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U.S. Citizenship
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File: WAC 04 023 51482 Office: CALIFORNIA SERVICE CENTER Date: MAY 03 2007

IN RE: Petitioner:
Beneficiary:



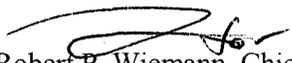
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 California and is allegedly engaged in the import and wholesale of gemstones. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The 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;
- (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 asserts on appeal that the beneficiary will be employed primarily as an executive, 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. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary will be employed either as an executive *or* a manager and will consider both classifications.

The petitioner described the beneficiary's job duties in the Form I-129 as follows: "Oversee the activities of the Company, hire & train employees." The petitioner also submitted a vague organizational chart and its California wage reports indicating that the petitioner employed three people, including the beneficiary, in the quarter immediately preceding the filing of the instant petition.

On March 17, 2004, the director requested additional evidence. The director requested, *inter alia*, a more detailed organizational chart for the United States operation which describes the employees' job duties and educational backgrounds; a more detailed description of the beneficiary's job duties; and the most recent California wage report for the petitioner.

In response, the petitioner submitted a letter dated April 26, 2004 in which it describes the beneficiary's duties as follows:

[The beneficiary's] workday starts at approximately 9:00 am [sic]. His first order of business is to review e-mail communications. He then normally meets with our operations manager to discuss activities of the staff, sales projections, credit issues, [a]ccounts [p]ayable and accounts receivable. This meeting normally takes anywhere from one and a half to three hours depending on the amount of subjects to be covered that day.

The next hour or so is devoted to reviewing sales figures, potential contracts and other documents relevant to the expansion of the Company.

These activities normally bring our president to lunch break. In the wholesale industry, it is common for executives to meet business customers for lunch. Our president usually either accompanies one of our 1 employees or attends lunch individually with these customers. Between the driving to and from lunch and the normal time of 1 to 1½ hours for lunch, this

usually places our president back in around 2:30 to 3:00 p.m.. [sic]

From 3 p.m. to approximately 6:00pm [sic], our president is in his office returning phone calls, and dealing with the companies [sic] many independent contractors including accountants, bankers, lawyers and other professionals.

Of course, this is a synopsis of his business activities and cannot and does not highlight or anticipate the myriad of issues that occur on a daily basis in which he is the final arbiter and ultimate decision maker.

Unfortunately, his day does not end at 6:00pm [sic]. Because of the significant time difference between [the] United States and India, he is often on the phone late at night engaged in executive phone meetings concerning allotments and shipments generally.

The petitioner also submitted an organizational chart which shows the beneficiary at the top of the organization supervising a "manager," who, in turn, supervises an "assorter," a secretary, and a sales employee. The "manager" is described as being "in charge of day-to-day operations of company and sales" and as having earned a degree at a foreign educational facility. The remaining workers are described as working with gemstones, performing clerical work, and engaging in sales tasks.

Finally, the petitioner submitted a California wage report for the first quarter of 2004. Neither the 2004 wage report nor the 2003 wage reports submitted with the initial petition includes the sales employee identified in the organizational chart. The petitioner does not offer an explanation for the sales employee's omission from the wage reports.

On June 21, 2004, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties are primarily those of an executive.

Upon review, the petitioner's assertions are not persuasive.

Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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's description of the beneficiary's job duties 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 will do on a day-to-day basis. For example, the petitioner describes the beneficiary as meeting with staff, reviewing documents, meeting with customers, and placing telephone calls to service providers and contacts in India. However, the petitioner does not specifically describe the substance of these meetings or telephone conversations and has not established that such tasks are managerial or executive in nature. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes lofty duties does not establish that the beneficiary will actually perform managerial duties. 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). 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).

Furthermore, many of the duties ascribed to the beneficiary appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary will spend most of his time acting as a first-line supervisor of non-professional workers (*see infra*), meeting with customers, and working with the petitioner's service providers. However, as such duties constitute administrative or operational tasks, it cannot be confirmed that he will be "primarily" employed as a manager. To the contrary, it appears that the beneficiary will primarily perform administrative or operational 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).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart, wage reports, and job descriptions for the subordinate staff members, the beneficiary appears to supervise a staff of three or four employees. However, the petitioner has not established that any of the subordinate employees are primarily engaged in performing supervisory or managerial duties. While the "manager" has been given a managerial title, the vague job description does not establish that this employee is truly engaged in primarily performing supervisory or managerial duties. Inflated job titles and artificial tiers of subordinate employees are not probative and will not establish that an organization is sufficiently complex to support a managerial position. To the contrary, it appears that the subordinate employees are performing the tasks necessary to produce a product or to provide a service, e.g., sales, clerical work, and gem sorting and grading. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, 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.

Moreover, the petitioner has not established that the beneficiary will manage a professional employee. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by 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 this matter, the petitioner has not established that a bachelor's degree is actually necessary to perform the work of the "manager." First, the petitioner failed to establish that the foreign degree allegedly earned by the "manager" is equivalent to a United States bachelor's degree. Second, the duties ascribed to the "manager" are so vaguely described that it is impossible to discern whether a university degree is necessary for the job. While the petitioner on appeal asserts that university degrees are generally required for "operations managers," an arbitrarily assigned job title is not probative in this matter. Absent a credible and detailed description of the manager's duties, it has not been established that the manager is a professional employee.

Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.¹

¹While the petitioner has not clearly argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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 will manage the function rather than perform the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary is primarily a first-line supervisor of non-professional employees and/or is engaged in performing non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager.

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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, the beneficiary appears to be primarily employed as a first-line supervisor and is performing tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

While section 101(a)(44)(C) of the Act requires CIS to take into account the reasonable needs of the organization and its overall purpose and stage of development if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, it is nevertheless appropriate for CIS to consider 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, the petitioner asserts in the organizational chart that it employs a sales employee, yet this employee does not appear in the California wage reports. The petitioner offers no explanation for this serious inconsistency in the record. 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).

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.²

See IKEA US, Inc. v. U.S. Dept. of Justice, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

²It is noted that the director in his decision relied, at least partly, on the job description in the undated letter from the foreign entity submitted in response to the Request for Evidence. Upon review, it appears that this job description concerns the beneficiary's employment abroad and does not concern his employment in the United States. Therefore, to the extent the director relied on this job description in concluding that the petitioner failed to establish that the beneficiary will be employed primarily as an executive or manager in the United States, the director's decision is withdrawn. Nevertheless, as explained above, the record still fails to

Beyond the decision of the director, the petitioner has failed to establish that it still has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

Evidence that the United States and the foreign entity are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section[.]

Title 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 (l)(1)(ii) of this section" and "is or will be doing business." A "subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity."

In this matter, the petitioner, a corporation, asserts that it is 100% owned by the foreign employer. In support of this assertion, the petitioner submitted a stock certificate and organizational documents indicating that 100% of the petitioner's stock had been issued to the foreign entity on June 20, 2002. The petitioner also submitted its 2002 Form 1120, U.S. Corporation Income Tax Return. However, most of schedule K to the Form 1120 was left blank. As this schedule includes questions related to the petitioner's ownership and control, the petitioner's failure to complete this schedule casts doubt on its assertion that it is 100% owned by a foreign entity. Moreover, the Form 1120 did not include a Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business. As the petitioner's stock was allegedly transferred to the foreign entity in 2002, it would have been obligated to complete this form in conjunction with the Form 1120. Therefore, the manner in which the petitioner completed and apparently filed the Form 1120 directly contradicts its assertion that it is 100% owned by the foreign employer. As explained above, 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. at 591-92.

Accordingly, the petitioner has not established that it and the foreign entity are still qualifying organizations. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary had been employed abroad in a primarily executive or managerial capacity.

In response to the Request for Evidence, the petitioner submitted an organizational chart for the foreign employer and an undated letter from the foreign employer describing the beneficiary's position abroad as "export/financial manager." However, the job description is so vague that it is impossible to discern what the beneficiary did on a day-to-day basis. Moreover, a majority of the duties attributed to the beneficiary appear

establish that the beneficiary will be employed primarily in an executive or managerial capacity, and director correctly denied the petition on that basis.

to have been administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the beneficiary is described as a first-line supervisor of non-professional workers, meeting with customers and suppliers, and "troubleshooting." These are not qualifying managerial or executive duties.

Finally, the organizational chart is not persuasive in establishing that the beneficiary supervised and controlled the work of other managerial, supervisory, or professional employees. Similar to the United States entity, the petitioner purports that the beneficiary managed a subordinate "manager" who, in turn, supervised the other employees. However, the vague job description for this subordinate manager fails to establish that this worker was truly engaged in performing primarily managerial or supervisory duties. To the contrary, it appears that all of the subordinate employees, including the "manager," were likely performing the tasks necessary to produce a product or to provide a service. Therefore, the beneficiary appears to have been primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both.

Accordingly, the petitioner failed to establish that the beneficiary had been employed abroad in a primarily executive or managerial capacity, and the petition may not be approved for this additional reason.

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ.*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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.

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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.