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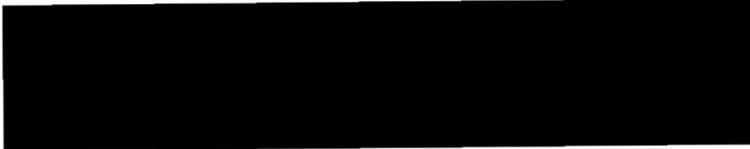
U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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File: EAC 07 021 50703 Office: VERMONT SERVICE CENTER Date: **MAY 02 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, Vermont 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 general 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 Wisconsin and describes its business in the Form I-129 as "general engineering including thermal spraying, grinding and project management."

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, counsel to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of a 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 primary issue in the present matter is whether the beneficiary will be employed by the United States

entity in a primarily managerial capacity.¹

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.

The foreign employer describes the beneficiary's proposed duties in the United States in a letter dated October 20, 2006 as follows:

- Direct and control the work and resources of [the petitioner] and ensure the recruitment and retention of the required numbers and types of well-motivated, trained and [sic] staff to ensure that it achieves its mission and objectives;
- Provide strategic [sic] and advice and guidance to the President and the members of the Board, to keep them aware of developments within the industry and to ensure that the appropriate policies are developed to meet the company's mission and objectives and to comply with all relevant statutory and other regulations;
- Establish and maintain effective formal and informal links with major customers, relevant government departments and agencies, local authorities, key decision-makers and other stakeholders generally, to exchange information and views and to

¹While the initial petition is unclear regarding whether the petitioner is seeking to classify the beneficiary as a manager or an executive, counsel to the petitioner clearly states in her appellate brief that the petitioner is seeking to classify the beneficiary as a manager. Therefore, the AAO will restrict its consideration to whether the petitioner has established that the beneficiary will be employed primarily in a managerial capacity.

ensure that the company is providing the appropriate range and quality of services;

- Plan the installation of products and services to ensure that these are completed to the required standards and within the agreed timescale. Inspect completed installations to ensure that these have been undertaken to the required standards. Maintain regular contact with installers and subcontractors to ensure that they are appropriately trained and carry out contract work to the required standards. Respond to any customer complaints to ensure that these are dealt with speedily and effectively;
- Develop and maintain research and development programs to ensure that the company remains at the forefront in the industry, applies the most cost-effective methods and approaches, provide leading-edge products and services, and retains its competitive edge;
- Prepare, gain acceptance, and monitor the implementation of the annual budget to ensure that budget targets are met, that revenue flows are maximized and that fixed costs are minimized;
- Develop and maintain an effective marketing and public relations strategy to promote the products, services and image of the company in the wider community;
- Represent the company in negotiations with customers, suppliers, government departments and other key contacts to secure the most effective contract terms for the company;
- Develop and maintain total quality management systems throughout the company to ensure that the best possible products and services are provided to customers;
- Develop, promote and direct the implementation of equal opportunities policies in all aspects of the company's work;
- Prepare the annual report and accounts of the Company and ensure their approval by the Board;
- Develop and [d]irect the implementation of policies and procedures to ensure that the company complies with all health and safety and other statutory regulations; and
- Such other duties assigned as needed.

The petitioner indicates in the Form I-129 that it currently employs one person and also submits an organizational chart for the United States operation. The chart shows the beneficiary reporting to the foreign employer's president in the United Kingdom and supervising three positions. Two of the three positions are described as "vacant." Therefore, it appears that the beneficiary will supervise one employee, [REDACTED], a technician, immediately upon his arrival in the United States.

On November 7, 2006, the director requested additional evidence. The director requested, *inter alia*, a description of the job duties of the beneficiary's proposed subordinates in the United States, a breakdown of the subordinates' job duties on a weekly basis, copies of the subordinates' educational credentials, and a copy of the petitioner's 2005 tax return and Forms W-2.

In response, the foreign employer submitted a letter dated January 8, 2007 in which it explains that the beneficiary's services are needed in the United States "due to the sudden serious health condition of the U.S. citizen who currently manages the U.S. operation" and that the petitioner needs the beneficiary's services "[i]n order to continue the U.S. operations while the current employee is undergoing treatment and recuperation." The petitioner also submitted a single 2005 Form W-2 for [REDACTED]. Apparently, this sole employee who has recently become ill is the same employee who was identified in the organizational chart as the beneficiary's only proposed subordinate employee. The petitioner fails to specifically address [REDACTED]'s present ability to work given his illness although, according to counsel, it appears that he is "unavailable due to his medical condition." The petitioner also failed to address [REDACTED]'s educational background. While the petitioner submitted a general job description for the proposed "technician" position, it is unclear whether [REDACTED] is presently performing these duties.

Furthermore, the petitioner submitted job descriptions for the vacant technician and administration positions. The technician job description indicates that an employee filling this position "ideally" have earned an associate's degree and that the worker will devote a majority of his or her time performing technical services necessary to the provision of a service or the production of a product.

Finally, counsel requests in her letter dated January 25, 2007 that Citizenship and Immigration Services (CIS) "take into account these unique circumstances" and that the petitioner is willing to be treated as a "new office" even though the record indicates that the petitioner began "doing business" in 2003.

On June 8, 2007, 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, counsel asserts that the beneficiary's duties are primarily those of a manager. Counsel also indicates that [REDACTED] would continue to be a technician for the U.S. operation" but that he "is not physically able to perform all of his job duties on a full[-]time basis during his treatment and recovery."

Upon review, counsel's assertions are not persuasive.

As a threshold issue, it must be noted that the more lenient "new office" criteria found at 8 C.F.R. § 214.2(l)(3)(v) may not be applied to the instant petition because the petitioner has been doing business in the United States for at least one year. These criteria, which generally excuse petitioners from establishing that a beneficiary will primarily perform qualifying managerial or executive duties immediately upon arrival in the United States, may not be applied to fully formed entities in the United States despite any number of "unique circumstances." Therefore, the petitioner in this matter must establish that the beneficiary will immediately perform primarily qualifying managerial or executive duties.

In view of the above, it must also be noted that the petitioner's proposed employment of an administrative employee and an additional technician is not relevant to the instant petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the AAO will only consider the petitioner's current staffing situation in addressing whether the petitioner has established that the beneficiary will be employed in a primarily managerial capacity in the United States.

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's description of the beneficiary's job duties fails to establish that the beneficiary will act primarily in a "managerial" capacity. In support of the petition, the petitioner has submitted a vague job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis given the petitioner's current lack of staffing. For example, the petitioner states that the beneficiary will establish links with customers and other stakeholders, plan product installation and service, inspect completed installations, work with installers and subcontractors, and respond to customer complaints. These duties, however, are non-qualifying tasks necessary to the provision of a service or the production of a product and do not constitute qualifying managerial duties. 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 capacity. *See* sections 101(a)(44)(A) 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 does not establish that the beneficiary will be relieved from the need to perform these non-qualifying tasks, and the other non-qualifying tasks generally inherent to running a small business, by a subordinate staff. As indicated above, the petitioner currently employs one person [REDACTED], who is apparently quite ill and is unable to perform at least some of his job duties. The petitioner fails to establish [REDACTED]'s level of commitment to the petitioner or to explain how, exactly, he will relieve the beneficiary of the need to perform non-qualifying tasks, if at all. Specifics are clearly an important indication of whether a beneficiary's duties are primarily 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).

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 asserted in the record, the beneficiary will directly supervise a single technician, [REDACTED]. However, as indicated above, it is unclear whether [REDACTED] is presently employed by the petitioner. Assuming that he is employed, the "technician" position is not described as having supervisory or managerial responsibilities. To the contrary, this employee is described as performing the tasks necessary to the provision of a service. In view of the above, the beneficiary would appear to be primarily 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.

Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Moreover, the petitioner failed to establish that the technician's duties require the employment of a "professional" employee. In evaluating whether the beneficiary will manage 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 also focus on the level of education required by the position, rather than just 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 this matter, the petitioner has failed to establish that the technician, ██████████, is a "professional" employee. First, the petitioner failed to submit ██████████'s educational credentials even though this evidence was specifically requested by the director. Once again, 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). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Second, the technician job description clearly does not require that a worker filling this position have earned a bachelor's degree or its equivalent. To the contrary, the job description itself requires, ideally, an associate's degree. Therefore, as the technician position does not require a bachelor's degree as a minimum for entry into the field of endeavor, the petitioner has not established that the beneficiary will supervise a professional employee.²

Finally, the petitioner has not established that the beneficiary will manage an essential function of the organization. The term "function manager" applies generally when a beneficiary will not supervise or control the work of a subordinate staff but instead will be 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 will manage 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

²It is noted that the director stated in the decision that it appears that the technician's duties "would normally require the skills of bona-fide professionals." However, as noted above, the job description for the technician is clearly not one requiring the employment of a "professional" as that term is defined above. Therefore, the director's conclusion that the duties of the technician require the employment of a "professional" shall be withdrawn.

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 petitioner's job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record establishes that the beneficiary will be a first-line supervisor of a non-professional employee and will likely perform non-qualifying operational or administrative tasks. It appears that the beneficiary will perform the tasks related to the function rather than truly "manage" the function. 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 will be managerial, nor can it deduce whether the beneficiary will primarily perform 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).

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for 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 primarily in a managerial capacity.³

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.

³It is noted that the director indicated in the decision that "[i]n response to the request for all of your companies [sic] 2005 Form W-2 and 2005 payroll roster you submitted one W-2 for \$17,648.35." Upon review, the AAO will withdraw this factual determination. It appears that the director misread the barely legible Form W-2 submitted in response to the Request for Evidence and that the \$17,648.35 figure actually represents the amount of federal taxes withheld from ██████████'s 2005 income. However, given that the petitioner failed to otherwise establish that the beneficiary will be employed primarily in a managerial capacity, this determination constitutes harmless error by the director.