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U.S. Citizenship
and Immigration
Services

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APR 01 2005



File: WAC-04-069-51200 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



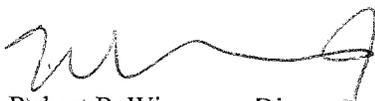
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


Robert P. Wiemann, Director
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 filed this nonimmigrant petition seeking to employ the beneficiary as 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), in order to open a new office in the United States. The petitioner is a corporation organized in the State of California that is engaged in the sale of automobile parts and other goods. The petitioner claims that it is the subsidiary [REDACTED] located in Zhuji City, China. The beneficiary entered the United States as an F-1 student, and the petitioner now seeks to change his status to L-1A.

The director denied the petition concluding that the petitioner did not establish that the beneficiary was 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 director failed to request all relevant information prior to denying the petition, and that the director did not adequately consider the evidence of record. In support of these assertions, counsel submits a brief and previously submitted documents.

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 (1)(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 issue in the present 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 petition filed on January 12, 2004, on Form I-129 the petitioner described the beneficiary's foreign job duties as follows:

Established the International Trade Department, separated from Domestic Department [sic]; Established detailed sales plans and sales missions and goals each month; allocated the sales jobs and sales markets among sales clerks in the Department, managed the overall aspects of the Department; and coordinated and synchronized the relationship of the sales team in the Department

In a support letter dated January 8, 2004, the petitioner further described the beneficiary's foreign job duties as follows:

[The beneficiary] is responsible for establishing and managing the International Trade Department of the parent company. He governed the day-to-day operation relating to personnel and international sales. During his tenure, [the beneficiary] has made significant contributions to assure the successful operations and achievements of the International Trade Department of the parent company, i.e., established the International Trade Department that was separated from the Sales Department; tried to find new customers through joining all kinds of auto parts shows; established a good trade relationship with many big customers,

such as Midwest, PAI and CCCN; established detailed sales plans and sales missions and goals each month; allocated the sales job and sales markets among sales clerks in the Department, managed the overall aspects of the Department; and coordinated and synchronized the relationship of the sales team.

On January 23, 2004, the director requested additional evidence. In part, the director requested: (1) the number of employees the beneficiary manages and their titles; (2) a complete description of the beneficiary's foreign job duties; (3) an indication of the decision-making powers the beneficiary has; and (4) an organizational chart for the foreign entity showing the beneficiary and all employees, including their names and job titles.

In a response dated February 26, 2004, in part the petitioner submitted: (1) a departmental chart of the petitioner's International Trade Department; (2) copies of work identification cards for the beneficiary and his subordinates; (3) copies of graduation certificates for the beneficiary's subordinates; (4) the foreign entity's organizational chart; and (5) a more detailed foreign job description for the beneficiary as follows:

Position:	Manager of the International Trade Department
Direct Superior:	President of the Group Company (Lixiang Chen)
Job Description:	In charge of all the work in the International Trade Department
Power:	Managing all the work in the International Trade Department
Responsibility:	Responsible for the benefits of the International Trade Department

Main Responsibilities and Powers in Details:

1. In charge of studying and planning the company's development directions; including the company's future industrial rationalization, development of new products and fund utilization;
2. In charge of drawing up and examining the group company's various rules, regulations and internal structure organization;
3. In charge of the communications between the group company and various governmental departments, strengthening the information exchanges for the government's better contribution to the economy;
4. In charge of the coordination among the group company and subsidiaries as well as various departments;
5. In charge of the group company's important decision makings, including personnel transfers, annual plan approval and significant accidents handling etc.;
6. Organizing the making and supervision of export and import subsidiaries' annual marketing plans and expenses, as well as plans such as the internal profit targets;
7. Organizing the study of development plans concerning export and import subsidiaries' marketing and market development;
8. Arranging the participation in national and international important auto fairs;
9. Organizing the participation in the group company's annual meeting, plan coordination meeting and other important meetings;

10. Attending the company's reception for important guests;
11. Implementing the company's requirements and handling other foreign-related affairs;
12. Be responsible for the International Trade Department and under the direct management and supervision of the company's president.

The departmental chart of the petitioner's International Trade Department shows that the beneficiary has supervisory responsibility over seven employees, including six clerks and one planning clerk. The short job descriptions for these subordinates reflects that they are involve in sales tasks. The petitioner submitted documentation to show that one of the clerks completed a bachelor's degree in gynecology.

On March 11, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary was employed abroad in a primarily managerial or executive capacity. Specifically, the director stated the following:

The [beneficiary's job] description . . . and the organizational chart shows that the beneficiary is a first-line supervisor overseeing six clerks and one planning clerk. The job description indicates that the beneficiary's duties primarily organized and synchronized a group of sales clerks.

Clearly, some of the beneficiary's duties may have involved decision-making processes, which are normally attributed to managerial or executive positions Since a significant part of the beneficiary's duties consist of the day-to-day functions, the duties may not be considered primarily executive or managerial in nature.

On appeal, counsel for the petitioner asserts that the director did not consider the job description provided for the beneficiary in response to the request for evidence. Counsel alleges that the director failed to consider that the department that the beneficiary manages is important to the foreign entity, accounting for 10 percent of its gross sales. Counsel alleges that the director failed to request additional information regarding the importance of the beneficiary's department, contrary to the requirements of 8 C.F.R. § 103.2(b)(8). Counsel asserts that an internal Citizenship and Immigration Services (CIS) memorandum from former-Associate Commissioner Fujie O. Ohata, dated December 20, 2002, requires the director to reference all elements of the definition of managerial capacity as found in section 101(a)(44)(A) of the act, and that the director erred in failing to do so. Counsel further asserts that the petitioner established that the beneficiary supervises professionals. Counsel provides that the beneficiary's subordinates are required to have proficiency in a foreign language which further establishes that they are professionals.

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 matter, the petitioner has submitted a total of five separate foreign job descriptions for the beneficiary, including Form I-129, a letter submitted with Form I-129, an employment certificate from the foreign entity, and documents provided in response to the director's request for evidence. As the

petitioner has not indicated that any of these descriptions contain errors, they will be considered together in order to determine what are the beneficiary's true duties.¹

The foreign job descriptions reflect that the beneficiary is primarily engaged with sales and marketing functions, and acting as a first-line supervisor. For example, in a letter accompanying Form I-129, the petitioner stated that the beneficiary "tried to find new customers through joining all kinds of auto parts shows [and] established a good trade relationship with many big customers." These functions appear to be routine, non-qualifying sales and marketing tasks. The letter accompanying Form I-129 as well as the job description provided on the foreign entity's departmental chart reflect that the beneficiary is primarily engaged with supervisory responsibilities over his seven subordinates. His tasks in this regard include "establish[ing] detailed sales plans and sales missions and goals each month; allocat[ing] the sales job and sales markets among sales clerks in the Department, manag[ing] the overall aspects of the Department; and coordinate[ing] and synchroniz[ing] the relationship of the sales team." The job description submitted in response to the request for evidence states that the beneficiary is "[i]n charge of all the work in the International Trade Department." The description then lists 12 duties attributed to the beneficiary, largely centered around conducting communications of the department and making general management decisions. It is noted that this list of twelve duties does not include supervising the beneficiary's seven subordinates in day-to-day activities. Thus, as the beneficiary clearly is charged with supervising the seven clerks, the list of 12 duties is understood to be a supplement to other job descriptions contained in the evidence of record, and not a complete assessment of the beneficiary's daily duties. In aggregate, the job descriptions show that the beneficiary is primarily engaged with managing the seven clerks, performing sales and marketing tasks, and the day-to-day operation of the International Trade Department.

Counsel claims that the beneficiary manages seven subordinates. 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).

¹ While counsel alleges that the director erroneously disregarded the more detailed job description the petitioner submitted on appeal, the director's decision gives no clear indication that he gave more weight to a particular job description in the evidence of record. As all of the petitioner's evidence is available for consideration, and the petitioner has not indicated that any job description contains errors, the director appropriately cited the job description that appeared on the foreign entity's departmental chart.

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 documentation to show that only one of the beneficiary's subordinates has a bachelor's degree. As the degree is in gynecology, it is self-evident that such academic training is not required to prepare a clerk to sell automobile parts. Further, the fact that the petitioner has hired the clerks without relevant bachelor's degrees reveals that a bachelor's degree is not necessary in order to perform their respective duties. Thus, the petitioner has failed to show that the beneficiary's subordinates are professionals. Nor has the petitioner shown that any of the 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. Accordingly, 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.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. 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. As noted above, without further explanation the evidence of record shows that the beneficiary will spend the majority of his time acting as a first-line supervisor over subordinates who are not professionals. A managerial or executive 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. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Thus, the time the beneficiary invests in supervising his subordinates does not constitute acting in a managerial or executive capacity.

Counsel alleges that the director failed to consider that the department that the beneficiary manages is important to the foreign entity. Yet, it is noted that the beneficiary's actual duties themselves reveal the true nature of his employment, irrespective of the prominence of his department. *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). As discussed above, the petitioner has failed to show that the beneficiary's duties are primarily managerial or executive in nature.

Counsel alleges that the director failed to request additional information regarding the importance of the beneficiary's department, contrary to the requirements of 8 C.F.R. § 103.2(b)(8). 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). It was within the director's discretion whether to explicitly request additional information about the role of the International Trade Department within the foreign entity. If the petitioner had determined that such information was vital to a clear understanding of the beneficiary's duties, it should have submitted it in response to the director's request for information about the beneficiary's employment capacity. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the

petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The director's decision not to solicit more information regarding the International Trade Department was not in error.

Counsel asserts that an internal CIS memorandum from former-Associate Commissioner [REDACTED] dated December 20, 2002, requires the director to reference all elements of the definition of managerial capacity as found in section 101(a)(44)(A) of the act, and that the director erred in failing to do so. In the director's decision, he cited the statutory requirements for L-1 classification as defined in section 101(a)(15)(L) of the Act, as well as the regulatory definitions of managerial and executive capacity as found in 8 C.F.R. § 214.2(l)(1)(ii)(B) and (C). It is noted that the definitions provided in 8 C.F.R. § 214.2(l)(1)(ii)(B) and (C) mirror the definitions found in sections 101(a)(44)(A) and (B) of the Act. The director then explained why the petitioner's evidence failed to satisfy the requirements for L-1A classification. Thus, the director appropriately informed the petitioner of the relevant legal provisions under which the decision was made, and explained why the petitioner failed to establish eligibility.

Based on the foregoing, the petitioner has not established that the beneficiary has been employed abroad in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(iv). For this reason, the appeal will be dismissed.

Beyond the decision of the director, there is no evidence of the size of the United States investment or the financial ability to remunerate the beneficiary as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The petitioner provided financial statements for the foreign entity, yet all monetary figures were presented in a currency other than U.S. dollars. Because the petitioner failed to submit translations of the documents showing values in U.S. currency, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the financial statements are not probative and will not be accorded any weight in this proceeding. While the petitioner claims that the foreign entity has \$500,000 to invest in the petitioner's operations, the petitioner has provided no evidence that funds have been committed to the enterprise. 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). For this additional reason, the appeal will be dismissed.

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. The petitioner has not met this burden.

ORDER: The appeal is dismissed.