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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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FEB 28 2005

[redacted]

FILE: EAC 03 045 54090 Office: VERMONT SERVICE CENTER Date:

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)

ON 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 is engaged in the manufacturing and sale of plastic films and equipment imported from the foreign parent company. The petitioner currently employs the beneficiary as its vice president of North American operations, and seeks to extend the employment of the beneficiary for an additional two years. The petitioner filed a petition to extend the beneficiary's classification as a nonimmigrant intracompany transferee. The director denied the petition concluding the beneficiary has not been and would not be employed in the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel contends that Citizenship and Immigration Services' (CIS) denial of the petition was arbitrary. Counsel asserts that sufficient evidence has been presented to substantiate the petitioner's claim that the beneficiary is functioning in the U.S. organization as a "management executive." Counsel submits a letter and additional documentation in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.
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> (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 issue in this proceeding is whether the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity.[1]

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) 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;

(3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(4) 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), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

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[1] As a new office, the petitioner is not required to have employed the beneficiary in a primarily managerial or executive capacity during the year prior to the present petition. *See* 8 C.F.R. § 214.2(l)(3)(v). Therefore, the AAO will not consider on appeal whether the beneficiary had been employed in the United States in a primarily managerial or executive capacity.

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a November 8, 2002 letter appended to the petition, the petitioner outlined the following job duties of the beneficiary:

- Formulating business strategies
- Overall planning and management of the company
- Coordinating market strategies to promote company products in the U.S.
- Creating a marketing division
- Monitoring the company's performance
- Reporting to the Indian parent company
- Establishing distribution networks
- Developing new relationships and alliances with companies including the execution of contracts with American corporations
- Negotiating contracts with companies in North America

The petitioner explained that during the beneficiary's previous year of employment in the U.S. entity he has been successful in negotiating and securing contracts with U.S. companies, and is actively involved in marketing the parent company's products. The petitioner also submitted copies of the beneficiary's resume and transcripts as evidence of his qualifications for classification as an intracompany transferee.

In a notice of action dated December 10, 2002, the director requested that the petitioner submit the following: (1) the year 2001 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return; (2) the two most recent IRS Form 941, Employer's Quarterly Federal Tax Return, including the names of all employees and the wages paid to each; (3) documentation pertaining to any contractors employed by the petitioner; (4) an organizational chart of the U.S. company, including each employee's job description; (5) a copy of the U.S. entity's stock ledger; and (6) photographs of the U.S. office premises.

The petitioner responded to the director's request on December 26, 2002. Included in the petitioner's response was the petitioner's organizational chart, in which four employees were identified as a director, vice president, sales representative, and bookkeeper/office manager. The beneficiary's subordinates included the sales representative, who the petitioner identified as a contractor, and the bookkeeper/office manager. Also included was a description of each employee's job duties, in which the petitioner outlined similar job responsibilities of the beneficiary to those provided above. The petitioner also included the specific tax forms requested by the director.

In a decision dated January 4, 2003, the director concluded that the record contained insufficient evidence regarding the staffing of the U.S. organization to establish the beneficiary's employment in a managerial or

executive capacity. The director noted that the beneficiary would not be supervising a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying job duties. The director also stated that the petitioning corporation has not reached "a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the [beneficiary's] duties performed on a day-to-day basis." Consequently, the director denied the petition.

On appeal, counsel states that the director's denial incorrectly assumes the beneficiary's ineligibility "due to the fact that the company has only a few employees." Counsel further states that because the petitioner is a newly established company, "it was and still is not financially viable for the company to hire a large number of employees." Counsel contends that sufficient evidence has been provided to demonstrate the beneficiary's employment as a management executive in the U.S. entity. Counsel also submits the petitioner's payroll journal and summary reports, bank account statements, year 2001 corporate income tax return, employer's quarterly tax return for the period ending December 2002, and financial statements.

On appeal, the record does not establish that the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity. 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

In the present matter, 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. Counsel states on appeal that the beneficiary is functioning as a "management executive." A petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). If a petitioner claims a beneficiary is both a manager and executive, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Counsel has not satisfied this burden. 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, the beneficiary's job description does not support a finding that the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity. There is insufficient evidence to establish that the beneficiary "supervises and controls the work of other supervisory, professional, or managerial employees" or "directs the management of the organization." 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(2) and (C)(1). While the petitioner stated in its response to the director's request for evidence that the beneficiary supervises the company's "professional personnel," there is no evidence beyond the assertions of the petitioner that its two subordinates, a bookkeeper/office manager and a sales representative, are in fact professionals, or may be deemed "management," as required in the regulations.[2]

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[2] Even though the bookkeeper is given the joint title of office manager, the petitioner has not identified any subordinate employees whom she is managing. Absent additional evidence, the bookkeeper cannot be considered "management" for purposes of determining the beneficiary's executive capacity.

In evaluating whether the beneficiary manages "professional" employees, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. *See 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) (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). 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 stated that vocational training is the only prerequisite to employment as the bookkeeper-office manager. Additionally, although the petitioner noted that a minimum of a bachelor's degree is required for employment as a sales representative, the petitioner has not demonstrated that an advanced degree is actually necessary to perform the job duties required in this position, or that the petitioner's sales representative actually possesses a bachelor's degree. Therefore, the record does not conclusively establish that the beneficiary's subordinates are supervisory, professional, or managerial employees.

The record also fails to demonstrate that the beneficiary "establishes the goals and policies of the organization, component, or function." 8 C.F.R. § 214.2(l)(1)(ii)(C)(2). The petitioner stated that the beneficiary develops company policies and business objectives. However, the petitioner also explained that the director, to whom the beneficiary reports, "plans business objectives and develop[s] organizational policies." The petitioner did not specifically differentiate between the policies and objectives that the beneficiary plans and those planned by the company's director. The petitioner is responsible for ambiguities in the record, and it is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), it is also appropriate for Citizenship and Immigration Services (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). 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 the present matter, the petitioner has not explained how the reasonable needs of the U.S. corporation, which has accrued more than $2,000,000 in goods sold, might plausibly be met through the employment of a director, the beneficiary, a salesman, who the petitioner claims is responsible for sales in all regions of the United States, and a bookkeeper. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to section 101(a)(44)(B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel asserts on appeal that as a newly established company, the petitioner is not "financially viable" to hire additional employees. Counsel's claim has no merit. 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 support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this

one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

For the foregoing reasons, the record does not demonstrate that the beneficiary would be employed in the U.S. organization in a primarily managerial or executive capacity.

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.