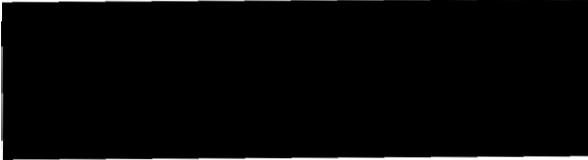


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File: WAC 05 003 50307 Office: CALIFORNIA SERVICE CENTER Date: SEP 06

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)

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, 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 visa petition seeking to extend the employment of its president 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 under the laws of the State of California¹ and is engaged in the business of marketing and selling metallized and coated films, paper, board, and metallic yarn manufactured by ██████████ in New Delhi, India. The petitioner also claims a qualifying relationship with ██████████. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and then granted a two-year extension. The petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary is 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 asserts that the director erred in denying the petition and that the evidence on record establishes that the beneficiary will be employed in a managerial or executive capacity. In support of its appeal, the petitioner submits a brief specifically identifying those errors allegedly made by the director in denying the petition.

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

¹ It should be noted that the petitioner, ██████████, is a duly registered fictitious name in San Mateo County, California, for ██████████. Therefore, ██████████ is the proper party in interest.

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)(i) also provides that a visa petition may be extended by filing a new Form I-129. The petitioner does not need to supply supporting documentation unless requested by the director.

The primary 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;

Personal Training:

25% time spent per week

Develop a training program for employees to improve their skills;

Hiring technical consultants, who are industry experts to augment the company's know-how as well as train employees.

The support letter further explains that the beneficiary supervises "around 11 professional employees" with the goal of hiring more and with the clarification that six of the eleven are "hired on contract."

The petitioner also included an organizational chart for the petitioner showing the petitioner at the top of the organization with supervisory responsibility over eleven people (three "managers," two "associates," and six "sales engineers"). The two "associates" and the six "sales engineers" all report, according to the chart, to at least one of the three "managers" who, in turn, report to the beneficiary.

Finally, the petition included a table describing the educational level and job responsibilities of all the employees, including the three "managers." All three "managers" hold master's degrees. The finance manager's duties are described as "[m]anage finance and corporate issues [and a]ssist President on joint ventures and alliances." The operations manager's duties are described as "[m]anage all operations and supply-chain [and c]oordinate with parent company for supplies.² The business development manager's duties are described as "[m]anage product [and] market development[; m]anage and coordinate sales engineers team[; and m]anage customer relations."

On October 14, 2004, the director requested additional evidence. Title 8 C.F.R. § 214.2(I)(14)(i) specifically permits the director to request supporting documentation in the context of an L-1 extension petition. The director requested, *inter alia*, the number of people employed by the petitioner and a copy of an organizational chart describing the petitioner's managerial hierarchy and staffing levels as follows:

The chart should include the current names of all executives, managers, supervisors and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of the job duties, educational level, annual salaries/wages for all employees under the beneficiary's supervision.

In response, the petitioner supplied the same organizational chart and job description table supplied with the original petition.

² The offer letter to [REDACTED], the current operations manager, also describes his duties as follows: "Your job responsibilities will include managing all administrative activities including that of independent contractors for functions such as accounts, payroll, and logistics. You will also be required to communicate with all agencies, customers and suppliers, as well as our parent company in India to ensure that all functions from order processing to delivery are adequately managed and performed."

The director also requested “evidence that the beneficiary 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.”

In response, the petitioner again referred to the organizational chart. It also provided copies of contracts, promotion letters, and email communications signed or sent in the beneficiary’s capacity as president as well as copies of the beneficiary’s credentials and an explanation of his track record as an entrepreneur. One of the letters, dated May 24, 2004, purports to promote [REDACTED] to the position of Business Development Manager and therein describes her duties as “communicate and coordinate with the sales engineer team and to manage customer relations.” The email communications are generally between the beneficiary and the so-called “sales engineers.”

On January 6, 2005, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director determined:

It is concluded that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a managerial or executive capacity. The record indicates that a preponderance of the beneficiary’s duties will be directly providing the services of the business. The record does not establish that the U.S. entity contains the organizational complexity to support additional executive or managerial position [sic]. Regarding the claimed managerial duties, the evidence fails to establish that the beneficiary’s daily activities or the specific scope and nature of the beneficiary’s activities will be primarily managerial or executive. Further, the petitioner’s evidence is not persuasive in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. As such, the beneficiary’s duties will not be primarily managerial or executive as defined above.

On appeal, the petitioner asserts that the beneficiary’s duties are primarily those of an executive or manager. The petitioner argues in its supporting brief that the director’s decision was in error for, *inter alia*, failing to recognize that the beneficiary is managing a subordinate staff of professionals, that the beneficiary is occupying a primarily managerial capacity, and that he is managing other managers.

Upon review, petitioner’s assertions are not persuasive.

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(1)(3)(ii). The petitioner’s description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions.

The petitioner has failed to prove that the beneficiary will act in a "managerial" capacity by managing a department, subdivision, function, or component of the organization. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. The job description states that he is primarily engaged in "general management activities," which include business development, marketing, directing management staff, and setting policies to control and assign work to employees and contractors. However, the petitioner did not define these terms. The only evidence provided by the petitioner was an organizational chart showing the beneficiary at the top; vague job descriptions for his subordinates; copies of contracts, promotion letters, and email communications signed or sent in the beneficiary's capacity as president; copies of the beneficiary's credentials; and an explanation of his track record as an entrepreneur. The only evidence of the beneficiary exercising management responsibilities is the set of emails apparently directing his sales staff. 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). 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).

The petitioner also failed to prove that the beneficiary "supervises and controls the work of other supervisory, professional, or managerial employees." According to the petition, the beneficiary is directly supervising three "managers." However, the job descriptions for these employees were either too vague to ascertain what they do on a day-to-day basis or, in the case of the business development manager, not provided at all except in the context of the promotion letter dated May 24, 2004, further described above. For example, the operations manager is depicted in the organizational chart as managing no one in the U.S. operation and is described as managing "all operations," the supply chain, and administrative activities such as accounts, payroll, and logistics. Likewise, the finance manager is described as supervising an administrative associate, which appears to be a clerical employee, and a contract accountant. Again, this employee was given a job description ("manage finance and corporate issues"), which is so vague that it is impossible to determine what this employee does on a day-to-day basis.

Finally, while the petitioner claims that the "sales engineers" are supervised by the Business Development Manager, this allegation is not supported by the evidence. Not only does the promotion letter outlining the duties of the Business Development Manager fail to state that her duties will include supervising the "sales engineers," but the series of emails submitted by the petitioner are evidence that the beneficiary directly supervises these contractors/employees. The emails are sent directly to the "sales engineers," and there is no evidence that their claimed supervisor was ever copied on any of this correspondence. Therefore, the evidence leads to the conclusion that the beneficiary directly supervises the "sales engineers" and that the business development manager, who received less than \$5,000.00 in reported income from the petitioner in 2003, does not play a supervisory role. This conclusion was essentially adopted by counsel to the petitioner in his response to the director's request for evidence dated November 15, 2004: "Exhibit C contains email communications to the contractors from the beneficiary, who assigns them work and closely supervises their day-to-day functioning."

In view of the above, the beneficiary would appear to be a first line supervisor, which would not be sufficient to support an L-1A manager, and/or the provider of actual services. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intl.*, 19 I&N Dec. 593, 604 (Comm. 1988). 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. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology Intl.*, 19 I&N Dec. at 604.

However, the fact that the beneficiary supervises the "sales engineers" and the three "managers" would not necessarily disqualify him as a managerial employee if the petitioner can prove that the "sales engineers" and/or the other employees are "professional" 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 degrees held by the subordinate employees. The possession of a bachelor's, or even a master's, degree by a subordinate employee does not automatically lead to the conclusion that the 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 to perform any of the jobs described in the petition. Not only are the managers' job descriptions so vague that it is often impossible to determine what they do on a day-to-day basis, but the information provided for the "sales engineers" is insufficient to prove that these employees are professionals. Sales agents and their associated duties are not the duties of a professional within the meaning of Section 101(a)(32). The fact that the agents must master technical jargon and deal with customers who are highly educated does not mean that a bachelor's degree is required for entry into this field. The petitioner has failed to provide any evidence supporting its contention that a bachelor's degree is required to be one of its sales agents. Therefore, the petitioner has not proven that the beneficiary is managing professional employees.

Furthermore, the petitioner has not proven that the beneficiary will manage an "essential function" of the organization. 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job description that clearly describes the duties to be performed

in managing the essential function, *i.e.*, 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. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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 capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995) (citing *Matter of Church Scientology Intl.*, 19 I&N Dec. at 604).

The petitioner's vague job description 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 managerial, but it fails to define them with enough specificity to determine which functions are being managed and which functions are being performed directly by the beneficiary. This failure of documentation is important because several of the beneficiary's daily tasks, such as marketing and budgeting, do not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties with more specificity, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce 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). 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). 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, *aff'd*, 905 F.2d 41. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Similarly, the petitioner has failed to prove that the beneficiary has been or will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that **person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization.** Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* As indicated above, while the petitioner may have provided a vague job description which reiterates the regulations, the petitioner has failed to prove that the beneficiary, who is apparently acting as a front-line manager, will be acting primarily in an executive capacity.

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).

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3).

Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361. The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Therefore, even though the petitioner was successful in the past in petitioning for the beneficiary, the director properly denied the petition in this case.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.