

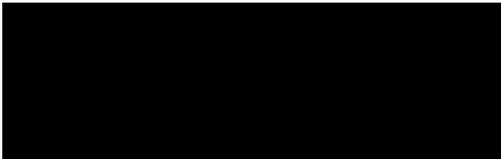
57

U.S. Department of Homeland Security

20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

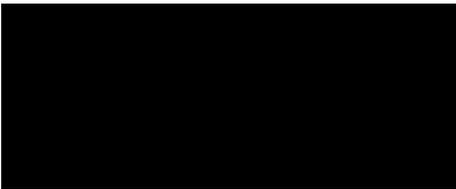


FILE: LIN 03 164 51336 Office: NEBRASKA SERVICE CENTER Date: OCT 20 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

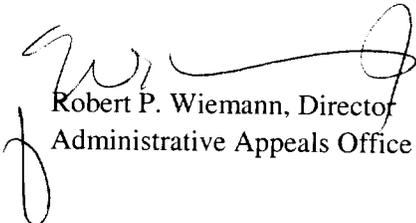
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

Identifying data deleted to
prevent disclosure of information
in violation of the Privacy Act

PUBLIC COPY

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was established in 1993 and claims to be engaged in the sale of chemical products and processes that enhance metals. The petitioner claims to be a subsidiary of HEF Groupe, located in France and Poland. It declares nine employees and approximately \$3.0 million dollars in gross annual income. It seeks to employ the beneficiary temporarily in the United States as a sales manager. The director determined that the petitioner failed to establish that the beneficiary has been employed by the foreign entity or will be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, counsel submits a brief in opposition to the director's decision. Counsel states that the petitioner has submitted sufficient evidence to establish that the beneficiary has been and will be primarily employed in a managerial or executive capacity.

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.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(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.
- (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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue in this proceeding is whether the petitioner has established that the beneficiary has been employed by the foreign entity in a primarily 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.

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The petitioner initially described the beneficiary's duties with HEF Groupe as:

- 35% - Managing prospective customers and markets
- 15% - Location of agents and establishment of distribution/sales networks
- 15% - Negotiating sales contracts
- 10% - Negotiating joint ventures
- 10% - Training and supervision of training and technology transfers to customers
- 5% - Conception of turnkey plants
- 10% - Coordination of business activities
- Meetings with important potential clients
- Visits to end user clients
- Representation of HEF in trade shows and technology conferences

The petitioner submitted a copy of the beneficiary's resume, which described his duties with HEF Groupe in part as:

Contract negotiations for the sales of HEF surface treatment processes, equipment and consumables Negotiations of joint ventures. Technology transfer sales and client training. Turn key project conception, management and follow-up. Prospecting large accounts

The director determined that the evidence submitted was insufficient to demonstrate that the beneficiary performed primarily in a managerial or executive capacity. The director noted that the duties described were primarily sales duties not managerial duties.

On appeal, the petitioner describes the beneficiary's duties with HEF Groupe as:

- 55% - Sales organizational and administrative management
- 25% - Budgetary management
- 20% - Direct implication in the tasks of the members of each division under his control
- 10% - Reporting operations to upper management and consequent business coordination

On review, the evidence of record is insufficient to establish that the beneficiary has been employed primarily in a managerial or executive capacity. In the instant matter, the petitioner submitted inconsistent evidence pertaining

to the beneficiary's job duties with the HEF Groupe. Initially 35 percent of the beneficiary's duties were described as "managing prospective customers and markets." The beneficiary described his duties with the foreign entity in his resume as being responsible for contract negotiations, the negotiation of joint ventures, and "technology transfer sales and client training." In contrast, on appeal the petitioner claims that the beneficiary spends 75 percent of his time engaged in "sales organizational and administrative management" and "budgetary management." In addition, the organizational chart submitted in response to the director's request for evidence differs from that which was submitted on appeal. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, evidence that is created by the petitioner after Citizenship and Immigration Services (CIS) points out the deficiencies and inconsistencies in the petition and evidence will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event that is to be proven and existent at the time of the director's notice.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, *id.* A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Based upon a review of the evidence and explanations given therefore, it appears that the beneficiary has been employed by the foreign entity primarily performing sales and marketing duties, rather than in a managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity.

The petitioner initially described the beneficiary's proposed duties as:

- 50% - Sales development through his staff
- 10% - Personal sales to major clients
- 10% - Negotiating Joint Ventures and other licensing agreements
- 10% - Technology transfer and customer training
- 10% - Staff management (administrative, unrelated to sales)
- 10% - Liaison with parent company board

In a letter dated May 12, 2003, the president of the U.S. entity stated that the beneficiary would be responsible for directing the special bushing sales, thermochemical process sales, PVD sales, laboratory services, and furnace services positions. The president further indicated that of the five positions only two actually had been filled. The petitioner submitted an organizational chart of the U.S. entity's hierarchy that demonstrated the beneficiary would direct the advanced marketing, bushing sales, laboratory services, and furnace services positions.

The director determined that the evidence submitted was insufficient to establish that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity. The director noted that there had been no evidence submitted to show that more than one position to be under the direction of the beneficiary had been filled. The director also noted that the beneficiary would be primarily performing sales duties, and that the evidence of the only subordinate did not indicate his duties to be managerial or professional. The director concluded by stating that the petitioner had failed to establish that the beneficiary would manage a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties.

On appeal, counsel asserts that the beneficiary will primarily manage the sales and marketing of the entity's products through subordinate employees. The petitioner submitted a letter dated, June 20, 2003, in which the company president infers that the U.S. entity is still in its developmental stages in that it continues to expand and intends to continue to hire new employees as a result of this expansion. In the letter he asserts that since the filing of the petition in the instant matter, the company has hired new employees to fill vacancies and has repositioned other employees within the organization. He also asserts that the beneficiary will be primarily responsible for managing the sales and marketing departments within the U.S. company by spending 70 percent of his working time performing only managerial duties.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed by the U.S. entity in a managerial or executive capacity. The record reveals that the petitioner was established in 1993 and has been doing business in the past years. It is implied throughout the record that the U.S. entity is still in its developmental stage. The petitioner stated that since the filing of the petition in the instant matter it has hired new employees to fill vacancies and anticipates hiring additional personnel in the future. In the instant matter, the record shows that the U.S. entity has been doing business for more than one year. Therefore, the petitioner does not qualify as a "new office" pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C) which allows the petitioning business one year to become sufficiently operational. The fact that the petitioner is still in a developmental stage of organizational development is considered, but does not relieve it from meeting statutory requirements. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp., supra.*

The petitioner seeks to submit a revised organizational chart and employment verification records on appeal. However, this evidence was specifically requested but not received by the director prior to his rendering his decision, and therefore will not be considered on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Again, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp., supra.*

Although the petitioner asserts that the beneficiary will be managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. In the instant matter, at the time of filing the petition the record demonstrates that the U.S. entity only employed one subordinate (bushing sales) to serve under the direction of the beneficiary in a non-managerial, non-professional capacity. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Based upon the evidence of

record it appears that the beneficiary will be primarily supervising a staff of non-professional employees; therefore the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. On appeal, the petitioner submits copies of employee's resumes that depict educational degrees received. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that an advanced degree is actually necessary to perform the duties of the subordinates. The evidence is insufficient to establish that the beneficiary would manage a subordinate staff of professional, managerial, or supervisory personnel. Neither does the evidence demonstrate that the petitioner will employ individuals who would relieve the beneficiary from performing non-qualifying duties.

Even though the petitioner claims that the beneficiary will direct and manage the petitioner's sales and marketing activities, there is insufficient evidence of record to substantiate that the U.S. entity has anyone on its staff to actually perform the sales and marketing function. Thus, either the beneficiary himself will perform the sales and marketing function or he will not actually manage the function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho, supra*. If the beneficiary is to perform the sales and marketing function, the AAO notes that 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 of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In review, the petitioner has failed to submit sufficient evidence to establish that the beneficiary has been employed by the foreign entity or will be employed by the U.S. entity primarily in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.