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Washington, DC 20529

U.S. Citizenship and Immigration Services

invasion of personal priva

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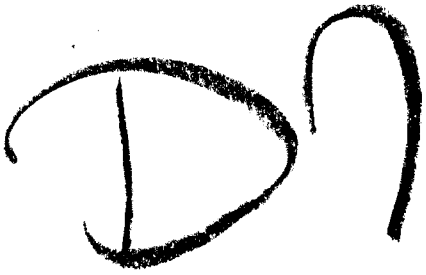

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FEB 1 2005

File: WAC-03-030-54491 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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, 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 petition seeking to extend the employment of its General Manager for Exports 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 in the State of California that is engaged in the export of building materials. The petitioner claims that it is the parent of Interczech, SRO, located in Brno, Czech Republic. The beneficiary was initially granted a three-year period in L-1A status 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, counsel for the petitioner asserts that "[t]he decision of the Director is erroneous in that it fails to follow the appropriate law." In support of this assertion, counsel submits a brief statement on Form I-290B. While counsel indicated on Form I-290B he would be submitting a brief and/or additional evidence within 30 days of filing the appeal, as of the date of this decision, the AAO has received no further documentation or correspondence from counsel or the petitioner.

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 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 a letter dated October 16, 2002 submitted with the initial petition, the petitioner described the beneficiary's job duties as follows:

> [The beneficiary will] manage the export of building materials and components. . . . He will continue to evaluate and acquire new U.S. products for exportation in Eastern Europe. He is currently supervising a technical staff of three people in our office in the U.S. and six technical people in our facility in Czech Republic. He is also currently training new staff in both the U.S. and the [foreign entity] for the management position which he now holds.

On February 27, 2003, the director requested additional evidence. In part, the director requested: (1) an organizational chart for the petitioner, including the names of all executives, managers, and supervisors, and the number of employees in each department; (2) a list of all of the petitioner's employees from the date of establishment to the present, including names, job titles, social security numbers, beginning and ending dates of employment, and wages per week; (3) the names and titles of all subordinates under the beneficiary, including a brief description of their job duties, educational level, annual salaries, and immigration status; (4) an explanation of the source of remuneration of all employees, including an indication of whether they are paid by salary, wage, or commission; (5) a detailed description of the beneficiary's duties, including the percentage of time spent on each duty, the education and employment experience required, and evidence that the beneficiary meets the requirements for the position; and (6) California Forms DE-6, Quarterly Wage Report, for the prior three quarters, including the names, social security numbers, and number of weeks worked for all employees.

In a response dated May 20, 2003, the petitioner submitted: (1) an organizational chart for the petitioner; (2) a statement describing the education, immigration status, compensation, and duties of each of the petitioner's employees; (3) Forms W-2 and payroll records for the petitioner's employees from 1993 to 2003, including quarterly payroll data from California Forms DE-6 for all quarters of 2002; (4) California Form DE-6, Quarterly Wage Report, for the first quarter of 2003; and (5) a statement further describing the duties of the beneficiary. In the statement, the petitioner provides the following:

> [The beneficiary] is responsible for the operation of [the petitioner] and also oversees the operations of the foreign subsidiary. The minimum education and employment qualifications for the position of the [petitioner] are those which [the beneficiary] acquired in the Czech Republic serving as General Manager for [the foreign entity] for nearly six years prior to assuming his managerial duties for [the petitioner]. The Educational requirement is a Bachelor's Degree or equivalent in Mechanical Engineering in order to be knowledgeable and familiar with the U.S. building products and components for purchase and shipment to our Czech Company. Furthermore, our U.S. manager must be knowledgeable of the foreign requirements for conversion of mechanical specifications, which now have become more complicated with the inclusion of the Czech Republic in the European Union. He obviously must also possess business administration experience in his managerial position in our company. He has demonstrated that experience, acquired while employed by our foreign subsidiary as General Manager. [The beneficiary] does have the ability to speak, read and write English. He deals with U.S. companies in sourcing and acquiring mechanical equipment and products for shipments to Europe on a daily basis.

On June 19, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated that "[t]here is no indication that the beneficiary will exercise significant authority over generalized policy or that the beneficiary's duties will be primarily managerial or executive in nature."

On appeal, counsel for the petitioner asserts that "[t]he decision of the Director is erroneous in that it fails to follow the appropriate law." In a brief statement on Form I-290B, counsel quotes previously submitted descriptions of the beneficiary's duties. Counsel further states that:

> [The beneficiary] was previously employed in the [foreign entity] as General Manager. He is responsible for the conduct and direction of all the employees of [the petitioner], two of whom have masters degrees and one a bachelor of Science in Mechanical Engineering. Although not set forth in the petition and request for information, it is implicit that [the beneficiary] has the capacity . . . to hire and fire employees. . . . The appropriate law regarding this matters [sic] has not been changed or amended since the date that [the beneficiary] was first approved as L1A intercompany [sic] transferee on December 8, 1999.

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.*

In the instant matter, the beneficiary's job description submitted by the petitioner was vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the statement that the beneficiary will "manage the export of building materials and components" does not indicate how the beneficiary will accomplish this task and what associated day-to-day duties he will perform. Further, the petitioner stated that the beneficiary "deals with U.S. companies in sourcing and acquiring mechanical equipment and products for shipments to Europe on a daily basis." Yet, the record does not reflect whether he will communicate with companies himself, or whether he will direct others to do so. The record does not answer whether he will personally perform the non-managerial task of placing orders for mechanical equipment and products, or whether his subordinate staff will do so. As requested by the director, the petitioner discussed the beneficiary's education and work experience. Though relevant, this information alone does not reveal what actual duties the beneficiary will perform. 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 actual duties themselves reveal the true nature of the employment. *Id.* The provided job description does not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial

administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Thus, the AAO cannot determine whether the beneficiary will be primarily engaged in managerial duties as defined by section 101(a)(44)(A) of the Act.

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 a 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, though the petitioner's employees purportedly have college level degrees, the petitioner has not established that bachelor's degrees are actually necessary to perform the duties of their respective positions. For example, the petitioner provides that the employee "[r]esponsible for freight forwarding and shipping" possesses a master of business administration degree, yet the short phrase to describe his duties does not show that an MBA is actually required for his position. The petitioner provides that the employee "[r]esponsible for sourcing and exportation of gate and garage door openers and all security features on garage doors" possesses a bachelor of science degree in mechanical engineering, yet the description of his duties does not show that advanced training in mechanical engineering is actually required for his duties. The petitioner provides that the employee "[r]esponsible for office management [and the] preparation of accounting data" possesses an master of science degree in education, yet it is self-evident that training in education is not required for these tasks. Thus, the petitioner has not established that the beneficiary's subordinates are professionals as contemplated by section 101(a)(44)(A)(ii) of the Act.

The organizational chart submitted by the petitioner reflects that none of the beneficiary's subordinates have subordinates of their own, thus they are not supervisory employees. Accordingly, the petitioner has not established that the beneficiary manages supervisory employees as contemplated by section 101(a)(44)(A)(ii) of the Act.

The beneficiary's subordinates possess managerial titles, such as "Shipping manager," "Manager," and "Office manager." Yet, the petitioner has not provided sufficiently detailed job descriptions such that the AAO can

determine if these employees actually possess managerial responsibilities. Thus, the petitioner has not established that the beneficiary's subordinates are managerial employees as contemplated by section 101(a)(44)(A)(ii) of the Act.

The petitioner indicated that the beneficiary supervises a manufacturing manager at the foreign entity in the Czech Republic, who in turn supervises a staff of eight workers in garage door manufacturing. However, the petitioner has not provided sufficient documentation to support that these workers are indeed employed by the foreign entity. Such documentation would include payroll records, detailed job descriptions, or documentation of projects these workers are engaged upon. 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).

Based on the foregoing, 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). For this reason, the appeal will be dismissed.

In the appeal, counsel stated that "[t]he appropriate law regarding this matters [sic] has not been changed or amended since the date that [the beneficiary] was first approved as L1A intercompany [sic] transferee on December 8, 1999." The AAO notes that the CIS California Service Center previously approved a prior petition filed by the petitioner on behalf of the beneficiary. Yet, prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

In visa 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.