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U.S. Citizenship and Immigration Services

D7

[redacted]

File: EAC 02 230 51446 Office: VERMONT SERVICE CENTER Date: NOV 01 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
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 petition seeking to extend the employment of 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 general partnership organized in the State of Pennsylvania, and is a wholesale business dealing with supplies to hotels, motels, restaurants, and other places of public accommodation. The petitioner claims that it is the subsidiary of Ronak Traders, located in Mumbai, India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, which was subsequently extended for two additional years. The petitioner now seeks to once again extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary had been and will continue to 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 for the petitioner contends that the director erroneously based his decision on the sales volume of the U.S. entity, and not the actual duties of the beneficiary as described in the record. In support of this assertion, 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 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 management 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.

In the initial petition, counsel for the petitioner submitted a detailed letter from the foreign entity outlining the beneficiary's duties while employed by the U.S. entity. Specifically, the petitioner alleged that the beneficiary's duties were exclusively managerial in nature, and described his duties as follows:

> [The beneficiary] oversees the work of this staff and determines our business policies and plan[s] and directs our marketing activities. With the help of his staff as described, he determines the demand for various products used by the hospitality industry, the cost of these products to us, and their availability within a certain period of time, to plan and determine prices and schedules that we can offer to customers, and to provide a reasonable profit to us. He also oversees the staff to make sure that orders are properly fulfilled and that we meet our commitment as to products, prices, and schedules. His duties are exclusively managerial in nature. He devotes about twenty hours per week to studying the demand for supplies in the market place and researching sources for good quality products which he uses to determine the products to be offered and the prices to be quoted by the sales staff, as well as the timing of the purchases and the terms to be negotiated by the purchasing agent. He reviews the documentation and records prepared by the staff, as well as financial statements, ledgers and tax returns prepared by our accountant in America.

In addition, counsel submitted a letter from the U.S. entity, prepared by the beneficiary in his capacity of general manager, which stated that he determined the business policies of the U.S. entity, planned and directed its marketing activities, determined the demand for various products used by the hospitality industry, and oversaw his staff to make sure that orders were properly fulfilled. The beneficiary essentially restated the duties set forth in the foreign entity's letter, and concluded by affirming that his duties are exclusively managerial in nature.

On August 9, 2002, the director requested additional evidence establishing that the beneficiary was employed in a capacity that was primarily managerial or executive in nature. The director requested specific documentation for the record, including:

(1) An organizational chart for the U.S. entity;
(2) A comprehensive description of the beneficiary's proposed duties, and an explanation as to how such duties would be primarily managerial or executive in nature;
(3) A position description and educational credentials of each of the beneficiary's subordinates; and
(4) A breakdown of hours devoted to each of the employees' job duties each week.

On September 20, 2002, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. Counsel's response, which provided a detailed overview of the beneficiary's duties as well as of the duties of his subordinates, did not include an organizational chart as requested.

On April 2, 2003, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director found that the description of the beneficiary's proposed duties was vague, thereby failing to convince Citizenship and Immigration Services (CIS) that the beneficiary was in fact qualified for the benefit sought. In addition, the director concluded that the beneficiary was not supervising professional employees as required by the regulations. Finally, the director found that the petitioner had failed to prove that the beneficiary could be alternatively qualified as a function manager.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous, and alleges that the director based his decision on the sales volume of the business of the U.S. entity, which was not a factor to be considered under the regulations. Counsel also asserted that the director's finding that the description of the beneficiary's duties was not vague, as the director had stated in his decision. Counsel contends that the beneficiary, as general manager, had in fact been serving exclusively in a managerial capacity, and that the description of his duties was not vague since it included great detail with regard to his day-to-day tasks and the percentages of time spent performing each task. In support of this contention, counsel restated in large part the previously submitted descriptions of both the beneficiary's position and those of his subordinates.

Upon review, counsel'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. 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.

Prior to adjudication of the petition, counsel contended that the beneficiary had been employed in a capacity that was primarily managerial in nature. In support of these contentions, counsel submitted a detailed response to the director's request for evidence, written by the beneficiary, which provided the following description of the beneficiary's proposed duties:

> I am responsible for setting business policy, hiring and termination of employees and directing and reviewing the work of our sales and service staff, our purchasing staff and our bookkeeping section. I confer regularly with our sales and service supervisor . . . regarding our customer demands and trends in ordering, to anticipate customer needs, and to plan and organize our pricing, our delivery schedules and the selection of products we should offer to best serve our customers, and to attract new customers.
>
> I consult with our Purchasing Supervisor on current costs and availability of goods to plan purchasing to make sure that we will have products available in inventory to meet our customers' needs while not overstocking, which adds to our costs and reduces profitability. We also discuss the prices, delivery schedules and reliability of our suppliers to make decisions on changing or negotiating different arrangements.
>
> Our bookkeeper prepares reports for my review, which I use to budget, plan and negotiate financing. He also provides credit data on our customers for my review, which I use in making decisions to extend or refuse further credit. My duties are strictly managerial and approximately a 40 hour week, about 3 to 4 hours are occupied with personnel compensation and benefits decisions, about 10 to 12 hours on developing sales and marketing policies including pricing and product selection in consultation with the Sales and Service Supervisor, about 12 to 15 hours per week in reviewing financial and credit reports prepared by the staff, consulting with our C.P.A. and making budgeting decisions, planning and negotiating financing for our business, and deciding on extensions and termination of credit to our customers. Another 10-12 hours are devoted to review of the purchasing and inventory control work and making decisions regarding which suppliers to deal with, the amount and type of inventory to carry and the payment terms which should be negotiated.

The petitioner additionally provided a detailed description of the subordinate employees and their position requirements. The Sales and Service Supervisor holds a Bachelor of Commerce degree and has more than three years of experience in sales management. The Purchasing Supervisor has ten years of schooling and two years of experience, but holds no formal degree. The Bookkeeper also holds no formal degree, but is a secondary school graduate with three years of experience. Finally, the two Sales and Service representatives have ten and twelve years of schooling, respectively, but no formal degree. The petitioner did not claim that any of these positions required a baccalaureate degree as a prerequisite to employment.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary was not employed in a primarily managerial or executive capacity. Specifically, upon review of the beneficiary's stated duties and the duties and credentials of his subordinate employees, it appears that the

beneficiary is merely a first line supervisor. The beneficiary does not appear to be supervising other professional or supervisory employees.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

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 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 an advanced degree is actually necessary, for example, to perform the customer service and administrative work of the Sales and Service Supervisor, who is among the beneficiary's subordinates. Although she possesses a degree in commerce, it is not stated that such a degree is actually necessary for the performance of her duties. The other employees have not attained advanced degrees, nor did the petitioner claim that advanced degrees were in fact necessary to perform the functions of these positions.

In addition, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner claims that his duties are "exclusively" managerial, yet the list of duties provided includes almost all non-managerial tasks. For example, the petitioner states that the beneficiary reviews financial reports, develops sales and marketing strategies, and makes decisions regarding inventory selection and purchase. In addition, the petitioner states that the beneficiary confers and consults with the other employees in the company, thereby weakening the claim that the beneficiary is in fact their supervisor. Rather, it appears that in lieu of primarily performing managerial or executive functions, the beneficiary is in fact performing many of the same day-to-day tasks as his alleged subordinates. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Id.* In this case, the supervised employees are not professional or managerial employees, as reflected by the record of

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

Although not discussed by the director, the AAO notes that the record contains insufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. 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). Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence in the record that the petitioner has been doing business for the year prior to the filing of the request for extension. For this additional reason the petition may not be approved.

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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.