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U.S. Citizenship
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Services

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File: WAC 05 027 50346 Office: CALIFORNIA SERVICE CENTER Date: **APR 05 2008**

IN RE: Petitioner:
Beneficiary:



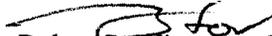
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 manager 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 California and is allegedly a carpet importer and wholesaler. The petitioner claims a qualifying relationship with Jyoti International, located in India. The beneficiary was granted a one-year period of stay to open a new office, which was subsequently extended for an additional two years. 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 will be employed in the United States in a primarily managerial or executive capacity.

The petitioner 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 and that the record establishes that the beneficiary will be primarily employed in a managerial capacity. In support of its appeal, the petitioner 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 primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial 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.

In the initial petition, the petitioner 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. The director considered both classifications because the petitioner occasionally used the word "executive" when describing the beneficiary. On appeal, counsel asserts that the beneficiary is employed primarily in a managerial capacity and specifically states that the petitioner is not seeking to classify the beneficiary as an executive. Therefore, the AAO will limit its consideration of the appeal to whether the beneficiary will be employed primarily in a managerial capacity.

In a letter dated November 4, 2004 appended to the initial I-129 petition, the petitioner described the beneficiary's job duties as follows:

Beneficiary, as manager/executive of petitioner company, directs the management of the company, establishes goals and policies of the organization in relation to finance, freight forwarding, and product and services development that the company provides to its customers in the international markets. He does this by exercising independent decision-making and by managing the work of professionals who work under him either as employees or independent

contractors [citation omitted].

Beneficiary has been granted authorization by the Board of Directors of Petitioner company to Hire and Fire Personnel as Beneficiary deems necessary for the successful operation of the company. Based upon this authority, Beneficiary has hired and manages a local team of professional employees who assist Beneficiary in achieving Petitioners [sic] laid out goals [citation omitted].

The petitioner further explained that the beneficiary signed leases on behalf of the business; manages employees and independent contractors; analyzes market trends, market opportunities, and oversees implementation of marketing plans; established two showrooms; established "strategic business relationships" with more than 35 wholesalers and an exclusive distribution relationship with a retailer; designed and oversaw the establishment of the petitioner's internet sales website; forecasts trends and designs which has influenced six new rug collections; negotiated distribution rights for a brand of rug pad; and is developing a home furnishings line.

The petitioner also provided a copy of its organizational chart which shows the beneficiary reporting to a "managing director" and directly supervising two marketing employees, an accounting-administration employee, an accountant, a customs broker, and a bank officer. While the accounting-administration employee is shown supervising "In House Sales and Warehouse," it is not clear if this is referring to an employee.

The petitioner further describes the employees supervised by the beneficiary in the letter dated November 4, 2004. The marketing employees, described in the letter as "marketing executives," appear to have duties relating directly to the marketing and sale of merchandise. One of the marketing employees, [REDACTED] is described as having a university degree, and the petitioner asserts that he is a professional employee. The accounting-administration employee is described as providing accounting support and is alleged also to possess a foreign university degree and to be a professional. Finally, the petitioner asserts that the beneficiary supervises the work of a variety of "outside professionals," identified as an accountant, a customs broker, and a bank officer.

On December 13, 2004, the director requested additional evidence. Specifically, the director requested further evidence regarding the petitioner's ownership and control, a more descriptive organizational chart, job descriptions for subordinate employees, wage reports, and a more detailed job description for the beneficiary.

In response, counsel to the petitioner provided a letter dated March 4, 2005, an organizational chart which materially differs from the chart appended to the initial petition, and wage reports. In the letter, counsel provides an identical job description for one of the marketing employees, [REDACTED]. The other marketing employee, [REDACTED] has been omitted from both counsel's letter and the organizational chart.

¹While counsel spelled the employee's name [REDACTED] in his letter dated March 4, 2005, the petitioner spelled his name [REDACTED] in the letter dated November 4, 2004. However, it appears that the two variations refer to the same employee.

Counsel now identifies the second marketing employee as [REDACTED]. Counsel does not explain when Ms. [REDACTED] commenced her employment with the petitioner, but the wage report for the quarter which includes the date upon which the current petition was filed does not list [REDACTED] as an employee. Counsel's letter and the new organizational chart also identify a third marketing employee who was not listed in the supporting documents attached to the initial petition. This third marketing employee is also not listed as an employee in the attached wage reports. The wage reports reveal that, as of the fourth quarter of 2004, the petitioner employed the beneficiary, the two marketing employees [REDACTED] and two employees who are not identified elsewhere in the supporting documentation.

Counsel also provides a breakdown of how much time the beneficiary devotes to each of his duties. According to counsel, the beneficiary devotes 35% of his time to the management of the company, 20% of his time managing professionals, 5% of his time hiring and firing employees, and 40% of his time exercising discretion over the day-to-day operations of the management of the company.

On August 8, 2005, the director denied the petition. The director determined that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the director erred and that the record establishes that the beneficiary will be primarily employed in a managerial capacity. Specifically, counsel reiterates the regulations and argues that the beneficiary is not primarily engaged in performing marketing duties; that the beneficiary manages professionals; that the beneficiary primarily manages "the organization as a whole entity;" and that the management of personnel is only a "small function" of the beneficiary's larger role of managing the petitioner.

Upon review, the 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(l)(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.*

The petitioner has failed to establish that the beneficiary will act in a "managerial" capacity. 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. For example, the petitioner states that the beneficiary's duties include directing the management of the company and establishing goals and policies. However, the petitioner failed to specifically explain what the beneficiary does to direct the management of the company or to specifically define what goals and policies have been established. Equally important, those aspects of the beneficiary's job which have been described with some specificity will inevitably involve non-qualifying administrative or operational tasks which would require a subordinate staff for the beneficiary to avoid performing those tasks necessary to perform these duties. For example, establishing showrooms, running a website, designing rugs, and marketing to customers are all identified as duties of the beneficiary; however, the petitioner does not explain how, or by whom, these duties are performed. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). 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 establish that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees, or manage an essential function within the organization. While the petitioner did supply an organizational chart, the job descriptions provided for the subordinate employees, i.e., the marketing employees and the accounting-administration employee, reveal that these employees are performing the tasks necessary to produce a product or to provide a service and appear to have no supervisory or managerial functions. Although the accounting-administration employee is shown supervising the "In House Sales and Warehouse," this accounting-administration employee's job description does not describe him as having a supervisory function, and the wage reports for the petitioner do not even list this person as an employee. In view of the above, the beneficiary would appear to be a first-line supervisor, the provider of actual services, or a combination of both. A managerial 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 International*, 19 I&N Dec. at 604.²

Moreover, the job descriptions provided for the subordinate employees, i.e., the marketing employees and the accounting-administration employee, do not establish that they are professionals. 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).

²As explained above, the petitioner provided a materially different organizational chart in response to the Request for Evidence as well as job descriptions for employees who were not identified in the initial petition and who appear not to have been employees at the time the petition was filed. The AAO will only consider the organizational chart and employee roster in effect at the time the petition was filed. 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).

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 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 a bachelor's degree is actually necessary, for example, to do the jobs of the marketing employees or the accounting-administration employee. While counsel on appeal submits evidence that two other employers in Internet job postings have stated that they prefer applicants to have a bachelor's degree for positions which the petitioner claims are similar to its marketing employees' positions, the evidence presented does not indicate that a degree is required for entry into the field of endeavor generally, i.e., international rug sales; that these job postings are for positions truly similar to the petitioner's vaguely described positions; what field of study is required for the other positions or that the petitioner's employees possess the same or a related degree; or that the other employers would reject an experienced candidate solely because he or she lacked a degree. Therefore, as the petitioner has not established that a baccalaureate degree is necessary for entry into the field of endeavor, the petitioner has not established that the beneficiary manages professional employees.

Additionally, the petitioner cannot rely on the beneficiary's supervision of "outside professionals," identified by the petitioner as an accountant, a customs broker, and a bank officer, in establishing that he supervises and controls professional employees. First, the record is devoid of any evidence that the beneficiary realistically supervises or controls these service providers or independent contractors. While undoubtedly the petitioner, like most all businesses, has purchased professional services from accountants and banks, this does not establish that the beneficiary supervises and controls the work of professionals. These persons are independent contractors who perform a service in exchange for a fee. While the petitioner may be a customer or client of these contractors, there is no evidence that it controls the time, place, and method by which these services are provided. Second, the petitioner may not as a matter of law use the supervision of non-employees to establish that the beneficiary supervises and controls professionals. Section 101(a)(44)(A)(ii) expressly limits the definition of "managerial capacity" to professional *employees*. Independent contractors are not employees. Therefore, even if the beneficiary was established to be supervising and controlling these professionals, this supervisory function could only be used to classify the beneficiary as a manager if the professionals are employees of the petitioner.³

³Finally, on appeal, counsel to the petitioner asserts that the beneficiary manages the "organization" as a whole entity. While counsel does not expressly argue that the management of the organization constitutes the management of an "essential function," the record nevertheless would not support such a classification. 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 offer 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.

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 capacity as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary had been employed abroad in a managerial or executive capacity or in a position which involved specialized knowledge. 8 C.F.R. § 214.2(l)(3)(iv). In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties abroad that fails to demonstrate what the beneficiary did on a day-to-day basis. 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. Specifics are clearly an important indication of whether a beneficiary's duties were primarily executive or managerial in nature or involved 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, *aff'd*, 905 F.2d 41.

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 a 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.

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 this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. As explained above, the petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial and what proportion would be non-managerial. Moreover, without any explanation as to who performs the non-qualifying administrative and operations tasks inherent in performing many of the beneficiary's duties, the petitioner has not established that a majority of the beneficiary's time is dedicated to performing managerial duties. Absent a clear and credible definition of the beneficiary's duties, the AAO cannot determine what proportion of the 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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.