

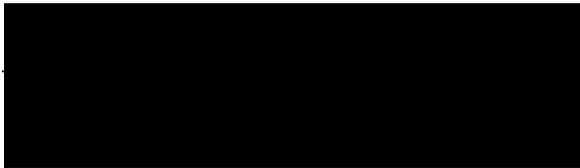
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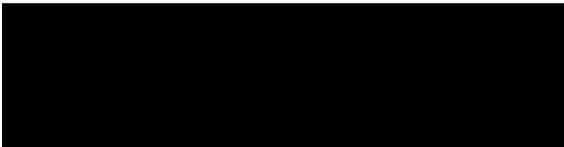
FILE: EAC 03 014 54018 Office: VERMONT SERVICE CENTER Date: JUN 14 2005

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)

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 endeavors to classify the beneficiary as a manager or executive 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 to be a wholly owned subsidiary¹ of [REDACTED] located in Italy and is engaged in the sales and distribution of extruders. 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 four years as the U.S. entity's president and chief executive officer. The petitioner was incorporated in the State of Delaware on April 27, 2001 and claims to have three employees.

On December 30, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive capacity.²

On appeal, the petitioner's counsel submits a lengthy brief and additional evidence, and claims that the beneficiary's "duties are primarily executive or managerial."

The AAO notes that in an October 25, 2004 letter counsel stated that he had "requested oral argument on appeal." The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. See 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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

¹ The AAO notes that on the Form I-129, the petitioner indicated that the U.S. company was a branch and a subsidiary of the foreign entity. However, since the petitioner submitted evidence to show that it was incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

² Although the director based his decision on the petitioner's claim that the beneficiary will primarily perform executive duties for the U.S. entity, on appeal, counsel claims that the beneficiary's duties are executive or managerial. Therefore, the AAO will examine whether the beneficiary will be employed in a primarily managerial or executive capacity.

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)(14)(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, pursuant to 8 C.F.R. § 214.2(l)(14)(ii), if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation requires:

A visa petition under section 101(a)(15)(L) 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 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 has been and will be primarily performing executive or managerial duties for the United States entity. 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.

On September 18, 2002, the petitioner filed the Form I-129. The petitioner described the beneficiary's proposed U.S. duties as the following: "Will manage and direct logistics, operations, and business development of [the petitioner]. Will direct and manage senior staff of executive for market expansion." In addition, the petitioner submitted a copy of the beneficiary's resume describing the beneficiary's duties as:

- Responsible for all management decisions for the American subsidiary corporation.
- Developing [sic] relationships with potential buyers in the North and South American markets.
- Responsible for all engineering and technical issues that the new corporation faces.

- Supervises all contracts and maintained relationships with all major customers.

The petitioner also explained that the beneficiary was responsible for “the management of all operations, logistics, legal and marketing aspects of business functions of the [petitioner]. [C]ustomer relationships . . . supervising the expansion of the distribution operations of the company.” The petitioner further described the beneficiary duties in an attached statement as:

This position is responsible for managing customers and expanding marketing to new customers in North and South American countries, responsible for supervising contracts and maintaining relationships with customers, responsible for researching the needs of the various geographic markets and then bringing those needs to the attention of the administration, research and development teams of [the foreign entity]. This position is [sic] also be responsible (i) for establishing [the foreign entity] as a global market leader in manufacturing quality extruders; (ii) for expanding sales in the North and South American countries; (iii) for supervising the expansion of sales and distribution operations of the company; (iv) for expanding and building a permanent corporate structure in the United States to serve customers in the United States, Canada, and South American markets; (v) for building customer relationships . . .; and (vi) for setup of infrastructure that is capable of future manufacturing operations in the United States.

On November 25, 2002, the director requested additional evidence including an organizational chart for the U.S. entity, and a description of the beneficiary’s subordinates describing the employees’ duties, educational credentials, and number of hours each will devote to their duties.

In a December 13, 2002 letter, the petitioner responded to the director’s request for additional evidence. The petitioner submitted an organizational chart for the U.S. company and provided a description of the beneficiary’s subordinate employees. In the letter, counsel stated that the beneficiary “manages a staff of independent contractors who he has regularly engaged on various projects” and the beneficiary “has made extensive use of independent contractors.” The organizational chart indicated that are three employees working for the U.S. company on a full-time basis. In addition, the petitioner claims that it uses contracted services such as phone support, legal, accounting, computer, and technical support contractors The petitioner claimed that the beneficiary managed the contractors and two full time employees including an executive vice president/chief executive officer and an office administrator.

On December 30, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive capacity.

On appeal, counsel submits a lengthy brief and claims that the beneficiary’s “duties are primarily executive or managerial.” Counsel reiterates the beneficiary’s duties as well as describes additional duties, and further describes the staffing of the U.S. entity.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). On review, the petitioner has not established that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The petitioner's descriptions of the beneficiary's proposed U.S. duties are general. For example, the petitioner described the beneficiary's duties as: "[r]esponsible for all engineering and technical issues," "expanding and building a permanent corporate structure," and "[s]upervises all contracts." However, the petitioner failed to specify how the beneficiary will supervise or expand the company's business. 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)). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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. Here, the petitioner fails 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 including both managerial and administrative or operational tasks, but 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 "responsible for researching the needs of the various geographic markets," "expanding sales," and "setup of infrastructure" 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).

Moreover, 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). The petitioner stated that the beneficiary is responsible for "the management of all operations, logistics, legal and marketing aspects of business functions of the [petitioner]." 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. Here, the petitioner has failed to provide a detailed description specifying the duties that the beneficiary will primarily perform for the U.S. entity. As previously stated, 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. at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

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 is responsible for two other employees and several independent contractors. Based upon the petitioner's description of the beneficiary's duties for the U.S. entity, the beneficiary appears to be acting at most, as a first-line supervisor. 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).

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 matter, the petitioner has not, in fact, established that a baccalaureate degree is actually necessary, for example, to perform the office administrator duties, which are among the beneficiary's subordinates. Nor has the petitioner shown that either of the beneficiary's claimed subordinates 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. Although one of the beneficiary's subordinates has a managerial job title, his duties largely consist of sales, marketing, customer service, and routine administrative tasks. 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.

Moreover, although counsel states that the petitioner has contractual employees in the areas of accounting, legal services, phone support, computer, and technical support, the petitioner has neither presented evidence to document evidence of payments to the contractors nor identified the specific services these individuals provide. As noted by the director, it is unlikely that the beneficiary or his subordinates actually supervise the employees of a company hired to provide phone or computer networking services, or that the beneficiary oversees the work performed by a contracted attorney or accountant. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. 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)).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, 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 reached the point that it can employ the beneficiary in a predominantly managerial or executive position. After careful consideration of the evidence, the AAO concludes that the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner's Internal Revenue Service (IRS) Form 1120 corporate tax returns reveal that it is not a subsidiary and is not affiliated with any other entity. In addition, the petitioner submitted an unsigned and undated stock certificate and failed to indicate that any amount of common stock was sold under Schedule L on the Form 1120. Consequently, it cannot be concluded that the petitioner has a qualifying relationship with a 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.