

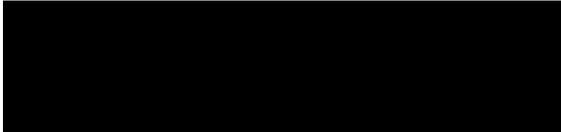
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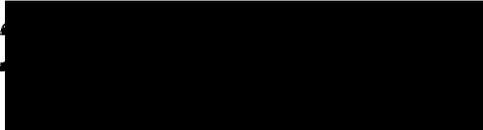
FILE: [REDACTED] Office: VERMONT SERVICE CENTER

Date: JUN 01 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

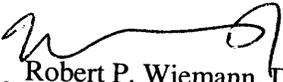
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been
returned to the office that originally decided your case. Any further inquiry must be made to that
office.


Robert P. Wiemann, Director
Administrative Appeals Office

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, [REDACTED] Trading, Inc., endeavors to classify the beneficiary as an executive or manager 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 that it is a wholly owned subsidiary of [REDACTED] (L.L.C.), located in the United Arab Emirates, and is engaged in the import and sale of garments business. The initial petition was approved to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's marketing manager. The petitioner was incorporated in the State of New Jersey on August 3, 1999 and claims to have four employees.

On April 10, 2001, the director determined that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial capacity.

On appeal, the petitioner's counsel claims that the director's "decision ignores the extensive explanation of the beneficiary's executive duties," and asserts that the beneficiary alternatively should be classified as a function manager.

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)(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 (I)(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 will be employed in a primarily managerial or executive capacity in the United States. 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.

Initially, on Form I-129, the petitioner described the beneficiary's duties as "[e]stablish [and] build U.S. business to promote, market, import [and] distribute our products." In addition, in an October 13, 2000 letter filed with Form I-129, the beneficiary described his U.S. duties:

I am responsible for directing our sales and marketing activities, including the development of patterns and samples for goods to be manufactured for our customers, and the creation of promotional and informational materials, analyzing the markets for our products and developing sales and marketing strategies for the garments and fabrics that we manufacture in Dubai.

* * *

I confer with existing major customers to determine both what types of products meet their needs, and how to best serve through order fulfillment, shipping and delivery arrangements and schedules, as well as payment terms and credit facilities. To handle the sales and marketing work, I have already hired three employees. . . . These are in addition to the personnel in Dubai whom I continue to manage and to rely on for sales, production, and fulfillment support.

In addition, the beneficiary claims that his subordinates in the United States include a senior account manager, an assistant to the senior account manager, and a secretary-receptionist. The beneficiary briefly described the U.S. employees' duties. The beneficiary also described the duties of the sales manager, a production manager, an assistant marketing manager, and merchandisers working at the foreign entity.

On December 18, 2000, the director requested additional evidence. In particular, the director requested a list of the beneficiary's duties, percentages of time spent on each duty, a description of the beneficiary's subordinates, a description of the U.S. employees' job duties, and the minimal experience and educational requirements for their positions.

In response, the petitioner submitted a January 23, 2001 letter reiterating the beneficiary's and U.S. employees' duties as stated in the October 13, 2000 letter. The petitioner submitted an organizational chart for the foreign entity and emphasized that the beneficiary maintains his role as marketing manager for the foreign entity.

On April 10, 2001, the director determined that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial capacity. The director found that in an office the size and nature of the petitioner's business, the beneficiary would not be engaged in primarily managerial or executive job duties. Consequently, the director denied the petition.

On appeal, the petitioner's counsel claims that the director's "decision ignores the extensive explanation of the beneficiary's executive duties." Counsel claims that the beneficiary will be: 1) acting as an executive and manager directing an important component of the organization; and, 2) acting as a functional manager for the company and does not directly perform the essential function of the company. Counsel also asserts that the number of employees supervised is not determinative of executive or managerial capacity and states that the director placed undue emphasis on the size of the U.S. company.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the description of the beneficiary's U.S. job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). On review, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner claimed that the beneficiary's U.S. duties will include "creat[ing] of promotional and informational materials, analyzing the markets for our products and developing sales and marketing strategies for the garments and fabrics that we manufacture." This description indicates that the beneficiary will be performing the marketing tasks to further establish the business. Although the petitioner claimed that the beneficiary has hired three U.S. subordinate employees to "handle the sales and marketing work," none of the employees' duties include performing marketing tasks. In addition, the petitioner stated that the beneficiary has an assistant marketing manager working at the foreign entity who is also responsible for the "development and preparation of informational and promotional materials." However, the beneficiary's duties are practically identical to the assistant marketing manager's duties at the foreign entity. Therefore, it appears that a significant portion of the beneficiary's time will be spent on non-managerial marketing tasks. 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).

Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel. Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's 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. The petitioner claimed that the beneficiary has three employees and other personnel at the foreign entity that the beneficiary will "continue to manage."

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 the subordinate employees. 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 a bachelors degree is actually necessary, for example, for the senior account manager who will provide information and monitor the fulfillment of orders to major customers. At most, the beneficiary may be acting, on occasion, as a first-line supervisor of non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also not established that the beneficiary will manage a subordinate staff of managerial or supervisory personnel. The claimed U.S. subordinate employees duties entail primarily performing non-managerial tasks. For example, the senior account manager provides information and his assistant provides clerical support. The job description provided for the senior account manager does not include any supervisory duties. Therefore, regardless of their job titles, it is evident that the subordinate employees will be performing daily non-managerial operational tasks of the business rather than performing managerial or supervisory duties.

Counsel also claims that the beneficiary fits the definition of a function manager and is "acting as an executive and manager directing an important component of the organization." However, the AAO is not persuaded that the beneficiary's duties establish the beneficiary has managerial control and authority over a function of the company. 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. In the instant matter, the petitioner claims the beneficiary's vital function is "marketing."

Counsel claims that the beneficiary will not "directly perform the essential function of the company." The petitioner claims that in order to handle the sales and marketing work, the beneficiary will be assisted by a senior account manager, an assistant to the senior account manager, and a secretary-receptionist. However, the description of the employees' duties does not include handling marketing tasks. For example, the senior account manager monitors the fulfillment of orders, his assistant provides clerical support, and the secretary-receptionist orders supplies, schedules appointments, and answers telephones. Therefore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, the description of the beneficiary's duties indicates that the beneficiary performs the actual function rather than manages the function. 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. Here, as requested by the director on December 18, 2000, the petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial and executive, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "creating promotional and informational materials," "analyzing markets," and "development of patterns and samples" do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel further refers to an unpublished decision involving an employee of the Irish Dairy Board. In the unpublished Irish Dairy Board decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the Irish Dairy Board matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel also states, "The number of employees supervised is not determinative of executive or managerial capacity." Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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. At the time of filing, the petitioner was a one-year-old import company that claimed to have a gross annual income of \$20,000,000 in the foreign country. The U.S. entity employed the beneficiary as its marketing manager. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as its marketing manager, a senior accounts manager, an assistant, and a secretary-receptionist. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the

beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO notes that although counsel cites several previous AAO decisions to support the petitioner's claim that the beneficiary manages or directs an essential function of the company, these decisions are unpublished and are not binding. While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the act, unpublished decisions are not similarly binding. *See id.*

Finally, 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 a managerial or executive position. At the time of filing, the petitioner had not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. After careful consideration of the evidence, the AAO must conclude that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the minimal documentation of the petitioner's business operations raises the issue of whether the U.S. entity has been doing business for the previous year. As noted above, 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). 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.

On review, the petitioner has not established that the U.S. entity has been doing business for the previous year. In a January 23, 2001 letter, the petitioner claimed, "Since sales are invoiced by our parent company and payments are made to them we do not have our own sales revenues. Due largely to our American sales and marketing, however, our global sales are projected to increase to about \$30,000,000 this year." In addition, the petitioner stated that the U.S. entity does not need warehouse space because the foreign entity ships the products directly to its customers. The petitioning entity appears to be acting as a conduit for the foreign entity by distributing the foreign entity's goods through the mere presence of an agent or office in the United States. Consequently, it cannot be concluded that the petitioner is a qualifying organization doing business in the United States, or that it has a qualifying relationship with the foreign entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). For this additional reason, the petition may 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 of 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.