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20 Massachusetts Ave., N.W., Rm. A3000  
Washington, DC 20529

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**U.S. Citizenship  
and Immigration  
Services**

DA

File: SRC 05 054 50555 Office: TEXAS SERVICE CENTER Date: APR 11 2007

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, 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 filed this nonimmigrant visa petition seeking to employ the beneficiary as its sales 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 authorized in 2001 to transact business in Texas and is allegedly a household appliance manufacturer. The petitioner claims a qualifying relationship with [REDACTED], of China.

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the beneficiary has been employed abroad 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 because the record establishes that the beneficiary will be and has been employed primarily as an executive or manager.

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 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.

Although the petitioner does not clarify in the initial petition 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 gist of the petition and supporting documentation is that the petitioner is seeking to classify the beneficiary as a manager. Given the ambiguity, the AAO will consider the appeal as if the petitioner is asserting that the beneficiary will be employed primarily as either a manager *or*, in the alternative, an executive.

In a letter dated December 6, 2004 appended to the initial Form I-129, the petitioner describes the beneficiary's proposed job duties as follows:

As Sales Manager, [the beneficiary] will be supervising the sales department, which currently consists of two assistant sales managers, both of whom will be reporting directly to [the beneficiary]. He will be responsible for expanding, organizing, directing, and developing this department.

[The beneficiary] will also be responsible for future staffing, training and evaluating performance to develop and control our sales programs. [The beneficiary] will coordinate sales distribution for all of North America by working closely with our marketing department who [sic] is currently working on approaching key U.S. and Canadian accounts for our OEM customers such as GE, Frigidaire, Applica and retail customers such as Wal-Mart, Target and Home Depot. [The beneficiary] will be reviewing market analyses to determine customer needs, volume potential, price schedules, and discount rates, and develop sales campaigns to accommodate goals of [the] company. He will also advise other dealers, distributors, and clients concerning sales and advertising techniques.

Furthermore, due to our relatively recent entry into the North American market and the unfamiliarity of our products outside of Asia, it will be essential for [the beneficiary] to direct product simplification and standardization to eliminate unprofitable items from our sales line. [The beneficiary] will also be representing our company at trade associations meetings to promote our products.

On December 29, 2004, the director requested additional evidence. The director requested, *inter alia*, an organizational chart for the United States entity, wage reports, and a description of the beneficiary's subordinate employees in the United States.

In response, the petitioner provided a letter dated March 22, 2005 in which it explains that the beneficiary will supervise two "assistant sales managers" in the United States. The job descriptions for these employees reveal that they are engaged in product sales, and the petitioner asserts that both of these subordinate employees have either attended university or have earned university degrees. The petitioner also provided an organizational chart which shows the beneficiary reporting to the company president and supervising the two "assistant sales managers." Finally, the petitioner provides a wage report which identifies the two "assistant sales managers" as employees.

On April 1, 2005, the director denied the petition. The director concluded that the petitioner did not 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 in denying the petition because the record establishes that the beneficiary will be employed primarily as an executive or a manager.

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(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 must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. 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. 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 will do on a day-to-day basis. For example, the petitioner states that the beneficiary's duties will include coordinating sales distribution and directing product simplification and standardization. The petitioner did not, however, specifically define these duties, or describe with specificity how the beneficiary will perform these duties. Equally important, some of these vaguely described duties likely include operational or administrative tasks. For example, marketing the petitioner's products to prospective customers is not a managerial or executive duty, and Citizenship and Immigration Services (CIS) cannot determine whether the beneficiary is primarily employed as a manager absent a detailed breakdown of how much time the beneficiary will spend performing such non-qualifying tasks. 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 prove that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees, or that he will manage an essential function within the organization. While the petitioner did supply an organizational chart, the job descriptions provided for the "assistant sales managers" reveal that these employees are performing the tasks necessary to produce a product or to provide a service and have no supervisory or managerial functions. 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 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 International*, 19 I&N Dec. at 604. Moreover, the job descriptions provided for the subordinate employees do not establish that they are professionals.<sup>1</sup> Therefore, the record does not establish that the beneficiary will be acting in a managerial capacity.

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<sup>1</sup>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.

On appeal, counsel to the petitioner asserts that the beneficiary is not a first-line supervisor, that the beneficiary manages a component of the organization, and that the director erroneously relied on staffing levels in denying the petition. Counsel's arguments are not persuasive. First, the record is clear that the beneficiary is acting as a first-line supervisor in his oversight of the "assistant sales managers." While the inclusion of this duty does not alone disqualify the beneficiary from being classified as a managerial employee, it is nevertheless a non-qualifying duty, and the petitioner must otherwise show that he is primarily employed in a managerial capacity. As explained above, absent a more specific description of his remaining duties and a breakdown revealing how much time the beneficiary spends performing non-qualifying tasks, i.e., acting as a first-line supervisor, the AAO cannot conclude that the beneficiary is primarily employed in a managerial capacity.

Second, while the petitioner has not specifically argued that the beneficiary manages an essential function of the organization, counsel alludes to this on appeal by claiming that the beneficiary manages a "component of the organization." The record does not support this position. 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.

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's vague job description, which includes operational and administrative tasks and indicates that he will likely have first-line supervisor responsibilities, fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine

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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 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 perform the work of the "assistant sales managers."

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).

Similarly, the petitioner has failed to establish that the beneficiary 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 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, the petitioner has failed to establish that the beneficiary, who will allegedly manage two employees who are apparently engaged in providing services to customers, will be acting primarily in an executive capacity.

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).

The second issue in the present matter is whether the petitioner has established that the beneficiary has been employed abroad in a position that was managerial, executive, or involved specialized knowledge as required by 8 C.F.R. § 214.2(l)(3)(iv).

As the petitioner did not provide a detailed job description for the beneficiary's overseas position, on December 29, 2004 the director requested additional evidence regarding his duties abroad including information regarding his subordinate employees.

In response, the petitioner provided a letter dated March 22, 2005 describing the beneficiary's job as "Area Manager – North America." The petitioner provided the following job description:

- A) Responsible for all sales for North America territory including the following:**
1. Created detailed annual sales plan for North America which involved plans involving different areas of the U.S. subsidiary, [the petitioner], including human resources, marketing, customer relations, product development and timelines.
  2. Configuration, training and administration of sales department for all of North America;
  3. Supervised customer files and document management and organized business information of America area;
  4. Managed and authorized the sales expense of the North American territory;

**B) Responsible for the accomplishment of annual sales task:**

1. Implemented sales plans for various products and oversaw marketing of the [sic] those products;
2. Formed sales strategies including customer strategy, pricing strategy and product lineup strategy; and attended the business negotiations with key accounts.

**C) Responsible for the sales network construction and management of North American territory:**

1. Create the sales network layout of America area;
2. Oversaw, evaluated and reviewed performance of the sales network to increase overall sales;
3. Worked in conjunction with [the foreign entity's] retail customers on marketing, sales network, and promotion of various [foreign entity] home appliance products[.]

**D) Responsible for evaluating business risks of North America territory:**

1. Exercised full authority for all sales contracts for North American territory;
2. Analyzed business, marketing and sales plans already in use to forecast future projections and eliminated those plans that failed to perform up to expectations;
3. Assisted in-house accountants with accounts receivables for North American territory.

**E) Information feedback and product development[:]**

1. Gathered and analyzed the market information for North American territory;
2. Reported the problems occurred in sales and marketing for North American territory;
3. Provided information of customer's requirement in product and delivery to Production Department and R&D Department;
4. Brought out new product development proposals for North American territory;
5. Organized the market research and composed market reports of North American territory[.]

- Percentage of time spent on each duty

Duty A): 25%

Duty B): 30%

Duty C): 20%

Duty D): 10%

Duty E): 15%

The petitioner also explained that the beneficiary supervises two "sales managers" abroad. The job descriptions for these employees reveal that they are engaged in product sales, and the petitioner asserts that

both of these subordinate employees have either attended university or have earned university degrees.

On April 1, 2005, the director denied the petition. The director concluded that the petitioner did not establish that the beneficiary has been employed abroad in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the director erred in denying the petition because the record establishes that the beneficiary has been employed primarily as an executive or a manager.

Upon review, petitioner's assertions are not persuasive.

Again, 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 matter, the petitioner has failed to establish that the beneficiary has acted in a "managerial" capacity overseas. In support of its petition, the petitioner has ascribed broad, yet vaguely described, responsibilities to the beneficiary covering all aspects of the foreign entity's North American sales. However, the petitioner has failed to specifically explain how the beneficiary performs duties such as creating and implementing sales plans, creating sales networks, and gathering market information, especially when the beneficiary manages only two staff members who apparently perform the actual sales work. Given the breadth of the beneficiary's duties and the lack of a subordinate staff, it is not credible that the beneficiary would not be primarily performing the tasks necessary to do the duties ascribed. As explained above, 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; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Moreover, the petitioner also failed to prove that the beneficiary has been supervising and controlling the work of other supervisory, professional, or managerial employees, or that he has managed an essential function within the organization. The job descriptions provided for the two subordinate employees reveal that these employees are performing the tasks necessary to produce a product or to provide a service and have no supervisory or managerial functions. Therefore, the beneficiary would appear to be a first-line supervisor, the provider of actual services, or a combination of both. 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 International*, 19 I&N Dec. at 604. Also, the job descriptions provided for the subordinate employees do not establish that they are professionals or that a university degree is necessary for the positions. Finally, the record does not establish that the beneficiary will manage an essential function of the organization for the same reasons articulated above for the United States position. Therefore, the record does not establish that the beneficiary will be acting in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary has acted in an "executive" capacity. As indicated above, the petitioner has failed to establish that the beneficiary, who is allegedly managing two employees who are apparently engaged in providing services to customers, will be acting primarily in an executive capacity.

Accordingly, the petitioner has not established that the beneficiary has been employed abroad in a primarily

managerial or executive capacity as required by 8 C.F.R. § 214.2(I)(3)(iv).

Beyond the decision of the director, a related matter is whether the petitioner has established that it has a qualifying relationship with the foreign employer, [REDACTED], of China.

The regulation at 8 C.F.R. § 214.2(I)(3)(i) states that a 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 (I)(1)(ii)(G) of this section.

8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (I)(1)(ii) of this section." A "subsidiary" is defined, in part, as a legal entity, including a limited liability company, which "a parent owns, directly or indirectly, more than half of the entity and controls the entity."

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the petitioner provided no evidence establishing the ownership and control of the United States entity. While the petitioner did provide a copy of its Texas certificate of authority, the petitioner did not provide a copy of its articles of incorporation, stock certificates, or any other organizational materials. Moreover, the record is rife with inconsistencies regarding the petitioner's state of incorporation. For example, the certificate of authority indicates that the petitioner is a Delaware corporation, the lease provided by the petitioner indicates that it is a Texas corporation, and the petitioner's 2003 New York Form CT-4 (General Business Corporation Franchise Tax Return Short Form) indicates that the petitioner is a New York corporation. Moreover, the petitioner is not listed in the foreign entity's annual report as an affiliated entity. 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). Therefore, as the petitioner has failed to establish the ownership and control of the United States entity, the petition may not be approved for failure to establish a qualifying relationship with the foreign entity.<sup>2</sup>

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<sup>2</sup>A review of Texas state corporate records indicates that the petitioner's authority to transact business in Texas has ended and the corporation no longer has standing. Therefore, as the State of Texas has forfeited the petitioner's corporate privileges and the petitioner has failed to establish that it is incorporated and authorized

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).

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, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.

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to do business in any other state, the company can no longer be considered a legal entity in the United States. As this clearly and unequivocally renders the petitioner ineligible for the classification sought, the petition could not be approved even if the appeal were not being dismissed for the other reasons articulated herein.