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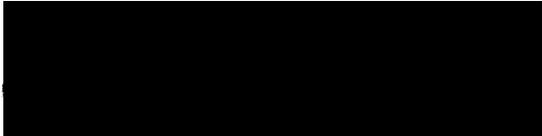


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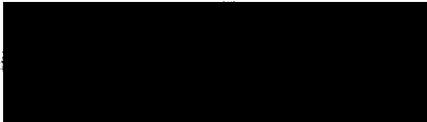
File: EAC-03-113-50546 Office: VERMONT SERVICE CENTER Date:

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)

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 Marketing Manager 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 limited liability company organized in the State of New York that operates as a wholesaler and retailer of imported carpets. The petitioner claims that it is the subsidiary of Inter Carpet Manufacturers, located in [REDACTED]. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

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 evidence of record shows that the beneficiary will be employed in a managerial or executive capacity, and that the director erroneously relied on the petitioner's small staff size in denying the petition. 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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 a letter submitted with the initial petition on February 25, 2003, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] is responsible for the overall strategic planning of [the petitioner's] marketing program. He is solely responsible for managing this central activity of the organization. He does not himself perform the ministerial and day-to-day operations of importing, but rather delegates these tasks to the import manager and administrative assistant.

[The beneficiary] is responsible for directing the company's marketing activities in the United States and Canada. He is directly accountable to the joint venture parent companies for developing recommendations and implementing marketing strategies consistent with the company's goals in the North American market. He assesses the rug market by studying trade journals, traveling to rug shows and visiting wholesalers throughout the United States. Using his in-depth knowledge of the international rug market, weaving, carpet design techniques and capabilities of factories in Nepal, [the beneficiary] explains different qualities of carpets to clients and prospective clients. He builds and conducts direct relationships with wholesalers, retailers and rug designers in the United States to meet design and color combination specifications.

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[The beneficiary] has established short-range marketing plans and strategies and is constantly making decisions, as appropriate, on establishing cost limits, contract negotiations and import considerations. As Marketing Manager, [the beneficiary] has direct access to factories in Nepal. He highlights to carpet buyers the advantages of doing business through [the

petitioner] and its joint venture partners stemming from the time savings and product control that the international organization's established international carpet manufacturing and marketing capabilities make possible.

\* \* \*

[The beneficiary] acts at a senior level with respect to the marketing activities of the organization, in that he heads it. He exercises full discretion over the day-to-day marketing operations of the organization. As Marketing Manager, [the beneficiary] has wide authority to act on the company's behalf. He directs the activities of two subordinates within his sole discretion.

On July 22, 2003, the director requested additional evidence.<sup>1</sup> Specifically, the director requested: (1) an organizational chart for the petitioner; (2) an explanation of how the beneficiary will function at a senior level within an organizational hierarchy; (3) evidence that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties, if appropriate; (4) a complete description of the duties and educational credentials for all of the beneficiary subordinates in the United States; and (5) a breakdown of the number of hours the petitioner's employees devote to their respective duties.

In a response dated August 19, 2003, the petitioner submitted: (1) an organizational chart; (2) affidavits from the petitioner's president, the beneficiary, and the beneficiary's two subordinates; (3) educational credentials of the petitioner's import manager; (4) a brief from counsel; and (5) a copy of an unpublished AAO decision. In the affidavit from the petitioner's president, the president attests that he is the president of both the petitioner and one of the petitioner's two equal partners, namely J.S.L. Carpet Corporation. The president indicates that he spends the majority of his time managing J.S.L. Carpet Corporation, and that he has "surrendered to [the beneficiary] all management authority over the marketing activities of [the petitioner]." The president further states that he "surrendered to [the beneficiary] wide executive authority for planning goals, setting policies and developing strategy for the growth of [the petitioner]."

In the affidavit from the beneficiary, he states that he "perform[s] both managerial and executive duties," and that he is "the manager of all marketing activity." The beneficiary further stated the following:

14. My subordinates process . . . orders.
15. Managing the marketing of rugs is where I devote the bulk of my efforts and approximately 40% of my time. To manage marketing, I represent [the petitioner] at trade shows in North America . . . .

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<sup>1</sup> The director issued a separate request for evidence on April 15, 2003, to which the petitioner responded on July 11, 2003 with a letter and additional documents. However, this request and the petitioner's response were not available for the AAO's review.

\* \* \*

- 19. I direct the activities of the import manager and administrative assistant in executing sales, and I review their work.
- 20. To summarize, I manage the marketing of rugs by making all decisions about how to market them. Subordinates perform all of the support activities needed to provide the actual service of the company, which is the importation of Tibetan carpets from Nepal. Subordinates execute, track and follow through in sales.
- 21. In addition to managing all marketing activity for [the petitioner], I also act in a clearly executive capacity for the company. I set and adjust strategy. Setting and adjusting company strategy occupies approximately 40% of my time.

\* \* \*

- 24. I use the [petitioner's] sales goals as a starting place to estimate revenues. I establish pricing strategies . . . . To do this, I consider manufacturing variables such as size, shape, weave and design complexity and other known operating variables.
- 25. I monitor the [petitioner's] success in reaching its sales goals. I change price incentives and discounts depending on results. I vary price and terms of sale for individual clients depending upon actual experience. Where needed, I adjust sales goals.
- 26. I select factories for specified samples and limited open stock.
- 27. I make the day-to-day decisions and exercise the planning authority needed to build up [the petitioner's] business of bringing saleable, in-demand product to the marketplace in a timely manner.

\* \* \*

- 29. A minor component of my job duties involves oversight. This role occupies approximately 20% of my time. My oversight duties include communicating with [the petitioner's] president and with other key personnel at [the foreign entity] concerning day-to-day operational and financial issues affecting the three companies; and consulting with [the petitioner's] president relating to budget, hiring, staff and compensation issues.

\* \* \*

31. During an average 50 hour week, approximately 20 hours are devoted to managerial job duties, approximately 20 hours are devoted to executive job duties and approximately 10 hours are devoted to oversight job duties . . . .
32. My two subordinates, [the] import manager . . . and administrative assistant . . . , relieve me from performing non-managerial/executive duties.

In the affidavit from the petitioner's import manager, he describes his duties as consisting of performing routine tasks necessary for importing carpets to the United States and delivering them to customers. The petitioner provided evidence that the import manager completed a bachelor's degree in management science. In the affidavit from the petitioner's administrative assistant, she indicates that she performs various clerical duties in support of the import manager and the beneficiary.

In counsel's brief, he cited an unpublished AAO decision to stand for the proposition that small companies can support a beneficiary in a primarily managerial or executive capacity.

On August 28, 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 that:

A review of the duties of the beneficiary's subordinates does not persuasively demonstrate an import manager or an administrative assistant employed by [the petitioner] are professional or managerial in nature . . . . While the beneficiary apparently carries a multitude of managerial titles, [CIS] is not convinced that an organization of [the petitioner's] nature would require the beneficiary to perform primarily executive or managerial job duties. [The petitioner has] not established that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who could relieve him from performing the services of the corporation. Rather, it appears that he would be primarily engaged in the non-managerial, day-to-day operations of [the] company.

On appeal, counsel for the petitioner asserts that the evidence of record shows that the beneficiary will be employed in a managerial or executive capacity, and that the director erroneously relied on the petitioner's small staff size in denying the petition. In a statement attached to Form I-290B, counsel references the affidavit from the petitioner's president, excerpted above, and alleges that it reflects that the beneficiary will function at a senior level within the petitioner's organization hierarchy. Counsel asserts that the director failed to consider whether the beneficiary would be employed in an executive capacity.

Counsel provides documents in connection with a petition that the petitioner previously filed in order to classify the beneficiary as an L-1B intracompany transferee employed in a specialized knowledge capacity. Counsel references a request for evidence in the L-1B proceeding in which the director stated that "[i]t appears the beneficiary normally performs functions considered to be managerial." Counsel alleges that this statement supports that the beneficiary is employed in a primarily managerial capacity.

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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant case, the petitioner asserts that the beneficiary is primarily engaged in both managerial duties and executive duties. To sustain such an assertion, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The job descriptions submitted for the beneficiary do not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The affidavit from the beneficiary contains vague statements that provide little insight into the actual daily tasks he will perform. For example, the beneficiary indicated that he "make[s] the day-to-day decisions and exercise the planning authority needed to build up [the petitioner's] business of bringing saleable, in-demand product to the marketplace in a timely manner," yet this broad statement does not reveal actual tasks the beneficiary will perform. The beneficiary provided that he "set[s] and adjust[s] strategy," yet he does not clearly identify what this duty involves beyond the process of setting prices for the petitioner's carpets. The beneficiary stated that "[s]etting and adjusting company strategy occupies approximately 40% of [his] time." However, these tasks have not been sufficiently explained such that this portion of the beneficiary's duties can be deemed managerial or executive.

The beneficiary stated that "[m]anaging the marketing of rugs is where [he] devote[s] the bulk of [his] efforts and approximately 40% of [his] time." Yet, these duties appear to be non-qualifying sales tasks. For example, the beneficiary indicated that "[he] represent[s] [the petitioner] at trade shows in North America," which is a non-managerial, non-executive duty. The beneficiary stated that he "[makes] all decisions about how to market [the petitioner's rugs]," and he "direct[s] the activities of the import manager and administrative assistant in executing sales . . . ." While the job descriptions for the beneficiary's subordinates show that they assist with processing orders, the evidence of record does not reflect that they actually contact customers in order to solicit and complete sales transactions. 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). Thus, it appears that the beneficiary is solely responsible for conducting the non-qualifying, day-to-day tasks of sales and marketing. Accordingly, the petitioner has not established that the 40 percent of the beneficiary's time devoted to marketing constitutes employment in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act.

The petitioner indicates that the beneficiary will have supervisory authority over two subordinate employees. 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 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 import manager completed a bachelor's degree in management science. Yet, the job description reveals that the majority of the import manager's duties involve clerical work and logistics tasks. The petitioner has failed to establish that such duties require a bachelor's degree. The administrative assistant does not possess a bachelor's degree, thus it is evident that one is not needed to successfully perform his duties. 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. The fact that the import manager possesses a managerial title does not, by itself, show that he is a managerial employee. An employee's actual duties 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). 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 correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

The petitioner operates as a wholesaler and retailer of carpets. Thus, it is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive sales and

marketing tasks. As discussed above, it appears that the beneficiary is responsible for the day-to-day tasks associated with sales and marketing, and that his subordinates do not relieve him from these non-qualifying duties. Thus, the reasonable needs of the petitioner suggest that the beneficiary must spend a significant amount of time performing the tasks necessary to provide the petitioner's products. 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 petitioner has failed to establish that these non-managerial and non-executive tasks do not constitute the majority of the beneficiary's time. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Counsel asserts that the director failed to consider whether the beneficiary would be employed in an executive capacity. The AAO notes that the director cited the statutory definition for managerial capacity, but not the statutory definition for executive capacity. It is not clear whether the director analyzed the beneficiary's duties in light of the requirements of executive capacity. As the AAO's review is conducted on a *de novo* basis, the beneficiary's employment capacity is herein considered in light of both the statutory definition for executive capacity under section 101(a)(44)(B) of the Act, and the statutory definition for managerial capacity under section 101(a)(44)(A) of the Act. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). 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). As noted above, the petitioner has failed to establish that the majority of the beneficiary's time is devoted to managerial or executive tasks, such that he is primarily employed in a managerial or executive capacity.

Counsel references a request for evidence in a prior L-1B proceeding in which the director stated that "[i]t appears the beneficiary normally performs functions considered to be managerial." However, the director's comment was made in the context of considering whether the beneficiary qualifies for L-1B status as an intracompany transferee employed in a specialized knowledge capacity. The request for evidence does not reflect that the director considered the beneficiary's duties in light of the elements of managerial capacity as found in section 101(a)(44)(A) of the Act. Thus, the statement is not *prima facie* evidence that the beneficiary will be employed in a managerial capacity.

The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not shown that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). For this reason, the appeal will be dismissed.

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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.