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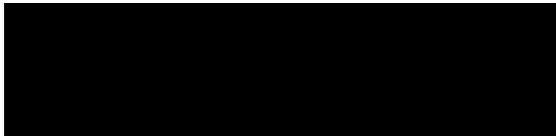
Date: APR 01 2005

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

The petitioner, UTA-USA LLC, endeavors to classify the beneficiary as an intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims to be an affiliate of Oz Kardester Yapi Malz. Paz. San. Ve Tic. Ltd. Sti., located in Turkey and is engaged in the business of importing and distributing marble. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's president. The petitioner was incorporated in the State of New Jersey on March 21, 2001 and claims to have eight employees.

On February 7, 2003 the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity.

On appeal, the petitioner's counsel submits a brief and claims that "[b]ased on the foregoing and all evidence submitted herewith, it should be abundantly clear that Beneficiary's position of President of [the petitioner] is an executive position. . . ."

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. 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. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(14)(3) state 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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether the beneficiary has been and will be primarily performing executive or managerial duties for the United States entity. 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 July 10, 2002 supporting letter, the petitioner described the beneficiary's proposed U.S. duties as the following:

[The beneficiary] will now devote a substantial portion of his time in the United States to the management of the Company. [The beneficiary] will continue to be responsible for the supervision of the import operations, coordinating shipment/transportation of merchandise, and supervising the accounting and budgeting functions of the United States Company. His specific responsibilities will continue to include the following:

- (1) Researching and purchasing the products to be imported from foreign countries in the United States;
- (2) Dealing with U.S. Customs, coordinating the domestic and foreign countries in the United States;
- (3) Supervising domestic procurement of items pertaining to business activities;
- (4) Supervising stock and warehouse facilities;
- (5) Supervising accounting and budgeting records; and
- (6) Conducting cost analysis.

The petitioner also stated that the beneficiary will "share the responsibility and authorization for the general decisions affecting the Company's general activity and performance; e.g., investment decisions, capital increase, recruitment of employees, among other issues."

Additionally, the petitioner submitted a copy of its employee contact list showing the names and positions of the workers. In its supporting letter, the petitioner claimed that as of June 2002 there were five full-time and three part-time employees including a president (the beneficiary), a vice president/ general manager, a full-time secretary, two full-time sales men, two part-time workers, and a part-time driver. The record also revealed that the petitioner indicated on its 2002 Employer's Report of Wages Paid Form WR-30 that it had had added six new employees and deleted the former five employees that had previously been employed by the petitioner. It is unclear why this change occurred.

In a request for additional evidence, on August 23, 2002, the director requested that the petitioner submit a comprehensive description of the beneficiary's proposed duties, an organizational chart for the U.S. entity indicating where the beneficiary will assume a managerial role, and a description of the subordinate employees' duties.

In response to the request for additional evidence, the petitioner submitted an October 16, 2002 letter that described the beneficiary's duties and his subordinates' duties. The petitioner stated that two of the sales persons "recently resigned from the company." In part, the letter described the beneficiary's U.S. duties as the following:

[The beneficiary] . . . will be responsible for devising strategies and formulating policies to ensure the Company's specific goals and objectives are met. Policy decisions include those involving investment decisions, capital increase and Company expansion into other regions of the U.S. [The beneficiary] has direct responsibility for purchasing, distribution and recruitment of professional employees.

Additionally, the beneficiary's duties were described in the letter under each of the following six enumerated headings:

- (1) Researching and purchasing the products to be imported from foreign countries into the United States
- (2) Dealing with U.S. Customs, supervising/coordinating the domestic and foreign transportation of the merchandise and preparing the shipment contracts
- (3) Supervising domestic procurement of items pertaining to business activities
- (4) Inventory report analysis
- (5) Supervising accounting and budgeting records
- (6) Managing cost analysis

The petitioner also stated that the beneficiary will perform "executive/managerial functions" and that his "responsibilities are of a senior level within the organizational hierarchy and with respect to the functions managed." In addition, the petitioner stated that the beneficiary "exercises wide discretion over the day-to-day operations of the functions for which he has authority."

On February 7, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The director found that the description that the petitioner provided of the beneficiary's duties was vague and did not "expound on the day-to-day activities of the beneficiary."

On appeal, the petitioner's counsel submits a brief that further describes the beneficiary's duties and claims that the beneficiary's position is "an executive position."

In 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). On review, the petitioner has failed to establish that the beneficiary has been and will be employed in a primarily

managerial or executive capacity. In the instant matter, the petitioner has provided a broad description of the beneficiary's duties that fails to indicate exactly what duties the beneficiary will primarily perform on a the daily basis. For example, the petitioner stated that the beneficiary's duties will involve "devising strategies and formulating policies," and "[r]esearching and purchasing the products" by "focusing on the product quality and price negotiations." The petitioner also claimed, on appeal, that the beneficiary will be involved in performing executive duties including, "directing the company's acquisition of inventory and negotiation of contracts and prices with foreign suppliers." However, the petitioner's description of the beneficiary's duties is non-specific. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, on appeal, the petitioner stated that the beneficiary "exercises wide discretion over the day-to-day operations of the functions for which he has authority." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, on appeal, the petitioner describes the beneficiary as being involved in "negotiation of contracts." Since the beneficiary is actually involved in the plans to increase sales and revenues, he will be providing the services of the business rather than directing such activities. On appeal the petitioner claims that "[o]nce the Company has been more firmly established and more profitable, and sufficient suppliers abroad are identified and contracts finalized, the Company will be in apposition to hire an individual who is qualified to assume import responsibilities – including negotiation of contracts/prices with suppliers." Therefore, the AAO is not persuaded that the beneficiary will only direct the management of the organization. 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).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. In response to the director's request for additional evidence, the petitioner claimed that the beneficiary has "indirect managerial responsibility over the existing employees." 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. 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 matter, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the duties and administrative work of the full-time secretary, whom are among the beneficiary's subordinates.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for directing an "essential function" within the organization. See section 101(a)(44)(B)(i) of the Act, 8 U.S.C. § 1101(a)(44)(B)(i). The petitioner stated on appeal that the beneficiary "directs the management of import and operation activities." If a petitioner claims that the beneficiary is directing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to directing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary directs the function rather than performs the duties relating to the function. As previously stated 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. at 593, 604. In this matter, the petitioner has not provided evidence that the beneficiary directs an essential function.

After careful consideration of the evidence, the AAO concludes that the petitioner has not established that the beneficiary has been or will be employed in a primarily executive or managerial capacity. For this reason, the petition will not be approved.

Beyond the decision of the director, the record does not establish that the parent company is still doing business abroad and still maintains a qualifying relationship with the U.S. entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner submitted insufficient evidence to establish that the foreign entity continues to do business abroad. The evidence in the record appears to suggest that overseas suppliers ship materials to the U.S. company without operating through a foreign affiliate. 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). In addition, the petitioner claims that the beneficiary (president of the company) and Ahmet Tuncer (general manager of the company) each own 50 percent of the U.S. entity. However, this raises a question as to the control of the U.S. and claimed foreign entity. The petitioner submitted a copy of its bylaws, U.S. Return of Partnership Income taxes Form 1065, membership certificates, and stock certificates indicating that the beneficiary and Ahmet Tuncer each owned 50 units of the U.S. company. However, this evidence failed to establish control of the U.S. entity. Without full disclosure of all relevant documents, CIS is unable to determine the elements of control of the U.S. entity and claimed foreign company. For this additional reason, the petition will not be approved.

Another issue beyond the decision of the director is whether the petitioner has established that the beneficiary's services are to be used for a temporary period and that he will be transferred to an assignment abroad upon the completion of the temporary services in the United States pursuant to 8 C.F.R. § 214.2(1)(3)(vii). Since both partners are running the U.S. business, this raises the question as to who would actually be operating the overseas company. The record does not contain proof that the beneficiary's services are to be used for a temporary period and that he will be transferred to an assignment abroad upon the completion of the temporary services in the United States pursuant to 8 C.F.R. § 214.2(1)(3)(vii). For this additional reason, the petition will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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 appeal will be dismissed.

ORDER: The appeal is dismissed.