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File: WAC 03 211 50194 Office: CALIFORNIA SERVICE CENTER Date: JUN 09 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)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

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.¹

The petitioner seeks to employ the beneficiary temporarily in the United States 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 U.S. petitioner, a corporation organized in the State of New York and licensed to do business in the State of California, is engaged in international freight forwarding. It seeks to employ the beneficiary as its marketing and sales manager in its California office. The petitioner claims that it is a branch of Alisped S.P.A., located in Prato, Italy.

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, the petitioner's former counsel asserts that the denial was arbitrary and capricious, and demonstrated a clear abuse of discretion. In addition, she alleges that the beneficiary clearly qualifies for the classification sought, and urges reconsideration on this matter.

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.

¹ In a letter dated May 13, 2005, counsel advised the AAO that she no longer represents the petitioner in this matter. As a result, the petitioner will be treated as self represented.

- (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 primary issue in this 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 would be acting as the marketing and sales manager for the petitioner's California office. With regard to his proposed duties, the petitioner stated in a letter dated July 9, 2003:

As Manager of Sales & Marketing, [the beneficiary] will direct and coordinate activities of the Sales and Marketing department of [the petitioner], a New York Corporation, duly authorized to transact business in the State of California, to obtain optimum efficiency and economy of operations and maximize profits. He will plan and develop organization policies and goals, and implement goals through subordinate administrative personnel. He will coordinate activities of the Sales & Marketing department, to effect operational efficiency and economy. He will direct and coordinate promotion of services performed to develop new markets, increase share of market, and obtain competitive position in [the] industry. He will analyze the Sales & Marketing department's budget requests to identify areas in which reductions could be made, and allocated operating budget. He will confer with administrative personnel, and [review] activity, operating, and sales reports to determine changes in programs or operations required. He will direct preparation of directives to department administrator outlining policy, program, or operations changes to be implemented.

On July 17, 2003, the director requested additional evidence establishing that the beneficiary was qualified for the benefit sought. Specifically, the director requested evidence supporting the petitioner's claim that the beneficiary had been acting in a primarily managerial or executive capacity while abroad, and that he would continue working in a primarily managerial capacity while in the United States. The director required the submission of quarterly wage reports for both the New York and the California offices of the petitioner, and further requested a detailed description of all employees of the U.S. petitioner including their position titles, duties, and education level required.

In a response dated August 8, 2003, the petitioner submitted a detailed response accompanied by the documentation requested by the director. The petitioner's response included copies of organizational charts for both the U.S. and foreign entities, copies of the petitioner's quarterly wage reports, and an extensive summary of the beneficiary's duties.

On August 21, 2003 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the California office. Specifically, the director concluded that the proposed duties of the beneficiary, in light of the California office's organizational structure, included a large percentage of non-qualifying tasks to be performed by the beneficiary himself. In addition, the director concluded that the California office had not demonstrated an organizational complexity in which a full-time managerial position would be supported. On appeal, former counsel for the petitioner alleges that this interpretation is erroneous, and reasserts that the beneficiary is clearly qualified for the classification sought.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the organizational structure under which he is intended to function, it appears that the beneficiary will not be acting in a primarily managerial or executive capacity.

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). In this case, the description of the beneficiary's duties includes numerous marketing and sales duties essential to the operation of the business and its success in the marketplace. Furthermore, in response to the request for evidence, the petitioner confirms that the beneficiary's duties will include conducting all purchases on behalf of the petitioner, and devising marketing strategies for both offices. The beneficiary would clearly be engaging first-hand in these non-managerial tasks, and would therefore be contributing to the establishment of the company's 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 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).

In contrast to this interpretation, the petitioner asserts that the beneficiary will execute these tasks through subordinate administrative personnel, and that he will oversee the entire sales and marketing department. The problem with this assertion, however, lies in the structure of the California office. As confirmed by the organizational chart provided in response to the request for evidence, the beneficiary would be overseeing two employees: the operations and customer service representative, and the bookkeeper/air ocean operations supervisor. The beneficiary also purportedly supervises an employee in the New York office identified as "marketing and human resources." Based on the petitioner's representations, her marketing duties are limited to a particular product and/or geographical region, thus she would not relieve the beneficiary from performing the majority of the petitioner's marketing duties. There is no mention of any other administrative staff or marketing or sales personnel to execute the goals identified by the beneficiary. 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)).

Also significant is the repeated contention that a significant portion of the beneficiary's time would be devoted to the supervision and direction of the personnel in the California office. Specifically, the petitioner claims that the beneficiary will hire and fire the personnel, direct the activities of the customer service department, attain goals through subordinate administrative personnel, and oversee the work of the marketing manager. 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.

Though requested by the director, the petitioner did not provide the level of education required to perform the duties of his subordinate employees. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into

the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by 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, in fact, established that a bachelor's degree is actually necessary, for example, to perform the duties associated with the beneficiary's subordinate employees. Although specifically requested in the director's request for evidence, the petitioner failed to state the minimum level of education required to perform the duties of the positions they fill. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not established that these employees must possess an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly 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.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will 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 petitioner has not submitted sufficient and credible evidence to establish a qualifying relationship between the United States and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). Specifically, the petitioner submitted copies of share certificates evidencing that Adriano Cerretelli owns four shares of the U.S. petitioner. The petitioner also provided a copy of the Minutes of the Special Meeting of Shareholders, dated July 6, 1999, which states that Alisped Spa, the claimed foreign entity, owns 100% of the petitioner's outstanding shares. This inconsistency has not been clarified.

Furthermore, the petitioner provides a copy of a filing with the Italian Chamber of Commerce, which indicates that the foreign entity is owned by three persons: [REDACTED] who owns 50%, [REDACTED] who owns 25%, and [REDACTED] who owns 25%. The petitioner alleges in support of the qualifying relationship that [REDACTED] is the majority owner of both companies and thus a qualifying relationship exists. However, he is not the majority owner of the foreign entity, for the combined shares [REDACTED] [REDACTED] equal his share for voting purposes. Furthermore, as noted above, the ownership of the U.S. entity (i.e., whether it is owned by the foreign corporation or [REDACTED] personally, is unclear. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply stating that [REDACTED] owns both companies does not qualify as independent and objective evidence. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.