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20 Mass. Ave, N.W., Rm. A3042
Washington, DC 20529

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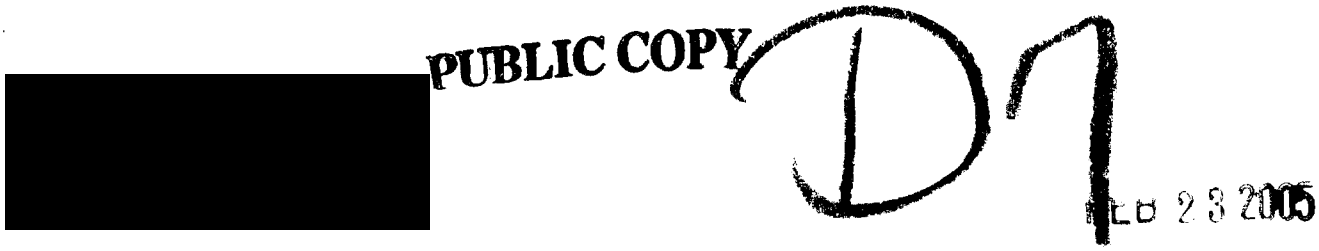

FEB 23 2005

File: EAC 03 037 53435 Office: VERMONT SERVICE CENTER Date:

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, 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 seeks to employ the beneficiary temporarily in the United States 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 U.S. petitioner, a corporation organized in the State of New Jersey that is engaged in the distribution and wholesale of diamonds and jewelry, seeks to employ the beneficiary as its manager. The petitioner claims that it is the subsidiary of Janam, located in Mumbai, India.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year of the petition's approval.

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 the evidence submitted with the initial petition and in response to the director's request for additional evidence clearly established that the beneficiary was employed in a primarily managerial or executive capacity as defined by the regulations, and that the director's decision was "arbitrary, capricious, and an abuse of discretion." In support of this assertion, counsel 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.

(v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The primary issue in this 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, the petitioner stated that the beneficiary would be acting as the manager of the U.S. entity, and stated that she would "[formulate] merchandising policies and [coordinate] merchandising in wholesale or retail jewelry establishment; determine mark-up and mark-down percentages necessary to ensure profit, based on estimated budget, profit goals, and average rate of stock turnover." In addition, she would "[determine the] amount of merchandise to be stocked and [direct the] purchase of supplies for resale." Finally, the petitioner stated that she would "[coordinate] interaction between [the] Indian Parent company and [the] US subsidiary."

On March 28, 2003, the director requested additional evidence establishing that the beneficiary was qualified for the benefit sought. Specifically, the director requested a copy of the organizational chart for the U.S. entity which demonstrated the beneficiary's rank within the organizational hierarchy, and further requested detailed information regarding the beneficiary's subordinate employees and their positions, their educational backgrounds, and their weekly duties.

In a response dated April 25, 2003, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. Counsel's response included an organizational chart evidencing that the beneficiary would be second in command at the U.S. entity would answer only to the president. In addition, the organizational chart indicated that two subordinate employees could potentially be hired to work under the beneficiary's supervision. Finally, counsel's response stated that with regard to the future hiring of employees, the hiring of additional subordinate staff members would "be based upon business development and normal economic growth."

On May 8, 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 while in the United States. Specifically, the director concluded that the duties of the beneficiary, as presented by counsel, were vague and general, and noted that the proposed duties appeared to merely summarize the regulatory definitions. In evaluating the beneficiary's duties in relation to the U.S. entity's business plan and organizational structure, the director concluded that based on the evidence presented, the beneficiary would not be employed in a capacity that was primarily managerial or executive in nature within one year.

On appeal, counsel for the petitioner alleges that the director failed to appreciate the business sophistication of the petitioner, erred in analyzing the petitioner's business plan, and erroneously penalized the petitioner for its small size.

The AAO, upon review of the record of proceeding, concurs with the director's findings. Specifically, upon review of the beneficiary's stated duties and her anticipated role in the organizational hierarchy of the U.S. entity, it appears that the beneficiary will not be acting in a primarily managerial or executive capacity by the end of the initial year of operations.

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 response to the director's request for evidence issued on March 28, 2003, counsel for the petitioner provided an updated description of the beneficiary's proposed duties. Specifically, the description stated that:

> [The beneficiary] will be responsible for the entire business set-up and day to day operations of [the petitioner].
>
> Specifically, she will supervise the hiring of staff upon approval in the United States. She has currently coordinated with [redacted] the President, in the potential hiring of two possible subordinates. She has reviewed their resumes and has conducted teleconferences with same as their interview. As to these and other potential staff, she will direct their daily activities, placement, job descriptions, salaries and benefits programs until such time as she can direct other subordinates to do the same. Initially, she will be entirely responsible for her subordinate staff.
>
> She will formulate the marketing and business policies of the Business. She will solely be responsible for the US Division. This may include site establishment and verification, review of existing facilities, equipment terms and product development and placement.

On appeal, counsel for the petitioner alleges that the beneficiary's duties are both managerial and executive in nature, and further elaborates on her stated duties. Specifically, counsel states that in addition to the duties discussed prior to adjudication, the beneficiary will:

- Supervise and direct activities [of] all subordinate staff members
- Oversee planning and management of company

- Meet with each subordinate staff member to assure increase in projected sales volume of corporation
- Handle negotiation of contracts
- Monitor company's performance
- Formulate business strategies
- Establish and implement company goals and policies
- Coordinate marketing strategies to promote jewelry in the U.S.
- Review marketing strategies prior to implementation

The AAO is not persuaded that the proposed duties of the beneficiary satisfy the regulatory requirements. In addition, the statements provided by counsel on appeal are not convincing.

There are two problems with the beneficiary's stated duties. First, the beneficiary's proposed duties include numerous non-managerial tasks that are essential to the daily operations of the business. Specifically, the assertion that the beneficiary will be handling the negotiation of contracts and coordinating marketing strategies suggests that she will be performing many undertakings that would normally be delegated to sales representatives or other non-managerial personnel. In this case, it is clear that the proposed duties include many practical obligations that would normally be delegated by a manager or supervisor to a subordinate staff. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Secondly, the description of her duties identifies both executive and managerial tasks. The petitioner does not clarify 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. In fact, counsel for the petitioner alleges on appeal that the beneficiary's duties are *both* managerial and executive. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

The description of the beneficiary's proposed duties further indicates that a significant portion of her time would be devoted to the supervision and direction of subordinate employees. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees will be 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, counsel for the petitioner states that the potential subordinate employees, who would be working as "Business Development Personnel," would have "a background in marketing and specifically in the field of Jewelry production and distribution," and "[t]hey would be individuals with degrees in marketing and/or manufacturing and have work experience equivalent to at least Three (3) years in the field." Although the petitioner indicates that the subordinate employees will possess advanced degrees, the petitioner has not established that an advanced degree is actually necessary to perform the stated duties of these positions, which include interviewing prospective clients, preparing and overseeing order placements, and finalizing matters upon the delivery of materials. Thus, the petitioner has not established that these positions require an advanced degree, such that the employees selected to fill these positions could be classified as professionals. Nor has the petitioner shown that any of the potential employees will supervise subordinate staff members or will manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's intended subordinate employees will be supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act."

Finally, the business plan submitted by counsel which outlines the potential advancements and expansions of the U.S. entity for the next two years is not persuasive in demonstrating that the petitioner will be able to employ the beneficiary in a capacity that is primarily managerial or executive after the expiration of one year. The director found that the plan's failure to clearly identify potential professional subordinate employees indicates that the beneficiary will not be relieved from performing the day-to-day tasks essential to the operation of the business.

On appeal, counsel alleges that the director's review of the petitioner's business plan and his subsequent reliance on the plan as a basis for denial was erroneous. Specifically, counsel alleges that the petitioner "justifiably" set forth three major management levels to initiate its operations, and that it initially deputized four employees to handle these management functions. However, the evidence in the record indicates that at the time of the filing of the petition, there were no employees working for the U.S. entity. Although the president of the foreign entity is identified on the organizational chart as the president of the U.S. entity, there is no evidence that he has been or will be working in the United States. In addition, the record contains numerous documents indicating that the U.S. entity will *potentially* hire two subordinate employees to relieve the beneficiary of the menial tasks associated with the daily operation of the business, yet there is no documentation that these employees were actually hired. 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).

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office and employ the beneficiary in a predominantly managerial or executive position. There is no provision in the regulations of Citizenship and Immigration Services (CIS) that allows for an extension of this one-year period. In this case, the U.S. entity currently has no employees. With respect to the hiring of future employees, the evidence of record indicates that the beneficiary may *potentially*, not positively, hire two subordinate employees during the first year of operations. In addition, the two-year business plan for the U.S. entity further indicates that additional personnel beyond the initial two employees *may* be hired as the business grows. There is no definitive hiring plan for the first year of operations, and consequently, the AAO is unable to conclude that at the end of one year the U.S. entity will have sufficiently expanded its business operations to the extent that the beneficiary will have a subordinate staff to relieve her of the non-managerial duties associated with the operations of a newly-established business. In the instant matter, it does not appear that the petitioner will be able to employ the beneficiary in a predominantly managerial or executive position in one year.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner claims that it is a wholly-owned subsidiary of a foreign entity. The petitioner states in the letters accompanying the petition that the U.S. entity is an S Corporation. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation owns it in any part. Although the ownership of the U.S. entity remains unclear, it is questionable whether the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved.

Although not explicitly addressed in the decision, the record contains no evidence to persuade the AAO that the beneficiary has been employed in a qualifying managerial or executive capacity with the foreign entity for at least one continuous year in the three year period preceding the filing of the petition as required by 8 C.F.R. §214.2(l)(3)(v)(B). The record reveals that the beneficiary has served as a "chief assorter" with the foreign company, which the petitioner describes as a supervisory role. Specifically, the beneficiary has been responsible for maintaining clerical and accounts related work, sorting precious stones and preparing export documentation, attending jewelry exhibits, supervising and designing jewelry, and supervising daily tasks of other "assorters." Based on this brief description, it appears that she divides her time between non-managerial clerical and accounting work, hands-on design and production of jewelry, and supervision of non-professional staff who are responsible for sorting jewelry stones. 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). Further a manager 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. *Id.* Upon review of the record, the AAO can not conclude that the beneficiary has been employed in a qualifying managerial or executive capacity with the foreign entity. For this additional reason, the petition may not be approved.

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).

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.