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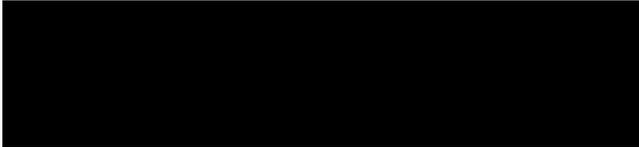


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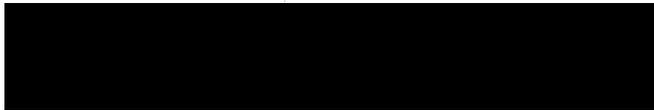
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FILE: WAC 02 271 55155 Office: CALIFORNIA SERVICE CENTER Date:

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is engaged in organizing trade exhibitions in the United States. It seeks to employ the beneficiary as its international marketing director, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed by the petitioning organization in a primarily managerial capacity.

On appeal, counsel asserts that the petitioner "provided sufficient evidence to show that the International Marketing Director works in a managerial capacity and oversees professional employees." Counsel submits an additional letter from the president of the U.S. company in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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 (l)(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.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in this proceeding is whether the beneficiary will be employed in the United States in a primarily managerial 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 a letter submitted with the petition, the petitioner outlined the following job responsibilities of the beneficiary:

- Market research to determine the best exposition media for the clients interested in participating in the Import/Export of goods through Mexico
- Organize the seminar programs with research institution, universities and government entities for the expositions and programs
- Meetings with agents, distributors and trade press in-country to maintain updates regarding events, shows and schedules
- Work hand in hand with national and international associations on the promotion of the shows to determine attendance
- Coordinate freight and customs Staffing, decoration and on-site events for maximum exposure

- Liaison between Mexican Consulate and attendees to the expositions and shows to facilitate their attendance to the shows
- Review, organize and translate when necessary, documentation of all marketing and promotional materials for events and expositions.

The petitioner submitted an organizational chart for the U.S. company, in which the beneficiary was identified as third in the organizational hierarchy. The petitioner included a notation on the organizational chart that the beneficiary would function as a liaison with two outside companies.

In a request for additional evidence, the director asked that the petitioner submit the following evidence supporting the beneficiary's role as a manager in the United States: (1) the U.S. entity's organizational chart identifying the beneficiary's position and other employees in the organization; (2) a detailed description of the beneficiary's specific job duties, including the percentage of time to be spent on each duty; (3) an explanation whether the beneficiary has supervisory, professional, or managerial employees under her direct supervision, including each subordinate's name, job title, job duties, entry date of employment, educational level, and salary; and, (4) any other employees under the beneficiary's supervision.

In response, the petitioner provided essentially the same job responsibilities as outlined above, and assigned percentages of time spent on each as follows: research and develop new business opportunities, 35%; market research for clients exporting goods through Mexico and Central America, 15%; organize seminar programs, 15%; meet with agents, distributors, trade, and consumer press, 25%; and, promotional work with national and international associations, 20%.¹ The petitioner further noted that the beneficiary would spend approximately fifty percent of her time initiating and developing the company's sales in the United States. The petitioner submitted an additional organizational chart for the U.S. company, and identified the beneficiary's subordinates as two sales executives, and one administrative assistant.

In his decision, the director concluded that the beneficiary would not be employed in a primarily managerial position in the United States. The director stated that because the petitioner failed to provide a description of the job duties performed by the beneficiary's subordinates, it is unclear whether the beneficiary would be supervising the work of other supervisory, professional, or managerial employees. The director also stated that a preponderance of the beneficiary's duties, specifically developing new business opportunities, market research, organizing seminars, and coordinating with freight and customs, are not managerial responsibilities. The director determined that the beneficiary "will be at best employed as a supervisor" of nonprofessional employees, and therefore, would not be employed in a managerial capacity.

On appeal, counsel asserts that the evidence submitted is sufficient to show that the beneficiary would oversee professional employees, and would be employed in a managerial capacity. Counsel outlines the requirements of managerial capacity, as defined in the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(B), and states that the beneficiary qualifies as a manager because: (1) the beneficiary will supervise the work of two sales executives, who are "professional" employees, and an administrative assistant; (2) the beneficiary will manage the "[m]arketing aspect of the company, which is an essential function within the organization"; (3) the beneficiary will have the authority to hire, fire, and recommend promotion for her three subordinate

¹ The AAO notes a discrepancy in the time allocations provided by the petitioner. The percentages total 110%, not including the additional time, 50%, the petitioner claimed the beneficiary would spend developing the company's sales.

employees, and would be in charge of the subordinates' performance reviews and interviewing new candidates; and (4) the beneficiary will have "the authority to guide [the sales executives] as to which markets or distributors to focus on for a particular event and to oversee the direction of sales efforts for said events." Counsel also provides the following job duties for the two sales executives functioning subordinate to the beneficiary:

maintaining contact with dealers and distributors in the U.S. and Mexico for participation in future trade shows and analyzing sales statistics in order to determine sales potential and monitoring client preferences, as well as analyzing the services offered by competitors and formulating options as to how to improve the company's services and products in order to improve sales and surpass the competitors.

Additionally, counsel submits a letter from the president of the petitioning organization, in which the president states that the position to be held by the beneficiary "is primarily working with the executives from various countries both government and private sector and U.S. associations and clients who are part of the industries we service." The president of the petitioning organization notes that the beneficiary would be "responsible for helping the sales team sell exhibit space and making sure the right kind of buyers attend the exhibition." The president also states that the beneficiary would hire and fire agencies that handle the local media relations, and would work with various associations in the U.S., Mexico, and South America to monitor the products displayed at the exhibitions.

In regards to employees of the organization, the president indicates that while the petitioner employs only a few permanent employees, independent contractors are hired to help with the preparation of an exhibition. The president claims that the beneficiary "would be instrumental in the selection and negotiation of these outside services."

On review, the record is not sufficient to demonstrate that the beneficiary would be employed in a primarily managerial capacity in the United States.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991) (Emphasis in original). When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

In the present matter, the petitioner outlined specific job duties to be performed by the beneficiary as the international marketing director. While some of the beneficiary's job duties may be classified as managerial, the majority of the duties do not represent the high-level responsibilities specified in the definition of managerial capacity. See 8 C.F.R. § 214.2(l)(1)(ii)(B). Specifically, the beneficiary will be performing market research, organizing seminars, and selling exhibit space. The petitioner also stated that the majority of the beneficiary's time, 50%, would be spent initiating and developing U.S. sales for the company. These job duties are indicative of the functions to be performed by employees of a sales, marketing, or public relations department, rather than a manager "who exercises discretion over the day-to-day operations of the activity or

function.” 8 C.F.R. § 214.2(l)(1)(ii)(B)(4). An employee who primarily performs the tasks necessary to produce a product or to 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).

Additionally, the evidence submitted by the petitioner and counsel does not demonstrate that the company employs a support staff sufficient to relieve the beneficiary from performing the above-listed non-managerial job duties. Although requested by the director, the petitioner failed to submit job descriptions for the beneficiary's two subordinates. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). When submitted by counsel on appeal, counsel provides that the sales executives would maintain contact with dealers and distributors, and analyze sales statistics and competitors' services in order to improve sales. The AAO will not consider this evidence as the petitioner was put on notice of required evidence, given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, and failed to submit the requested evidence. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, even if previously provided by the petitioner in its response to the director's request for evidence, the job descriptions do not establish that the beneficiary will be relieved from functioning in a non-managerial capacity.

Furthermore, the petitioner has not established that the beneficiary's subordinates are “supervisory, professional, or managerial employees,” as required in the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(B). In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that “[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 the present matter, although specifically requested by the director, the petitioner neglected to provide evidence of the sales executives' job duties, entry dates of employment, educational levels, and salaries. It is therefore impossible for the AAO to determine whether the beneficiary's subordinates should be considered “professionals.” Again, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Additionally, although counsel contends on appeal that the beneficiary “will supervise the work of the Sales Executives (‘professional’ employees),” counsel has not provided any evidence supporting the classification as a “professional.” The assertions of counsel 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).

For the foregoing reasons, the beneficiary may not be considered to be functioning in a primarily managerial capacity in the United States entity.

Beyond the decision of the director, the minimal documentation of the beneficiary's job duties in the foreign company raises the issue of whether the beneficiary has been employed abroad in a primarily managerial or executive position. The petitioner stated that the beneficiary has been employed as the foreign company's international marketing director, and has been involved in marketing exhibitions to “mainstream and Hispanic

companies.” Yet, the record is devoid of any additional description of the beneficiary’s job responsibilities. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has not shown that the beneficiary had the requisite one year of qualifying employment abroad. For this additional reason, this petition may not be approved.

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. Here, that burden has not been met. Accordingly, the director’s decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.