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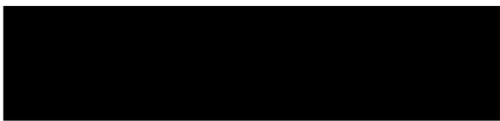
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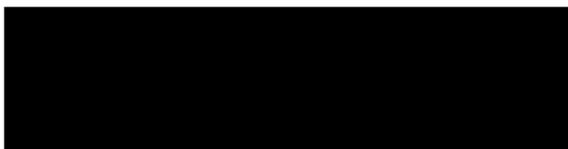
File: SRC 03 122 51347 Office: TEXAS SERVICE CENTER Date: DEC 04 2007

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa as abandoned. The petitioner moved to reopen the matter. The director granted the motion to reopen and issued a new decision denying the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its purchasing manager 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 under the laws of the State of Florida and is allegedly engaged in the antique business.

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 to the petitioner argues that the director erred and that the beneficiary's duties are primarily those of an executive and a manager. Specifically, counsel asserts that the beneficiary will supervise a professional who, in turn, will supervise a subordinate employee. In support, 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 primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner does not clarify in the initial petition whether the beneficiary will 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, and states on appeal that the beneficiary will be employed as both an executive and a manager. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the

beneficiary as both an executive *and* a manager, it 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.

The petitioner described the beneficiary's job duties in a letter dated March 18, 2003. As this letter is in the record, the job description will not be repeated here.

On November 21, 2003, the director requested additional evidence. The director requested, *inter alia*, a more detailed explanation regarding the beneficiary's claimed managerial or executive duties, a description of the subordinate employees, and copies of the petitioner's Quarterly Tax Returns.

In response, the petitioner submitted a letter dated February 10, 2004 in which it describes the beneficiary's duties as follows:

Duties	Percentage of Time
To plan develop and establish purchasing policies and objectives in accordance with corporate goals;	30%
To recruit and train purchasing personnel;	5%
Supervise and direct activities of subordinate personnel;	10%
To establish hiring and firing standards for purchasing personnel and administer the same;	[sic]
To develop purchasing strategies for the company;	20%
To establish product procurement and research policies and projects;	20%
To carryout thorough authentication procedures of products;	5%
To oversee shipping and distribution of purchased products including the accurate completion of shipping and customs documents	10%

The petitioner also submitted an organizational chart which shows the beneficiary reporting to a sales manager and directly supervising a "professional appraiser," who, in turn, is shown supervising a "shipment coordinator." However, the petitioner's wage reports and tax documents fail to list the "shipment coordinator," who is described in the letter dated February 10, 2004 as performing the tasks necessary to produce a product or to provide a service. It does not appear as if the "shipment coordinator" was an employee of the petitioner at the time the instant petition was filed. In fact, the petitioner indicated in the letter dated February 10, 2004 that the "shipment coordinator" began working for the petitioner in November 2003. The instant petition was filed on March 26, 2003.

The petitioner also described the duties of the appraiser in the letter dated February 10, 2004 as follows:

[E]xamines works of art, such as paintings, sculpture, and antiques to determine their authenticity and value; sells and purchases antiques; logs information for prospective purchases; prepares and issues purchase orders and quotes and effects sales transactions; travels to exhibition location across country at art fairs to display antiques in inventory and works to coordinate exhibition and hires independent contractors; gathers data on market trends and pricing; and, submits report of marketability of pieces to Purchasing Manager for

review.

Furthermore, the petitioner asserts that the appraiser began appraising for the foreign employer in early 1991 and that he has more than 12 years of work experience in the supposedly professional field of appraising.

On March 4, 2004, after reopening the matter, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties are primarily those of an executive and manager. Specifically, counsel asserts that the beneficiary will supervise a professional who, in turn, will supervise a subordinate employee. Counsel also asserts that the beneficiary will manage the organization's purchasing function. Counsel argues that the beneficiary is not a first-line supervisor and, regardless, that the "appraiser" should be considered to be a "professional" because he has over 12 years of experience in art appraising, which is classified by the Department of Labor as a "professional, technical, or managerial occupation." Counsel further argues that the appraiser's 12 years of experience supplants the requirement that he have the equivalent to a United States bachelor's degree in order to qualify as a "professional." 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

Upon review, the petitioner'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 will be either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary will be primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position will entail executive responsibilities, while other duties will be managerial. A petitioner may not claim that the beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will plan, develop, and establish "purchasing policies and objectives," will "develop purchasing strategies," and will "establish product procurement and research policies and projects." However, the petitioner does not specifically describe these policies, objectives, strategies, and projects. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated duties does not establish that the beneficiary will actually perform managerial duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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).

Likewise, most of the duties listed by the petitioner appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary will develop various policies, objectives, standards, and strategies. However, the drafting and development of policies and standards constitute administrative or operational tasks when the tasks inherent to these duties are performed, rather than managed, by the beneficiary. Furthermore, the petitioner states that the beneficiary will recruit and train personnel, authenticate products, and "oversee" shipping and distribution of products. Similarly, these are non-qualifying administrative or operational tasks or, in the case of overseeing shipping and distribution, are tasks associated with first-line supervisors. As the organizational chart and job descriptions for the subordinate employees fail to identify any employees who will relieve the beneficiary of the need to perform these non-qualifying tasks, it must be concluded that he will perform these tasks. As the petitioner has not established how much time the beneficiary will devote to such non-qualifying tasks, it cannot be confirmed that he will be "primarily" employed as a manager. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart, wage reports, and job descriptions for the subordinate staff members, the beneficiary appears to supervise one employee, an "appraiser." However, the petitioner has not established that this employee is primarily engaged in performing supervisory or managerial duties. To the contrary, it appears that this employee performs tasks necessary to produce a product or to provide a service, e.g., examining products, attending exhibitions, and preparing purchase orders. Furthermore, the record reveals that the appraiser's claimed subordinate employee, the shipment coordinator, was not employed by the petitioner at the time the petition was filed. 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). In view of the above, the beneficiary would appear to be primarily a first-line supervisor, the provider of actual services, or a combination of both. A managerial 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. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Moreover, the petitioner has not established that the beneficiary will manage a professional employee. In evaluating whether a 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, or its equivalent, held by the subordinate employee. The possession of a bachelor's degree or its equivalent by a subordinate employee will not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

In this matter, the petitioner has not established that the "appraiser," who will allegedly be supervised and controlled by the beneficiary, is a "professional" or that he is employed in a "professional capacity." First, it has not been established that the appraiser possesses the necessary combination of education and experience to be considered a member of a profession. As correctly noted by counsel by analogy, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) does permit a combination of education, specialized training, and/or work experience to be treated as equivalent to a bachelor's degree when determining whether a worker is engaged in a specialty occupation. However, without addressing the applicability of this H-1B regulation to L-1A intracompany transferee petitions by analogy, this same regulation provides in part the following:

It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

In this matter, even assuming the applicability of this regulation to the instant matter by analogy, the record is devoid of any of this required evidence. While the petitioner asserts in the letter dated February 10, 2004 that the appraiser worked abroad for 12 years "with individuals who already possess[ed] a degree or its equival[ent] in the specialty occupation," the record is devoid of any specific evidence corroborating this assertion. The petitioner does not identify these individuals, does not describe the circumstances surrounding the appraiser's professional development and relationship to these peers, and fails to explain with any specificity what the appraiser did on a day-to-day basis. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). Importantly, the petitioner never explains how the appraiser commenced working in this field when, according to the petitioner, "[c]urators and [a]rt connoisseurs in Argentina with whom the Appraiser worked, by definition, possess the requisite education and experience to hold such advanced and highly complex positions." Given the alleged complexity and sophistication of the field, it is imperative that the petitioner provide evidence outlining his professional development and explaining how he gained progressively responsible work experience ultimately qualifying him to be

employed in a position requiring a bachelor's degree or its equivalent. The petitioner, however, has failed to submit any of the independent evidence listed in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) or to provide any specific examples describing the appraiser's experience and background.

Second, the petitioner has not established that a degree or its equivalent is necessary to perform the duties of the appraiser in the United States as described in the petition. Therefore, it has not been established that the appraiser is employed in a professional capacity even assuming he is a "professional" possessing the equivalent to a United States bachelor's degree. In support of the petition, the petitioner has provided a vague and nonspecific description of the appraiser's duties that fails to demonstrate what the appraiser does on a day-to-day basis. For example, the appraiser is described as examining "works of art, such as paintings, sculpture, and antiques to determine their authenticity and value." However, the petitioner failed to provide any examples of what the appraiser has "examined," failed to explain how often he provides these services, and failed to reveal what techniques he uses to set values and confirm authenticity. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. In addition, the other duties ascribed to the appraiser appear unrelated to the claimed profession of art appraising. It is not credible that one would need the equivalent to a United States bachelor's degree to log information for prospective purchasers, prepare purchase orders, or to travel to exhibitions and art fairs to display products. Therefore, the petitioner has not established that the appraiser is employed in a professional capacity or even employed as a bona fide "appraiser."

Finally, the petitioner has not established that the beneficiary will manage an essential function of the organization. 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., 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. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary is primarily a first-line supervisor of a non-professional employee and/or is engaged in performing non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary will be primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will be primarily employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

It is 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).

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner has failed to establish that it and the foreign employer are "qualifying organizations," because the petitioner has failed to establish that it and the foreign employer were "doing business" as defined in the regulations as of the day the petition was filed.

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section" and "is or will be doing business." "Doing business" is defined in pertinent part as "the regular, systematic, and continuous provision of goods and/or services."

In this matter, the record is devoid of any evidence that the petitioner or the foreign entity was engaged in the regular, systematic, and continuous provision of goods and/or services on the day the petition was filed, March 26, 2003. While the petitioner provided documentation regarding business activity such as bank statements, invoices, and bills of lading, all of these documents predate September 30, 2002, have illegible or missing dates, and/or are untranslated Spanish language documents which lack evidentiary value. *See* 8 C.F.R. § 103.2(b)(3).

Accordingly, as the petitioner has failed to establish that it and the foreign entity were doing business at the

