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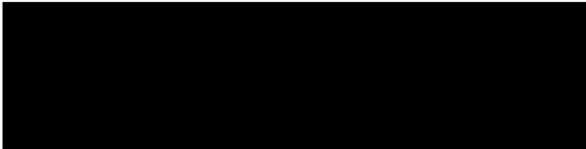
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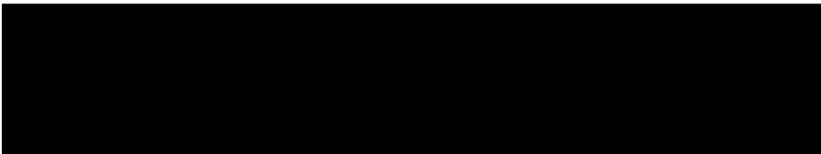


File: WAC 03 256 54644 Office: CALIFORNIA SERVICE CENTER Date: JUL 26 2007

IN RE: Petitioner: [Redacted]
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:



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to employ the beneficiary temporarily in the United States as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The U.S. petitioner, a corporation organized in the State of California that is engaged in import and export operations, seeks to employ the beneficiary as its operations manager to open a new office. The petitioner claims that it is the affiliate of L. Ibarreta Bus Service, located in Quezon City, Philippines.

The director denied the petition concluding that the petitioner did not establish that the beneficiary had been employed abroad 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 evidence submitted with the initial petition and in response to the director's request for additional evidence clearly established that the beneficiary was employed in a primarily managerial or executive capacity as defined by the regulations. In support of this assertion, counsel submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

- (v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:
 - (A) Sufficient physical premises to house the new office have been secured;
 - (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
 - (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The primary issue in this matter is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised,

functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

In the initial letter of support dated September 8, 2003, the foreign entity claimed that:

[The beneficiary] has been employed with [the foreign entity] in the Philippines as our Operations Manager since 1982 up to and including the present time. He is responsible for the efficiency and effectiveness of the Philippine business in many respects. He has been responsible for hiring/firing of staff and organizing the necessary training programs in the aforesaid areas and seeing to it that his policies and business ideas were carried out by staff through the managers and other responsible staff in the business.

On December 11, 2003, the director requested additional evidence establishing that the beneficiary had been employed abroad in a qualifying capacity. Specifically, the director requested evidence regarding the organizational hierarchy of the foreign entity as well as details regarding its employees.

In a response dated March 2, 2004, the foreign entity, through counsel, submitted a detailed response accompanied by the documentation requested by the director. An organizational chart for the foreign entity demonstrated that the beneficiary, as Assistant Operations Manager, oversaw a Mechanic Operator, who in turn oversaw an Assistant Mechanic Operator. The Assistant Mechanic Operator in turn oversaw nine school bus drivers and nine conductors. The petitioner provided brief job descriptions for the employees.

On June 30, 2003 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary had been employed in a primarily managerial or executive capacity while

abroad. Specifically, the director concluded that despite overseeing a large subordinate staff, the beneficiary was not supervising professional, supervisory or managerial employees.

On appeal, counsel for the petitioner restates the four requirements of "managerial capacity" and "executive capacity" as defined by the regulations, and alleges that the beneficiary satisfied all of these requirements in his position abroad.

The AAO, upon review of the record of proceeding, concurs with the director's finding. 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 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, although the petitioner provided an overview of the educational backgrounds of each of the beneficiary's subordinates (it is noted that the Mechanics Operator and Assistant Mechanics Operator both had two years of vocation school, and some of the drivers had college educations), the petitioner has not, in fact, established that a bachelor's degree or other education is actually necessary, for example, to perform the work of these employees. Nor has the petitioner shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Although counsel claims on appeal that the auto mechanic and assistant auto mechanic are supervisors, the AAO notes that their duties, as described by the petitioner, do not include any supervisory or personnel-related tasks. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisors, professionals or managers, as required by section 101(a)(44)(A)(ii) of the Act.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate

employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of operating the bus service. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

Furthermore, a review of the beneficiary's duties abroad does little to clarify the nature of his position. For example, the petitioner claimed in its September 8, 2003 letter that the beneficiary is responsible for "the efficiency and effectiveness of the Philippine business in many respects." It stated that his responsibilities included hiring and firing of staff, organizing training, and ensuring that his policies and business ideas were carried out by other staff members. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

It is noted that, on appeal, counsel for the petitioner contends that the beneficiary is employed in the alternative in an executive capacity. In support of this claim, however, the petitioner merely provides vague, unsubstantiated duties, such as "performed major financial, business and other management actions" and "exercised wide latitude in discretionary decision making," and claimed that, pursuant to the definitions, he only received supervision from the owner of the company himself. Counsel, however, provides no additional evidence or examples of the exact nature of the beneficiary's tasks, and merely paraphrases the regulatory definition of "executive capacity." 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. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Furthermore, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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

Beyond the decision of the director, the evidence submitted does not establish that the beneficiary would be employed in the United States in a managerial or executive capacity within one year, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

In a letter from the foreign entity dated September 8, 2003, the beneficiary's proposed duties were described as follows:

[The beneficiary] will be privy to direct and coordinate through supervisory personnel all activities concerning with the operational order and selection of company products. [The beneficiary] will be the individual responsible for planning and directing sales figures, establishing priorities, in keeping with effective operations and cost factors. He will also confer with the president and develop marketing plans, cargo/freighting timeline procedures and quality control standards. [The beneficiary] will also develop budgets and cost control of the business.

When necessary, [the beneficiary] will negotiate, arrange and sign all contracts on behalf of the business in the U.S.A. [The beneficiary] will report to the Board of Directors from time to time on the progress of the business.

In his managerial capacity with our business, [the beneficiary] will have full control of the direction of the corporation as well as the development and operation plans extent and scope the corporation will be involved in.

On December 11, 2003, the director requested additional evidence establishing that the beneficiary was qualified for the benefit sought. Specifically, the director requested evidence supporting the petitioner's claim that the beneficiary will be acting in a primarily managerial or executive capacity in the United States. In a response dated March 2, 2004, the foreign entity submitted a response as requested by the director. The foreign entity indicated that the new U.S. company intends to hire a sales manager to enforce the operation of the marketing division, and two account executives to sell and promote its products.

The beneficiary's proposed duties include numerous non-managerial tasks that are essential to the daily operations of the business. Specifically, the assertions that the beneficiary will be negotiating and signing contracts and will be responsible for sales and marketing plans suggests that he will be performing many undertakings that would normally be delegated to sales representatives or other non-managerial personnel. In this case, it is clear that the proposed duties include many practical obligations that would normally be delegated by a manager or supervisor to a subordinate staff. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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).

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not

normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Although the record indicates that the petitioner intends to hire a sales manager and two account executives in the future, no mention is made of the petitioner's hiring plan in the areas of purchasing, import and export, administrative, or finance. This is important, since the basis of the petitioner's business and its chances for success ultimately will require sufficient staff in these crucial areas. In addition, it does not appear that the petitioner has acquired sufficient physical premises to house its new office as required by 8 C.F.R. §214.2(l)(3)(v)(A). The petitioner submits a copy of a "Business Identity Agreement," wherein the petitioner essentially creates a virtual office and contracts for the use of a mailing address, receptionist services, and a telephone answering service. Although the petitioner, according to the agreement, will receive a listing in the business directory of the building's lobby, the agreement specifically states that the business address cannot be used by the petitioner other than for ten hours per month as outlined in the agreement. Finally, the size of the U.S. investment is unclear, particularly absent sufficient evidence of the finances available to meet the estimated \$40,000 in start-up costs as estimated in the business plan.

For the reasons set forth above, in addition to the vague overview of the beneficiary's proposed duties, it cannot be concluded that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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ORDER: The appeal is dismissed.