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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **JUN 16 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:  
[REDACTED]

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, Shamrock-US Branch, 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 claimed to be a branch of ██████████ located in India and is engaged in the business of marketing home furnishings and garments. The initial petition was approved for one year 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 vice president. The petitioner was established in February 2000.

On March 6, 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 or managerial capacity. Counsel submits additional evidence in support of the appeal.

On appeal, the petitioner's counsel submitted a lengthy brief describing the beneficiary's duties and qualifications as an L-1A manager or executive and claims, "the position is in a managerial/executive capacity."<sup>1</sup>

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)(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:

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<sup>1</sup> Counsel requests that the director treat this matter as a motion to reopen and reconsider; however, the director declined to treat the appeal as a motion and forwarded the appeal to the Administrative Appeals Office (AAO) for review.

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.

In a June 10, 2002 letter submitted with the Form I-129, the petitioner described the beneficiary's proposed U.S. duties as the following:

[The beneficiary] will continue to be responsible for overseeing, coordinating and managing the daily operations of [the petitioner] in the United States. This will also include managing and overseeing the daily activities of our retail store . . . and negotiating production contracts with U.S. buyers to manufacture men's, ladies' and children's garments in factories in India managed or associated to [the foreign entity].

[The beneficiary] will manage and oversee daily contacts with buyers, coordinate delivery and garment production, as well as establish price, quality and quantities. She will oversee delivery arrangements and sales orders made by U.S. buyers and verify that orders are properly executed in India. [The beneficiary] will discuss and sign contracts with U.S. buyers, establish prices and procedures to meet garments' qualities . . . She will handle the logistics of our U.S. operations, seeking new business deals to expand operations. This will include developing and implementing marketing plans and strategies for home furnishings and garments manufactured in India and sold to buyers/customers in the U.S.

[The beneficiary] will continue possessing wide decision-making power in negotiating garment production contracts with clients. She will determine wholesale prices, quantities, delivery dates and quality controls, following [the foreign entity's] policies. [The beneficiary] will direct, coordinate and develop marketing plans and strategies for [the petitioner]. She will review, identify and approve new business opportunities for our company. [The beneficiary] will establish corporate policy, following guidelines from the parent company in India.

Specifically, [the beneficiary] will continue assume the following managerial/executive duties:

1. Overall management of [the petitioner].

2. Negotiate contracts with U.S. buyers to manufacture men's, ladies' and children's garments in India.
3. Plan and develop internal controls following [the foreign entity's] guidelines.
4. Oversee and implement marketing plans and strategies following [the foreign entity's] guidelines, policies and procedures.
5. Plan, develop and establish business goals for [the petitioner].
6. Prepare reports for review by senior management in India as to sales and progress achieved in the United States.
7. Plan, develop and implement control policies regarding company's business operations.
8. Identify new clients and garments to be manufactured by [the foreign entity's] factories in India.
9. Train and supervise subordinate staff; and,
10. Exercise discretionary decision-making over the day-to-day activities of the company. This will include negotiating contracts, establishing office policies and coordinating manufacturing orders in India.

[The beneficiary] will oversee and coordinate the activities of the Store Manager and clerical staff. She will assign workloads and establish company's monthly and annual goals. [She] will possess administrative responsibility of subordinates, including the authority to hire, fire and apply disciplinary actions, and promotions. [She] will report directly to the Board of Directors of [the foreign entity].

On October 28, 2002, the director requested additional evidence such as the U.S. company's organizational chart, a description of the U.S. entity's staff, a detailed description of the employees' duties, and evidence of the wages paid to these employees.

In response, in a January 17, 2003 letter, counsel reiterated the beneficiary's proposed U.S. duties and submitted a U.S. organizational chart and descriptions of the employees' duties. In addition, in a December 3, 2003 letter, the petitioner further described the beneficiary's duties and added the following fourteen enumerated duties in addition to the ones described in the letter:

1. Overall management of [the petitioner].
2. Interact with clients and their agents providing them with the necessary product information.

3. Maintain a close contact on a weekly basis with [the foreign entity] to make sure garments and textiles ordered are shipped according to schedule.
4. Oversee and implement marketing plans and strategies following [the foreign entity's] guidelines, policies and procedures. Plan, develop and establish business goals for [the petitioner].
5. Provide manufacturing centers with detailed information on style, dimension, colors and quality of fabrics.
6. Negotiate freight rates with freight agents and make sure that the products imported into the U.S. are classified under the right category.
7. Plan, develop and implement control policies regarding company's business operations.
8. Identify new clients and garments to be manufactured by [the foreign entity].
9. Train and supervise subordinate staff; and,
10. Exercise discretionary decision-making over the day-to-day activities of the company. This will include negotiating contracts, establishing office policies and coordinating manufacturing orders in India.
11. Oversee and manage the finance of the U.S. operations.
12. Make timely payment to suppliers.
13. Visit clients to finalize orders.
14. Take major decisions with regard to signing contracts on behalf of [the petitioner].

In addition, the petitioner claimed that the beneficiary will be supervising the activities of a merchandising manager and a sales assistant, and she will be managing a function by being "solely responsible for managing and overseeing marketing plans and strategies" for the foreign entity's products in the United States. The petitioner claimed that the beneficiary will spend 80 to 90 percent of her time on managerial functions and 10 percent of her time on nonmanagerial duties. The petitioner provided brief job descriptions for the beneficiary's subordinates and evidence of wages paid to the sales assistant during the first two quarters of 2002.

On March 6, 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 or managerial capacity. The director found that the beneficiary will be engaged in the non-managerial, day-to day operations involved in producing a product or service. The director noted that the petitioner

provided insufficient evidence to establish the number of full and part-time employees the U.S. company employed at the time of filing.

On appeal, the petitioner's counsel submitted a lengthy brief describing the beneficiary's duties and qualifications as an L-1A manager or executive and claims, "the position is in a managerial/executive capacity."

The AAO notes that counsel claims that the beneficiary is engaged in managerial and executive duties. However, counsel does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

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 beneficiary's described duties are broad and do not elaborate how the beneficiary will primarily perform managerial or executive duties. For example, the petitioner described the beneficiary's duties as "[p]lan, develop and implement control policies," "oversee delivery arrangements and sales orders," "oversee and implement marketing plans," and "[t]rain and supervise subordinate staff." However, the petitioner failed to specify the beneficiary's policies, nor did it identify whether the beneficiary would directly be involved in marketing and sales duties, or whether she would supervise others to do so. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. 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 are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Without a specific description, the AAO is unable to determine whether the beneficiary's proposed duties will be primarily managerial or executive in nature.

In addition, the petitioner described the beneficiary as being involved in "[i]dentify[ing] new clients and garments to be manufactured," "developing and implementing marketing plans and strategies," and "interact[ing] with clients and their agents providing them with the necessary product information." Since the beneficiary will actually be involved in marketing, routine customer communication and the development of plans to increase sales, she will be providing the services of the business rather than directing such activities. 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).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are “primarily” managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner indicated that the beneficiary would spend “80-90%” of her time performing managerial functions but fails to document how much time she would devote to each job duty, as requested by the director. The petitioner indicates that her duties are primarily managerial, yet the beneficiary’s duties include administrative and operational tasks, including the above-mentioned sales and marketing tasks, submitting and following up orders with manufacturing centers, and making freight delivery arrangements, which do not fall under traditional managerial duties as defined in the statute. The petitioner’s description of the beneficiary’s duties is insufficient to establish what proportion of the beneficiary’s duties is managerial and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

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. At the time the petition was filed in July 2002, the petitioner stated that the beneficiary oversees a shop manager who was hired in March 2002 and “clerical staff.” When the petitioner responded to the request for evidence in January 2003, it claimed to employ a merchandising manager and a sales assistant, whose duties appear to encompass operating the petitioner’s retail location. The petitioner’s quarterly wage report for the second quarter of 2002 shows only one employee, the individual identified as the sales assistant. The record contains no evidence of wages paid to the merchandising manager, nor has the petitioner identified any “clerical staff” by name. The petitioner has not demonstrated that the sales assistant supervised any employees or managed a function of the organization. Since there are no other lower level employees, this raises the question of who would be performing the lower level nonmanagerial or nonexecutive duties of the company. At most, the beneficiary appears to be performing the duties of 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 bachelor's degree is actually necessary, for example, to perform the duties of the sales assistant, the beneficiary's only subordinate.

Moreover, 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 an L-1A manager or executive. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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).

Finally, on appeal, counsel claims that the petitioner decided to hire a full-time marketing manager "who will visit customers in the U.S." However, the petitioner cannot attempt to make a deficient petition conform to the requirements by raising new facts to be considered on appeal. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

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.

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.