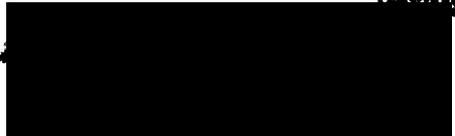


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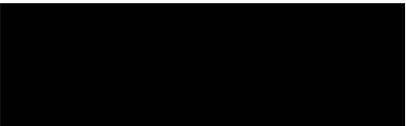
APR 05 2005

File: EAC-03-239-55879 Office: VERMONT SERVICE CENTER Date:

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)

IN 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, Vermont 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 filed this nonimmigrant petition seeking to extend the employment of its President and Director as an L-1A nonimmigrant 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 is a corporation organized in the State of Massachusetts that operates as an importer and exporter of automotive parts. The petitioner claims that it is the branch of [REDACTED] for Trading & Construction, located in [REDACTED]. The beneficiary was initially approved for L-1 status to open a new office in the United States, and was subsequently approved for an extension of her stay. The petitioner now seeks to again extend the beneficiary's stay for a two year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will be employed as a function manager, and that the petitioner has sufficient resources to support the beneficiary in a managerial status. In support of these assertions, counsel submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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) 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 the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 an August 25, 2003 letter submitted with the initial petition, the petitioner described the beneficiary's job duties as follows:

In this high level position, [the beneficiary] has a group of three (3) employees directly reporting to her, a number we hope will expand in the coming year. In the area of human resources management, [the beneficiary] exercises authority in regard to hiring, firing, training, delegation of assignments according to capabilities, preferences and technical goals, discipline, promotions, and remuneration. She conducts performance reviews and ensures that her staff follows corporate procedures.

Functioning autonomously, [the beneficiary] is responsible for managing and directing all development activities of [the petitioner] as they pertain to our international operations. Our International Expansion Office promotes the standardization areas across our international branches using head office policies and practices as a model [The beneficiary] routinely meets with various technical specialists and business contacts and with the Managing Director to ensure that our corporate philosophy is being understood and is being delivered accurately. She represents the unique concerns and requirements of the international operations to headquarters and provides a significant contribution in the formulation of strategic product plans to ensure that the business and strategic policies are effectively incorporated into our international business activities.

[The beneficiary] also establishes and promotes the standardization of customer support and service based upon our corporate model. She meets regularly with various development units to review current policies and procedures and develop appropriate plans necessary to ensure consistency of development practice in accordance with corporate standards

[The beneficiary] travels out of the United States on an average of two to three times per annum, each trip lasting approximately one and a half months. During these trips, [the beneficiary] renews acquaintances with current clients and establishes relationships with new ones

[The beneficiary] is also exploring new industries, so the [the petitioner] can diversify and expand its services and product line in order to be competitive as a multinational corporation. [The beneficiary] is responsible for contracting the lease and making all necessary arrangements for [the petitioner's] latest acquisition, Liberty Auto Sales.

On August 28, 2003, the director requested additional evidence. Specifically, the director requested: (1) an organizational chart for the petitioner; (2) evidence that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties, if applicable; (3) a complete position description for each of the beneficiary's subordinates, including an indication of the educational requirements for their duties; and (4) a breakdown of the number of hours the petitioner's employees will devote to their respective duties on a weekly basis.

In a response dated September 23, 2003, the petitioner submitted: (1) an organizational chart; (2) a position description for the beneficiary; and (3) documents providing the number of hours the petitioner's employees will devote to their respective duties on a weekly basis. The petitioner detailed the beneficiary's duties as follows:

PRESIDENT: [The beneficiary]

B.A. in English, Riyadh University, Riyadh, Saudi Arabia

- Formulating policies and providing the overall direction of the company by determining which products to import and export
approximately 8-10 hours/week
- Attending Board of Directors meeting on a weekly basis to determine the direction of the company and to plan future strategies
approximately 2-3 hours per week
- Meeting with Clerk prior to the Directors meeting to assess the past week's profits and problems experienced
approximately 1 hour per week
- Determining new products to purchase in the United States, examining these products, finding a market to accept the new goods
approximately 10-15 hours/week
- Establishing import and export contacts and marketing products with manufacturers, suppliers, dealers, and clients
approximately 2 hours/week
- Designing a schedule for the products to be shipped, and arranging for delivery, receiving, and the work force necessary to handle these jobs
approximately 5-6 hours
This activity occurs before trips abroad, approximately 2-3 times/year
- Meeting with and recruiting clientele from countries all over the world, including extensive travel
on average, trips lasting 1-1½ months
This activity only occurs during trips abroad, approximately 2-3 times/year
- Seeking and researching new and upcoming markets to enter, to give the company the cutting edge on particular products, and directing and guiding the staff and consultants necessary for such projects
approximately 9-10 hours/week

- Opening, establishing, and stabilizing markets for new goods in the Middle East and abroad
approximately 7-9 hours/week
- Upon completion of a project, meeting with the client either telephonically or in person and acquiring his or her satisfaction; follow-up with order updates
approximately 6-8 hours/week

The petitioner further indicated that it intends to hire an automotive manager and a mechanic in the future in order to staff an automotive repair division.

On September 30, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated "[t]he record does not ascertain that the beneficiary qualifies as a manager or an executive other than in position title." The director noted that the petitioner's annual net income is \$13,826, and determined that the petitioner would not realistically employ the beneficiary as a manager. The director further found that the evidence of record does not establish that the beneficiary's two subordinates are in fact managerial, supervisory, or professional employees. The director stated that "it appears that [the beneficiary] would be primarily engaged in the non-managerial, day-to-day operations of [the petitioner]."

On appeal, on Form I-290B counsel states the following:

Although the present staff consists of four employees, [the] Beneficiary is sufficiently engaged in managerial and supervisory functions to qualify as an L1 visa holder. Indeed, [CIS] has previously approved the initial L1 petition and an extension based on the same corporate structure. Moreover, because of complex laws and business decisions that are required, [the] Beneficiary relies heavily on her managerial subordinates to make important decisions, particularly when the Beneficiary is outside the US on business matters.

In a brief dated November 28, 2003, counsel asserts that the beneficiary will be employed as a function manager, and thus she is not required to supervise subordinates. Counsel states that the fact that CIS previously approved an L-1A petition and extension on behalf of the beneficiary renders the present denial "curious and legally questionable." Counsel further notes that the petitioner's gross income in 2001 was \$931,035, and that the director's reliance on the petitioner's net income as evidence of its ability to employ the beneficiary in a managerial capacity was erroneous. Counsel submits additional evidence, including copies of the petitioner's bank statements and a statement from the petitioner's accountant reporting income figures during the years 2000, 2001, and 2002.

Upon review, counsel's assertions are not persuasive. 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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial

capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

In the instant matter, the petitioner asserts that the beneficiary will be employed in a managerial capacity, with supervisory authority over subordinate employees. Yet, the petitioner's breakdown of the number of hours per week the beneficiary devotes to her respective duties reflects that she spends the majority of her time on non-qualifying purchasing and sales tasks. For example, the petitioner indicates that she invests 10 to 15 hours per week "[d]etermining new products to purchase in the United States, examining these products, finding a market to accept the new goods." These tasks involve purchasing and marketing. She spends two hours per week "[e]stablishing import and export contacts and marketing products with manufacturers, suppliers, dealers, and clients," which are again purchasing and marketing functions. She undertakes two to three trips abroad lasting four to six weeks to "[meet] with and [recruit] clientele from countries all over the world." As described, these trips are intended as sales efforts. She spends seven to nine hours per week "[o]pening, establishing, and stabilizing markets for new goods in the Middle East and abroad," which appear to be non-qualifying marketing functions. She spends six to eight hours per week "[u]pon completion of a project, meeting with client[s] either telephonically or in person and acquiring his or her satisfaction," which appear to be customer service activities.

Thus, the beneficiary will spend 25 to 34 hours per week performing non-qualifying sales and marketing tasks, in addition to taking significant portions of her time to travel abroad for sales activity. These tasks are necessary to provide the petitioner's sales services. 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). 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). The evidence of record shows that the beneficiary will spend the majority of her time performing non-qualifying tasks, thus the petitioner has not established that she will be primarily performing managerial or executive duties. *See* sections 101(a)(44)(A) and (B) of the Act.

The petitioner indicates that the beneficiary will have supervisory authority over subordinate employees. Yet, the record contains inconsistent information regarding the number of staff members she will oversee. In the letter included with the petition, the petitioner stated that the beneficiary "has a group of three (3) employees directly reporting to her." Yet elsewhere in the letter, the petitioner provides that it "employs a U.S. workforce of 3 employees." On Form I-290B, counsel claims that the petitioner employs four individuals. Yet, the petitioner's organizational chart shows that the petitioner has three employees including the beneficiary. In response to the director's request for evidence, the petitioner provided job descriptions for only three employees including the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has failed to resolve this inconsistency.

Counsel correctly notes that a beneficiary is not required to supervise personnel in order to qualify for L-1A status. Yet, as the petitioner claims that the beneficiary does in fact supervise subordinate employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

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 a 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 case, the petitioner provides that its employee titled "Director & Clerk" possesses a high school diploma. The petitioner did not indicate the level of education completed by its employee titled "Salesman & Supply Chain Operator." As neither of these employees have been shown to require a bachelor's degree, the petitioner has not established that they are professionals. Nor has the petitioner shown that the employees spend significant amounts of time supervising subordinate staff members or manage a sufficiently defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel claims on appeal that the beneficiary is employed as a functional manager with responsibility for the petitioner's "import/export" operations. 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 managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing 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 managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Again, 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). In this matter, the petitioner has not provided evidence or sufficient explanation of the essential function that the beneficiary purportedly manages. Further, whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner

has sustained its burden of proving that his duties are “primarily” managerial. As discussed above, the petitioner has failed to show that the beneficiary will be primarily engaged with managerial duties.

Counsel asserts that the director's reliance on the petitioner's net income as evidence of its ability to employ the beneficiary in a managerial capacity was erroneous. Upon reviewing the director's decision, it is evident that she did not use the petitioner's income as a determinative factor in denying the petition, but rather referenced it as among the factors calling into question the beneficiary's employment capacity. Nevertheless, the beneficiary's actual duties themselves reveal the true nature of the employment. *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). As found by the director, the petitioner has not shown that the beneficiary's duties will be primarily managerial or executive.

Counsel states that the fact that CIS previously approved an L-1A petition and extension on behalf of the beneficiary renders the present denial "curious and legally questionable." However, the prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

It is further noted that, on appeal, the petitioner submits copies of its bank statements covering transactions that occurred after the petition was filed. 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). Thus, the bank statements are not probative of the petitioner's eligibility as of the filing date, and they have been given no weight in this proceeding.

The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, as noted above 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. at 248. Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(1)(3).

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 met this burden.

ORDER: The appeal is dismissed.