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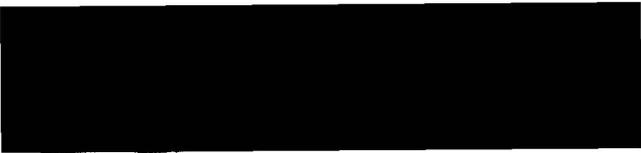
IN RE: Petitioner:
Beneficiary:



JUL 18 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 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 Massachusetts that is engaged in dental laboratory management software development, seeks to employ the beneficiary as its customer implementation and training manager. The petitioner claims that it is the subsidiary of [REDACTED]

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary was employed abroad in a primarily managerial or executive capacity; or (2) 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 evidence submitted with the initial petition and in response to the director's request for additional evidence clearly established that the beneficiary was employed in a primarily managerial or executive capacity as defined by the regulations, and that the director erred by focusing on the size of the U.S. company when evaluating the beneficiary's qualifications.

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.

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.

The first issue in the present matter is whether the beneficiary was employed abroad in a primarily managerial or executive capacity.

In a letter from the petitioner dated September 7, 2006, the petitioner indicated that the beneficiary had been employed abroad with the foreign entity since February 2001 as the Software Account Manager. The petitioner stated that in this position, the beneficiary “has assisted in development of the [REDACTED] product and has managed training and implementation for numerous implementation projects.”

In an undated statement from [REDACTED] Director and Chief Financial Officer of the petitioner, her duties are described as including the following:

- Manage [REDACTED] software installation & client training programs
- Develop [REDACTED] training programs
- Participate in product development

On September 23, 2004, the director requested additional evidence with regard to the beneficiary’s employment abroad. Specifically, the petitioner was asked to submit additional information with regard to the employees the beneficiary supervised, including their duties and educational backgrounds. In a response dated October 12, 2004, the petitioner, through counsel, responded to the director’s request. The record indicates that the beneficiary oversaw two employees, both technical support officers. These employees were listed as each having attained a Bachelor’s degree in Management and Psychology and Chemistry, respectively. Their duties were described as “providing first level support to all of [the foreign entity’s customers and] reporting directly to [the beneficiary] who has overall responsibility for managing the UK customer base.”

On October 27, 2004, the director denied the petition. The director noted that the beneficiary’s position abroad was not one involving primarily managerial or executive duties. Rather, the director found that the beneficiary’s position of software account manager required her to perform many of the tasks necessary to produce the petitioner’s product and/or service, and thus her duties were not primarily in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director overlooked the advanced degrees held by the beneficiary’s subordinates, and asserted that by virtue of overseeing these professional employees, the beneficiary was a qualified manager. The AAO disagrees.

Although the beneficiary is not required to supervise personnel, if it is claimed that her 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. 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 this matter, counsel for the petitioner asserts that because the beneficiary’s two subordinate employees abroad hold advanced degrees, they are consequently professional employees and therefore the beneficiary is a qualified manager.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require an advanced 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 employee. The possession of an advanced 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, for example, to perform the technical support services of the beneficiary's subordinates. In fact, although the employees provide software support services, their degrees, namely chemistry and management and psychology, seem unrelated to the positions they occupy. For this reason, counsel's assertions are not persuasive.

The brief description of the beneficiary's duties abroad indicates that she managed and developed software installation and training programs. The description does not identify managerial or executive tasks performed by the beneficiary; instead, it focuses on her active participation in product development and customer assistance. 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. The petitioner, therefore, has failed to show that the beneficiary was primarily employed abroad in a qualifying capacity. For this reason, the petition may not be approved.

The second issue in this matter is whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

In a letter from counsel dated September 10, 2004 as well as in a letter from the petitioner dated September 7, 2006, the beneficiary's proposed duties were described as follows:

Specifically, she is in charge of the installation, application, and servicing of the European based Laboratory Management Systems, [REDACTED]. [The beneficiary] provides implementation support and on-site training for all U.S. clients. Furthermore, [the beneficiary] will be responsible for training U.S. workers in the [REDACTED] systems as the U.S. operations expand. [The beneficiary] will have authority to develop and implement training policy and procedure guidelines with respect to subordinate employees. She will also be responsible for hiring, termination, and discipline decisions with respect to subordinate employees. [The beneficiary] will serve at the highest level with respect to the Customer Service and Customer Training function. The Company currently does not have a U.S. worker with the knowledge and expertise that [the beneficiary] holds. [The beneficiary] will be the highest ranking worker in the U.S. operations responsible for all customer support

and related activities. As such, [the beneficiary] has sole discretion over a major function of the organization.

On September 23, 2004, the director requested additional evidence with regard to the beneficiary's employment in the United States. Specifically, the petitioner was asked to submit additional information with regard to the employees the beneficiary would supervise, including their duties and educational backgrounds. In addition, the petitioner was requested to submit copies of its Employer's Quarterly Returns for the first and second quarters of 2004. In a response dated October 12, 2004, the petitioner, through counsel, responded to the director's request. The record indicates that the beneficiary would oversee two employees, namely, an office administrator and a technical support officer. No quarterly tax returns were submitted.

On October 27, 2006, 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 United States. Specifically, the director concluded that the duties of the beneficiary, coupled with the small personnel size of the petitioner, failed to establish that the beneficiary would be employed in a qualifying capacity.

On appeal, counsel for the petitioner restates the four requirements of "managerial capacity" as defined by the regulations and alleges that the beneficiary's duties clearly correspond to each requirement. In addition, counsel asserts that the director's reliance on the size of the U.S. petitioner was erroneous. The AAO, upon review of the record of proceeding, concurs with the director's finding.

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 beneficiary's proposed duties in the United States include training employees and providing on-site implementation and support for clients. As stated above, 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.

On appeal, counsel for the petitioner provided a step-by-step analysis of the beneficiary's duties by examining them with each of the four elements of managerial capacity. Specifically, counsel asserts that the beneficiary will have hiring and firing authority, will oversee all daily operations, and will oversee professionals. The AAO is not persuaded that the proposed duties of the beneficiary satisfy the regulatory requirements.

There are two problems with the beneficiary's stated duties. First, the beneficiary's proposed duties include numerous non-managerial tasks that are essential to the daily operations of the business. Specifically, the assertions that the beneficiary will be assisting customers on site, developing software, and training employees suggests that she will be performing many undertakings that would normally be delegated to sales representatives or other non-managerial personnel. In this case, it is clear that the proposed duties include many practical obligations that would normally be delegated by a manager or supervisor to a subordinate staff. 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). Secondly, the description of her duties indicates that a significant portion of her time would be devoted to the supervision and direction of

her two subordinates, namely, the office administrator and the technical support officer. As previously discussed, if it is claimed that her 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 has not established that these employees require an advanced degree, such that they could be classified as professionals. Although counsel directs our attention to the response to the request for evidence where it is stated that the technical support officer has a bachelor's degree in business and the office administrator completed accounting and banking courses at technical college, no evidence has been submitted to confirm that such educational degrees are actually required to perform the duties associated with these positions. Furthermore, the petitioner has not 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.

Finally, it is noted that counsel correctly observes that 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 a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, counsel asserts that the beneficiary will be a qualified manager by virtue of her supervision of the office administrator and technical support officer. As discussed above, however, it appears that the beneficiary would merely be a first-line supervisor to these persons. However, and most importantly, the petitioner has failed to submit evidence to corroborate its claim of employment of these two individuals. On Form I-129, filed on September 15, 2004, the petitioner indicated that it currently employed one person. Despite the director's request for copies of its quarterly tax returns for the first and second quarters of 2004, the petitioner failed and/or refused to submit these documents. Therefore, there is no evidence to corroborate the petitioner's claim that these employees were on the petitioner's payroll at the time of filing. On appeal, counsel alleges that the naming of one employee on the Form I-129 was an oversight, and alleges that both the office administrator and the technical support officer were hired one year prior to the petition's filing. However, no evidence to corroborate this claim has been submitted.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, 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). Despite the director's request, the petitioner failed to submit documentation that the petitioner actually employed the persons in question. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of

proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

ORDER: The appeal is dismissed.