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U.S. Citizenship and Immigration Services

[redacted]

MAY 0 4 2005

File: SRC-03-200-52047 Office: TEXAS 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)

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, Texas 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 President 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 Florida that operates a retail gourmet food and wine store. The petitioner claims that it is the subsidiary of Blinkhorns, located in London, England. The beneficiary was initially granted a one-year period of stay to open a new office in the United States 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 the petitioner has submitted sufficient evidence to show that the beneficiary will be employed in a primarily executive capacity. Counsel further claims that the beneficiary qualifies as a functional manager, and that the director erroneously relied on the petitioner's small staff size in denying the petition. In support of these assertions, counsel submits a brief.

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 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 an attachment to Form I-129 submitted with the initial petition on July 14, 2003, the petitioner described the beneficiary's job duties as follows:

> [The beneficiary] will continue to serve in the capacity as President in order to assure that the U.S. company continues with its successful commencement of operation and continues establishing itself on a sound financial footing. [The beneficiary], during the transition phase of operations from the previous owners of Casa Italia, has overseen the initial period of trading from September 4, 2002 to April 30, 2003 . . . . As President, the beneficiary is required to undertake myriad executive level duties of a sophisticated nature. He is responsible for purchasing with a large proportionate of inventory imported from Europe and the Company's products are varied and very high quality. Pricing is competitive and complex. In addition, he is required to create and implement the sales strategy which involves a detailed review of pricing in the region as well as the creation and implementation of effective advertising strategies.
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> [The beneficiary] has responsibility for finance which includes cash/treasury management, liaison with lenders, overall responsibility for control of cash inflows and outflows and creditor relations. In addition, he has final responsibility for personnel activity including hiring and firing as well as the liaison with outside accounting professionals. Finally, activities in connection with the physical plant including compliance with all local and state requirements as well as compliance with safety and hygiene standards are all with his scope of responsibility.

On Form I-129, the petitioner indicated that it employs three workers. In an attached letter, the petitioner stated that "[t]wo employees have been employed during the partial year of operation, one in the position of general manager and the other as the general manager's assistant."

On September 29, 2003, the director requested additional evidence. In part, the director requested: (1) the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the second quarter of 2003; and (2) evidence of the petitioner's current staffing, including position titles and duties for all employees, and educational backgrounds for any professionals employed.

In a response dated December 18, 2003, the petitioner submitted copies of its IRS Forms 941 for the second and third quarters of 2003, and a letter that describes its staffing as follows:

> [redacted] – age 56
>
> High School graduate . . . . joined [the store purchased by the petitioner] in December 1988 and now manages the store.
>
> [redacted] age 41
>
> High School graduate – 2 years in college, did not graduate – 6 months in private chef school . . . . joined [the petitioner] on October 13, 2003 as manager of cooked foods section.
>
> [redacted] – age 17
>
> High School graduate . . . . joined [the petitioner] on November 11, 2003 as deli cleaner/helper.

On April 6, 2004, 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. The director noted that two of the petitioner's claimed employees were hired after the date of filing the petition, and that "[t]here is no evidence that the beneficiary's duties are either managerial, executive or in a specialized capacity."

On appeal, counsel asserts that the petitioner has submitted sufficient evidence to show that the beneficiary will be employed in a primarily executive capacity. Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988) and an unpublished AAO decision to support that the beneficiary will be employed in an executive capacity. Counsel further states that "the size of the [petitioner's] business operation in the U.S. should not be overemphasized by [Citizenship and Immigration Services (CIS)]." To support this assertion, counsel again cites *Mars Jewelers, Inc. v. INS* and an unpublished AAO decision involving an employee of the Irish Dairy Board. Counsel recited the facts in a third unpublished AAO decision.

Counsel further claims that the beneficiary qualifies as a functional manager. Counsel discusses the facts of four unpublished AAO decisions and claims that "[the beneficiary's] job of 'starting-up' an enterprise in addition to his financial expertise and the sums involved makes him a function manager."

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 case, the petitioner asserts that the beneficiary is primarily engaged in executive duties. Counsel further asserts that the beneficiary is a functional manager. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The beneficiary's job description submitted by the petitioner is insufficient to establish that he will be employed in a primarily managerial or executive capacity. The description contains vague language that provides little insight into the actual tasks the beneficiary will perform. For example, the petitioner states that "the beneficiary is required to undertake myriad executive level duties of a sophisticated nature," yet this broad assertion does not describe the beneficiary's daily duties. The petitioner states that the beneficiary "is responsible for purchasing" and "is required to create and implement the sales strategy," but without further explanation, these appear to be a non-qualifying duties. The petitioner indicates that the beneficiary "has responsibility for finance." It is understood that such responsibility would include numerous non-managerial and non-executive tasks such as managing a checking account, paying routine bills, and reconciling cash receipts. Yet, the petitioner has failed to identify who performs these non-qualifying duties, and thus it is unclear whether the beneficiary's financial responsibility is a primarily managerial or executive duty.

In the request for evidence, the director requested the position titles and duties for all of the petitioner's employees. As the beneficiary is one of the petitioner's employees, it is understood that the director requested additional information regarding his duties. However, in response, the petitioner failed to further discuss the beneficiary's responsibilities. On appeal, counsel now submits additional detail regarding the beneficiary's role in the petitioner's operations. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the additional information regarding the beneficiary's duties to be considered, it should have submitted such a description in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the additional description submitted on appeal.

In response to the request for evidence, the petitioner provided an account of its current staffing. However, as noted by the director, two of the employees listed were hired after the date of filing the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The fact that the petitioner hired additional workers after the date of filing is not probative of the petitioner's eligibility as of the filing date. Thus, the manager of the cooked foods section and the deli cleaner/helper will not be considered.

The petitioner states that it currently employs the beneficiary as president and an employee who "manages the store." The petitioner previously provided that it also employs a manager's assistant. 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, the petitioner provides that the store manager is a high school graduate, thus he is not a professional employee. The petitioner failed to indicate the educational credentials of the manager's assistant, thus the record does not support that this employee is a professional. Further, the petitioner has failed to adequately describe the duties of the store manager or manager's assistant, thus it cannot be determined whether they are managerial employees, or whether they have supervisory authority over other workers. 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). Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988) and an unpublished AAO decision involving an employee of the Irish Dairy Board to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. It is noted that *Mars Jewelers, Inc. v. INS* relates to an immigrant visa petition, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, *Mars Jewelers, Inc. v. INS* is distinguishable

based on the applicable regulations. *See* 8 C.F.R. § 214.2(l)(14)(ii). Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Yet, counsel correctly observes that a company's size alone may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

The petitioner operates a retail gourmet food and wine store. Thus, it is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive tasks such as conducting sales using a cash register, answering questions about merchandise from customers, tracking the petitioner's inventory, managing a checking account and paying bills, answering the telephone, receiving deliveries, stocking shelves, and providing custodial services. As noted above, the petitioner has failed to provide sufficient descriptions of the beneficiary's subordinates such that the AAO can determine who is responsible for these tasks. Without such explanation, and considering the petitioner's staff is limited to two to three workers, it is assumed that the beneficiary must perform many of these duties. Thus, the reasonable needs of the petitioner suggest that the beneficiary must spend a significant amount of time performing the tasks necessary to provide the petitioner's products and services. 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). The petitioner has failed to establish that these non-managerial and non-executive tasks do not constitute the majority of the beneficiary's time. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Counsel asserts that the beneficiary qualifies as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Again, 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. at 604.

In the present matter, counsel discusses the facts of four unpublished AAO decisions and claims that "[the beneficiary's] job of 'starting-up' an enterprise in addition to his financial expertise and the sums involved makes him a function manager." As stated above, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Further, counsel does not sufficiently discuss the facts of the present petition and explain how the cited matters support the petitioner's eligibility. 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). Nor has counsel clearly identified the function that the beneficiary would manage, or explained how the beneficiary will manage the function rather than perform it himself. Thus, the petitioner has failed to show that the beneficiary will be a function manager.

The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. Again, 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. In the instant matter, the petitioner has not shown that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, 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 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. The petitioner has not met this burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.