will be overseeing professional, managerial, or supervisory personnel who can relieve him from performing nonqualifying duties. In particular, section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[T]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

In this case, the beneficiary will be supervising two employees, namely, a clerk [REDACTED] and a warehouse sales person [REDACTED]. The petitioner submitted no evidence demonstrating that these two positions required an advanced baccalaureate degree. Additionally, the petitioner failed to describe the clerk or sales person's duties. The petitioner's failure to submit adequate supporting documentary evidence does not meet the burden of proof in these proceedings. *Matter of Treasure Craft of California*, supra. 14 I&N Dec. 190 (Reg. Comm. 1972). Consequently, the director properly concluded that the clerk and sales person would be unable to relieve the beneficiary of his non-managerial duties.

On appeal, petitioner's counsel asserts that the petitioner will eventually hire more employees for the beneficiary to supervise, in turn elevating the beneficiary to a primarily managerial or executive level. The record contains no proof that the petitioner has hired or will hire additional staff for the beneficiary to oversee. Counsel's assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence

is insufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.*

Also, the Bureau may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The Bureau will adjudicate the appeal based only on the record proceedings before the director. See, *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). When the petitioner filed Form I-129, the beneficiary did not supervise any employees other than the clerk and the warehouse sales person. Therefore, the director correctly found that the beneficiary did not serve in a primarily executive or managerial capacity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999) (requiring the petitioner to provide adequate documentation); *Republic of Transkei v. INS*, 923 F.2d 175; 178 (D.C. Cir. 1991) (holding burden is on the petitioner to provide documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

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