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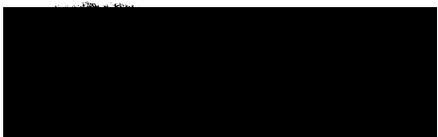
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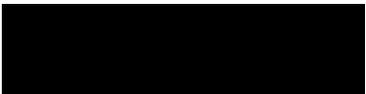
U.S. Citizenship
and Immigration
Services

D7



File: WAC-03-138-50066 Office: CALIFORNIA SERVICE CENTER Date: FEB 18 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)

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

The petitioner filed this nonimmigrant petition seeking to extend the employment of its General 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 corporation organized in the State of California that is engaged in the Import, Export, and sale of solid rubber products. The petitioner claims that it is the subsidiary of [REDACTED] located in Taipei, Taiwan. 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 director's decision was "not according to laws and fact," as the beneficiary is employed in a primarily managerial capacity. In support of this assertion, the 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 primary 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 the initial petition, the petitioner stated that the beneficiary's duties include "[s]upervis[ing] [its] business operation, marketing of solid rubber products by using salespersons, and various administrative duties." In an attached letter, the petitioner further stated:

Our business expansion plans are being implemented by [the beneficiary]. His strategy in promote [sic] our products has gained a wide range of exposure throughout the entire United States. . . . [The beneficiary] has attended at [sic] several trade exhibitions and have [sic] contacted buyers from various cities in the U.S.A. [The beneficiary] has an important role in our business expansion plans.

On April 8, 2003, the director requested additional evidence to show that the beneficiary has been and will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director requested: (1) a detailed description of the beneficiary's duties in the United States, including the percentage of time he spends on each task, and the education and employment qualifications for his position; (2) a list of all of the employees under the beneficiary's direction; (3) a line and block organizational chart for the petitioner that reflects the names of all executives, managers, and supervisors, as well as all employees under the beneficiary's supervision with their names, titles, job duties, entry dates of employment, education level, and salaries or wages paid within the previous 12 months; and (4) a clear indication of whether the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees, and if so, their names, job titles, and duties.

In response, the petitioner submitted a detailed statement describing the beneficiary's duties in the United States and an organizational chart, providing each employees' name, title, educational level, compensation, date of entry into employment, and a brief phrase to describe his or her respective duties. In the statement, the petitioner provided that the beneficiary "obtained a Bachelor Degree of Business Administration in June 1996 at the Fu Jen Catholic University in Taipei, Taiwan." The petitioner described the beneficiary's duties as follows:

Percentage of time spent in each duty as a General Manager of [the petitioner]:

50% Time Spent – Duties of sales and marketing which include the followings [sic]:

Advertisement: To select related magazine, such as Asphalt Contractor, Better Road, Equipment Today, Heavy Equipment News and Pavement etc.

Research for Machine Model: To search for qualified machinery and model products. . . .

Hold Meetings with Sales Manager: Provide opinions to the sales manager, to review sales strategy, sales amount quantity and items.

Contact with Original Equipment Manufacturer (OEM): Visit OEM customers and introduce our products to them. Try to become OEM parts suppliers.

New Customer Accounts: Find new dealers and customers and open new accounts

Business Visits: Visit the end users and dealers at least once a month.

Search New Leads: Collect huge data base of potential customers.

Join Construction and Distributors Association: Join different construction [and] distributor associations, take the opportunities to expose our company and to meet with other members. Using this method have [sic] resulted in many new distributors.

Setting process for the End User and Dealers: Suggest the retail price according to market situation.

Explore Business Location in the East Coast: Ideally, we want a location in New Jersey . . .

15% Time Spent – Office Operation and Management:

Contact with trucking companies: Establish accounts with trucking companies to get a better rate and service.

Staff Meeting: Meeting with all staff members once a month to make sure everything is running properly, such as accounting and warehouse.

10% Time Spent – Human Resources:

Recruit Staff: Recruit new sales person and other staff as required. Supervision of all staff members.

15% Time Spent – Research and Development:

New Product Lines: To add new product lines according to customers' needs. Trying to become the dealers' distributor of U.S. made products or imported related products from overseas.

10% Time Spent – Finance and Accounting:

Account Systems: Setting up accounting system by using Quick book software system.

Company Account: To review company account and make decision on budgets.

The organizational chart provided by the petitioner identified four employees in addition to the beneficiary, with the titles "Secretary," "Sales Manager," "Store/Warehouse Keeper," and "Salesperson." The chart indicated that the salesperson completed a two-year associates degree, and the other three employees completed high school education or received a high school diploma.

On May 2, 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 it appears that the beneficiary's subordinates are engaged in non-managerial duties, and thus the record does not reflect that the beneficiary will be supervising professionals who will relieve him from performing non-qualifying duties. The director further stated that "the record indicates that a preponderance of the beneficiary's duties will be directly providing the services of the business," and that the description of the beneficiary's duties does not "demonstrate that [he] would be managing the organization, or managing a department, subdivision, function, or component of the company." The director found that "[t]he petitioner has not shown that the beneficiary would be functioning at a senior level within an organizational hierarchy."

On appeal, counsel for the petitioner asserts that the director's decision was "not according to laws and fact," as the beneficiary is employed in a primarily managerial capacity. In support of this assertion, counsel submits a brief and additional evidence. In the brief, counsel describes the petitioner's business operations, including the facts that it has an established warehouse with inventory, it has visited trade shows, and it employs four workers. Counsel asserts that the petitioner's sales manager has the equivalent of a bachelor's degree in marketing due to his alleged 20 years of sales experience. Counsel explains that the sales manager supervises two salesmen. Counsel states that the petitioner's accounting is relatively simple, and it has a secretary-accountant to perform the basic financial tasks of the company. Counsel further explains that the petitioner uses an outside accounting firm for the preparation of various tax and financial documents. Counsel asserts that one employee is in charge of the operations of the warehouse, including keeping inventory and sending and receiving shipments. Counsel indicates that the warehouseman's and the secretary's decisions are subject to the review and approval of the managers. Counsel states that "[the beneficiary] has been directing the overall operation of [the petitioner] and he is spending most of his time managing the staff."

Counsel discusses the petitioner's future expansion plans, including the intention to visit more trade shows and to hire additional staff. Counsel further explains that the petitioner plans to form sales agreements with additional salespeople on a commission basis. Counsel states that "[w]e need additional time in which to increase our sales. As we increase our sales, we will be able to increase our staffing."

Counsel provides a new organizational chart and employee list that reflect several staffing changes since the date of the request for evidence. Counsel also submits a statement from the beneficiary describing the staffing of the petitioner. In the statement, the beneficiary provides that the sales manager "is involved with the overall solicitation of sales," and he "supervises the [two] salesmen." The beneficiary identifies a new individual as the administrative assistant and salesman, and he indicates that this employee has a bachelor's degree in English with experience in management and sales. The beneficiary states that the secretary resigned, and the petitioner is currently seeking a replacement.

The beneficiary describes his own duties as follows:

Most of my time is spent on management services. I have [sic] not involved with any more than 10% of my time in actual work. 90% of my time is spent managing the four (4) employees and trying to locate sales representatives and additional staff. I have been instructed by the Chief Executive Officer in our parent company in Taichung, Taiwan, to expand the operation of our company by engaging many more Sales Representatives to sell our products throughout the United States.

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.* Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

Based on the current record, the AAO is unable to determine whether the claimed managerial tasks constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner has given a list of the beneficiary's duties grouped into categories, with an indication of the percentage of time the beneficiary devotes to each group. Yet, within each group, the petitioner has not indicated the amount of time the beneficiary spends on each task. As most of these groups contain a combination of tasks that are non-managerial and managerial, the AAO is unable to determine the total amount of time the beneficiary spends on managerial or executive duties from the information given. For example, the petitioner indicates that the beneficiary spends 50 percent of his time performing tasks such as: (1) selecting magazines for advertising; (2) holding meetings with the sales manager; (3) visiting customers to introduce the petitioner's products; (4) opening new accounts with dealers and customers; (5) collecting a database of potential customers; and (6) joining associations to expose the petitioner's products. Of these duties, only "holding meetings with [the] sales manager" appears to be

managerial. The majority of duties encompassed by this group that accounts for 50 percent of the beneficiary's time are clearly non-managerial sales functions. Thus, in analyzing this group of tasks, the AAO cannot determine what portion of the 50 percent of the beneficiary's time is spent on managerial duties.

The same problem is presented with the group of responsibilities labeled, "Finance and Accounting," as the included duty of "mak[ing] decisions on budgets" is arguably managerial, while the included duty of "setting up [an] accounting system by using [Quickbooks] software" is not. Likewise, the group labeled, "Office Operation and Management," includes the duty of "meeting with all staff members once a month," which is arguably managerial, while it also includes the duty of "[establishing] accounts with trucking companies to get a better rate and service" which is non-managerial.

Further, in the statement by the beneficiary submitted on appeal, he provides that "90% of [his] time is spent managing the four (4) employees and trying to locate sales representatives and additional staff." This assertion is inconsistent with the breakdown of his duties provided in the response to the director's request for evidence, as described above. Few of the duties listed in the petitioner's breakdown of the beneficiary's duties actually involve managing the petitioner's staff or recruiting new personnel. 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).

Thus, the beneficiary's job description does not allow the AAO to determine whether the beneficiary would primarily perform in a managerial or executive capacity as defined in sections 101(a)(44)(A) and (B) of the Act.

Counsel indicates that the beneficiary will manage subordinate personnel. 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 section 101(a)(44)(A)(ii) of the Act. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions required 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 has not established that a bachelor's degree is actually necessary to perform the work of the beneficiary's subordinates. Only one of the beneficiary's subordinates allegedly possesses a university-level degree, namely, the individual with the title "administrative assistant

and sales” completed a bachelor’s degree in English. Yet, the petitioner has not established that academic study in English is helpful or required to perform the tasks of this employee. Accordingly, this employee is not deemed a professional due to his completion of a baccalaureate program. Counsel asserts that the petitioner’s sales manager possess the equivalent of a bachelor’s degree in marketing due to his purported 20 years of sales and management experience, yet counsel has provided no documentation to support this assertion. 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). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner indicates that the sales manager supervises two salesmen. Yet, counsel asserts that the beneficiary manages the other four employees of the petitioner. In fact, as discussed above, the beneficiary submits a statement in which he avers that “90% of [his] time is spent managing the four (4) employees and trying to locate sales representatives and additional staff.” Thus, the record is not clear regarding who actually manages the two salesmen on a daily basis. Accordingly, the AAO cannot determine whether the sales manager is truly a supervisory employee, such that the beneficiary manages a supervisory subordinate as contemplated by section 101(a)(44)(A)(ii) of the Act.

Therefore, the petitioner has not established that the beneficiary supervises subordinate employees who are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

Counsel states that the petitioner has future plans to expand, and it needs more time to increase its sales and staffing level. The beneficiary reports that he has been instructed by the parent company in Taiwan to expand the petitioner’s operations. However, 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.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248. Thus, the petitioner’s intention to expand and hire additional workers in the future does not support that the beneficiary was eligible for L-1A classification as of the date of filing the present petition.

Based on the foregoing, 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). For this reason, 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. Here, that burden has not been met. Accordingly, the director’s decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.