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20 Mass. Ave. N.W. Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
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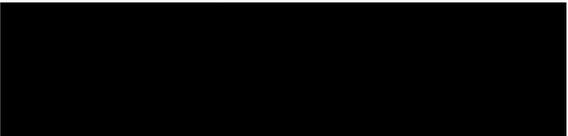


File: WAC 03 012 50057 Office: CALIFORNIA SERVICE CENTER Date: JUN 29 2005

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:



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 secretary 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 and is engaged in the wholesale of automobiles. The petitioner claims that it is the subsidiary of Ply Agency, located in Bombay, India. 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 petitioner submitted extensive documentary evidence in response to the director's request for additional evidence that clearly established that the beneficiary was employed in a primarily managerial or executive capacity as defined by the regulations. In support of this assertion, 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 managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The first 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 described the beneficiary's job duties as follows:

[The beneficiary] came to the United States to direct, manage, and develop the petitioner's business in the US market. Specifically, [the beneficiary] explored the Indian company's business activities to expand their services to the wholesale of timber and ply wood [sic] in the United States in order to expand the scope of their business on this side of the Pacific Rim.

In the business plan accompanying the initial petition, the beneficiary's responsibilities were further defined as follows:

1. Setup the entire business in the United States of America
2. Hire well trained persons to run business
3. Complete all legal formalities which include the following:
  - a. Setup Corporation in California
  - b. Sign the lease of space or rent a space
  - c. File list of Directors['] name[s] with the Secretary of State
  - d. Maintain Share holders [sic] register and file with the Secretary of State
  - e. Obtain legal whole sale used car license from Department of Motor Vehicle
  - f. Open the bank account
  - g. Arrangement of funds through banking channel

Finally, as Financial Officer and Secretary, the petitioner states that:

[The beneficiary] will maintain the company records and be in direct Communication with the accountant and other advisors. He will also be in charge of the computer system and

perform all of [the] desktop publishing for the Company. He will assist as needed with sales, shipping and receiving and customer service related issues. In addition to his regular duties, [the beneficiary] will be doing Internet marketing from his office. We anticipate that 20 hours every week will be dedicated to this marketing. The revenue that will be generated by this is reflected in the Sales Forecast.

On October 25, 2002, the director requested additional evidence establishing that the beneficiary was qualified for the benefit sought. Specifically, the director requested the following documentation:

- (1) Copies of the U.S. entity's stock ledger;
- (2) A copy of the U.S. organizational chart describing its managerial hierarchy and staffing levels;
- (3) Copies of the U.S. entity's forms DE-6, State Quarterly Wage Reports, for the preceding four quarters;
- (4) Copies of the U.S. entity's forms 941, Federal Quarterly Wage Reports, for the preceding four quarters;
- (5) Copies of the U.S. entity's payroll summary, including forms W-2 and W-3, for the preceding year; and
- (6) A list of all H-1B and L-1 petitions filed by the petitioner in the preceding twelve months.

On December 2, 2002, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. Counsel's response, which provided all specifically requested documentation, also provided a detailed description of the positions filled by the beneficiary's alleged subordinates.

On December 13, 2002, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be relieved of the everyday tasks of the organization by the two subordinate employees.<sup>1</sup> In addition, the director determined that the two subordinate employees, namely, a detailing manager and a service manager, were not professional employees as provided by the regulations.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous and that the beneficiary was in fact acting in a primarily executive capacity. Counsel for the petitioner also alleges for the first time

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<sup>1</sup> The AAO notes that the director did not mention the sales and wholesales commissions person, identified as an independent contractor, in his decision. The record does not contain evidence that the independent contractor was in fact compensated by the U.S. entity. Although requested by the director, no explanation or evidence was provided on how or if this contractor was paid by the petitioner, even though payroll records demonstrated the payment of wages to the other two employees named on the organizational chart provided. For this reason, the AAO concurs with the director's decision to consider only those employees for which evidence of actual employment existed was submitted.

that in addition to supervising personnel, the beneficiary also served as a function manager in charge of the operations of the company.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary was not employed in a primarily managerial or executive capacity. Specifically, upon review of the beneficiary's stated duties, the duties of his subordinate employees, and the payroll records which illustrate the nature of the company's staffing, it appears that the beneficiary is merely a first-line supervisor. The beneficiary does not appear to be supervising other professional or supervisory employees.

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 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 an advanced degree is actually necessary to perform the duties of the two other employees listed on the organizational chart. It is presumed, however, that an advanced degree is not required for these positions in light of the minimal salary paid to these employees. In addition, the stated duties of these employees, which included washing and detailing automobiles and picking up automobiles from auction sites, does not support a finding that these employees are professional. Finally, there is no evidence that these employees will be supervising subordinate personnel to perform lower level tasks. Since the record does not establish that the beneficiary will be supervising professional, supervisory, or managerial employees, the beneficiary has not met the definition of manager under the regulatory definitions.

Counsel argues for the first time on appeal that in addition to supervising personnel, the beneficiary is duly qualified as a function manager. 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). As previously stated, counsel did not previously introduce a claim or evidence in support of this assertion. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job

responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Counsel further refers to an unpublished decision involving an employee of the Irish Dairy Board. In the unpublished 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. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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.<sup>2</sup>

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 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 support an executive or managerial position. There is no provision in the 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, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the petition may not be approved.

Beyond the decision of the director, a related issue is whether the petitioner has established that it has secured sufficient physical premises to house the new office. The petitioner has submitted a copy of its lease, which indicates that the size of the premises is a mere 150 square feet. There is no indication of an exterior lot or storage area in which the automobiles may be stored and/or displayed. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient space to house the new enterprise. For this additional 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 director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.

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<sup>2</sup> On appeal, counsel cites additional unpublished decisions from the AAO. In accordance with 8 C.F.R. § 103.3(c), these examples are not binding on the AAO in rendering a decision in this matter.