U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

D7

[redacted]

FILE: SRC 02 269 52792 Office: TEXAS SERVICE CENTER Date: FEB 07 2005

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)

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 nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Hard Export Corp., endeavors to classify the beneficiary as a nonimmigrant manager 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 claims to be a subsidiary of [redacted], located in Brazil. The petitioner claims to be engaged in the business of import, export, and commercialization of computers, telephony material, and equipment to supply offices, stores, industries, and banks. The initial petition was approved to allow the petitioner to open a new office. It now seeks to extend the petition's validity and the beneficiary's stay for two years as the U.S. entity's commercial manager. The petitioner was incorporated in the State of Florida on October 4, 2000 and claims to have four employees.

On March 18, 2003, the director denied the petition and determined that the petitioner had not established that the beneficiary will be primarily performing duties in a managerial capacity.

On appeal, the petitioner's counsel states, "the managerial capacity of the beneficiary is clearly demonstrated" and asserts that the petitioner's utilization of independent contractors is indispensable to the functioning of the company. Counsel submits a brief in support of the appeal.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. 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. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(3) state 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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act 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 managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The primary issue in this proceeding is whether the beneficiary will be primarily performing managerial duties for the United States entity. 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-

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.

On September 17, 2002, the petitioner filed Form I-129. The petitioner claimed four employees and described the beneficiary's proposed duties in the United States as:

Continue the Management of the Commercial Department; Hire and dismiss; create and install organizational structures; implement systems and methods for work

optimization; establish goals, policies and administrative rules; supervise and control the work of all the professionals she employ.

In addition, in an August 30, 2002 supporting letter, the petitioner further described the beneficiary's proposed U.S. duties as:

To analyze and elaborate financial projections;
To manage the Commercial Department of the company;
To hire and dismiss [at] her discretion;
To create and install organizational structures;
To implement systems and methods for work optimization;
To establish goals, policies and administrative rules;
To supervise and control the work of all professionals and managers that she employs;
To select and contract suppliers of goods and services;
To identify and select new products;
To establish budgets, market and sales strategies;
To orient staff to comply with Brazil and Florida laws and regulations.

The petitioner also stated, "[the beneficiary] will be involved in planning marketing strategies and in the business budget [sic]."

On November 1, 2002, the director requested additional evidence. In particular, the director requested evidence that the six independent contractors actually work for the U.S. company and an explanation for why the quarterly tax return ending on June 30, 2002 indicated that the beneficiary was the petitioner's only employee who was paid low wages.

In response, the petitioner claimed it employed six independent contractors. The petitioner submitted a copy of the employment agreements for its employees and stated that these employees opted to be paid "a low wage but with the advantage to receive a percentage over the net profit of the company at the end of the year." The petitioner also explained that there are "no contracts with the 2 independent sales people" and "[s]uch professionals are paid by commission over sales and are not full time or exclusive employees of the company." The petitioner submitted copies of the checks purportedly paying the commission for the sales performed by the two contract employees. In addition, the petitioner claimed that the freight agent is provided by an independent company that ships its products overseas and is paid according to each shipment service they provide. The petitioner stated that an independent company also provides its accountant and financial assistant and submitted a copy of the service contracts and checks paid to the independent company. Finally, the petitioner submitted a copy of a service agreement and claimed that it retained the services of an advertising agency to assist with advertisement and promotions of the company.

On March 18, 2003, the director denied the petition. The director determined that the petitioner had not established that the beneficiary will be primarily performing duties in a managerial capacity. The director found that "the business had not expanded to the point where the services of a full-time, bona fide commercial manager would be required."

On appeal, counsel claims, "the managerial capacity of the beneficiary is clearly demonstrated." Counsel stated that "all the independent contractors render services to [the petitioner], have services agreements and are an indispensable part of the functioning of the company." Counsel submits supporting documentation including the petitioner's IRS Form 941, the employment agreements between the independent contractors and the petitioner, a description of the beneficiary's duties, and a timetable.

In examining the managerial capacity of the beneficiary, the AAO will look to the description of the beneficiary's U.S. job duties to determine whether the beneficiary is primarily acting in a managerial capacity. See 8 C.F.R. § 214.2(l)(3)(ii). On review, the petitioner failed to establish that the beneficiary will be employed in a primarily managerial capacity. The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fail to establish what the beneficiary does on a day-to-day basis. For example, the petitioner stated that the beneficiary's duties include "install organizational structures," "implement systems and methods for work optimization," and "establish goals, policies and administrative rules." However, it is unclear what organizational structures the beneficiary will install, what systems and methods the beneficiary will devise, and the goals, policies, and administrative rules that the beneficiary will establish. 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).

In addition, the petitioner generally paraphrased the statutory definition of managerial capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as "supervise[ing] and control[ing] the work of all the professionals she employ." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, whether the beneficiary is a managerial employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as being "involved in planning marketing strategies," "identify[ing] and select[ing] new products," and "establish[ing] budgets, market and sales strategies," do not fall directly under traditional managerial duties as defined in the statute. Although the petitioner claimed it employed the services of an advertising agency to assist with advertisement and promotions of the company, the list of employees and assigned duties did not indicate that any of the listed employees perform or assist the beneficiary with these daily tasks. 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 capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

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 are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. The petitioner claimed that the beneficiary "supervise[s] and control[s] the work of all professionals and managers that she employs."

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 matter, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the administrative work of the import and export agent or purchase and sales agent, whom are among the beneficiary's subordinates.

Although counsel states on appeal that the petitioner has contractual employees, the petitioner has not presented sufficient evidence to document the existence of these employees. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The AAO notes that the petitioner submitted inconsistent evidence. First, in the response to the director's request for additional evidence, the petitioner claimed that there are "no contracts with the 2 independent sales people" and "[s]uch professionals are paid by commission over sales and are not full time or exclusive employees of the company." Second, on the 2002 U.S. organizational chart, the petitioner indicated that of the six subordinate employees, the two commissioned sales employees and the freight agent were independent contractors. Third, the Employer's Quarterly Report ending the quarter on June 30, 2002 indicates that the petitioner employed four workers. Fourth, IRS Form 941 indicates that there were two employees paid for the quarter ending March 31, 2002. Fifth, in an August 30, 2002 letter, the petitioner stated that the company was "able to hire two other employees on the second quarter of this current year increasing its staff from two to four paid employees;" therefore, indicating that for the previous year, prior to he time of filing for the beneficiary's extension on September 17, 2002, the petitioner was not operating the business with a full staff. 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). Sixth, the employment agreements between the petitioner and two of the employees were effective as of February 2002. Seventh, the 2001 U.S. Corporation Income Tax Return indicates that no salaries and wages were paid and there was no cost for labor even though in the August 30, 2002 letter, the petitioner claimed that the beneficiary was transferred to the U.S. company in September 2001. Because of these inconsistencies, CIS cannot determine the actual organizational structure of the petitioning entity and the beneficiary's resulting duties.

Finally, the petitioner submitted copies of the checks for the independent contractors that are dated as of 2002 and paid to "cash," although the petitioner claimed that it had made agreements with several independent companies and its employees. For example, the petitioner made a deal with [redacted], to ship its products overseas and claimed that the "company is paid according to each shipment service they provide to the petitioner." However, check number [redacted] indicates pay to the order of "cash" even though in the left hand corner it shows it is for [redacted]. In addition, the memo section of check number [redacted] among others, appears to be altered with "white-out" or correction fluid in parts. On April 26, 2002 two checks were written, check number [redacted] indicates that it is for [redacted] and check number [redacted] indicates that it is for a commission for [redacted]; however, the checks are paid to the order of cash and show the same driver's license number, birth date, and American Express number. Because of the inconsistencies in the evidence and the apparent alterations, the AAO deems this evidence to be of reduced probative value and weight. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In sum, based upon the varying discrepancies in the record, the AAO is unclear exactly who works full-time, part-time, or as an independent contractor for the petitioning entity. 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. at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

After careful consideration of the evidence, the AAO must conclude that the beneficiary will not be employed in a primarily managerial capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO is not persuaded that the beneficiary has been employed in a managerial capacity abroad as defined at section 101(a)(44) of the Act. As previously stated to establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. The petitioner submitted a vague description of the beneficiary's employment abroad to determine whether her employment was of a qualifying nature. For instance, the petitioner described the beneficiary as "maintain[ing] contact with the suppliers" and "establish[ing] goals and policies." Again, 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. at 190.

Another issue not addressed by the director is whether the petitioning entity has been doing business for the previous year. At the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). The record contains evidence of a minimal number of transactions during the petitioner's first year of operations. 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. In sum, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial position. For these additional reasons, the petition may not be approved.

The AAO observes that the petitioner claims it is engaged in the import and export business, but notes that the petitioner has submitted no evidence that would indicate that it is actually engaged in this type of business. Upon the importation of goods into the United States, the Customs Form 7501, Entry Summary, serves to classify the goods under the Harmonized Tariff Schedules of the United States and to ascertain customs duties and taxes. The Customs Form 301, Customs Bond, serves to secure the payment of import duties and taxes upon entry of the goods into the United States According to 19 C.F.R. § 144.12, the Customs Form 7501 shall show the value, classification, and rate of duty for the imported goods as approved by the port director at the time the entry summary is filed. The regulation at 19 C.F.R. § 144.13 states that the Customs Form 301 will be filed in the amount required by the port director to support the entry documentation. Although customs brokers or agents are frequently utilized in the import process, the ultimate consignee should have access to these forms since they are liable for all import duties and taxes. Any company that is doing business through the regular, systematic, and continuous provision of goods through importation may reasonably be expected to submit copies of these forms to show that they are doing business as an import firm. The AAO notes that the record is devoid of any evidence of this nature.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.