

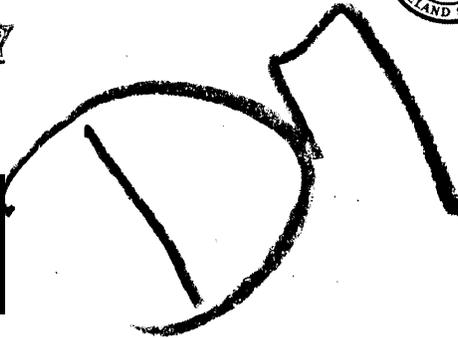
Identifying data deleted to
prevent disclosure of information
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



FEB 07 2008

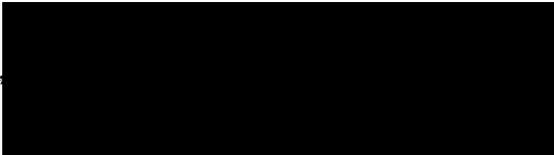
FILE: WAC 02 205 50228 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



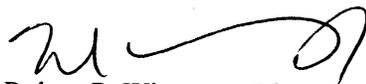
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

6

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 appeal will be dismissed.

The petitioner is engaged in the business of importing and exporting general handicraft and gift items and in operating a beauty salon. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its manager. The director determined that the beneficiary has not been and will not be employed primarily in a qualifying executive or managerial capacity.

On appeal, counsel asserts that the director did not review evidence that was submitted in response to the request for evidence. Counsel asserts that the beneficiary is employed in a managerial and executive capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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.

The United States petitioner was incorporated in March 1999 and states that it is a subsidiary of Vineet Enterprises located in New Delhi, India. On the Form I-129, the petitioner stated that it has ten employees and stated a gross income of \$400,000. The initial petition was approved and was valid from June 27, 2001 until June 27, 2002. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$42,000.

The issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties.

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.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means 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.

When examining the executive or managerial capacity of the beneficiary, Citizenship & Immigration Services (CIS) looks first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2 (l) (3) (ii). In this instance, in a letter attached to the petition, dated June 6, 2002, the petitioner stated that the beneficiary is a manager in the company. The petitioner explained that it is expanding into the area of "Indian Henna and Facial Threading" services. In the instant petition, the petitioner stated that the beneficiary will:

[d]irect and coordinate activities of the new entity and import of the products. Will formulate and administer organization policies; participate in formulating and administering company policies and developing long-range goals and objectives. Direct and coordinate activities of the department for which responsibility is delegated to further attainment of goals and objectives.

Will hire the appropriate management and staff to handle the company, train, coordinate advertising and promotions for the new business, sales activities of establishment. Direct staffing, training and performance evaluation to develop and control sales program. Develop the existing business plan, direct and coordinate the activities of the U.S. Imports and Exports

On July 11, 2002, the director requested the following additional evidence:

- U.S. Business Organizational Chart: Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current names of all executives, managers, supervisors, and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, annual salaries/wages (in U.S. Dollar equivalents) and immigration status . . . for all employees under the beneficiary's supervision. Finally, explain the source of remuneration for all employees and explain if the employees are on salary, wage or paid commission.
- Duties in the U.S. : Submit a more detailed description of the beneficiary's duties in the U.S. Be specific. List all the education and employment qualifications for the position in the U.S. Company. Include evidence that the beneficiary meets the petitioner's qualification, and, if required, that the beneficiary has the ability to speak, read, and write English. Indicate exactly who the beneficiary directs including their job title and position description. List all employees under the beneficiary's direction. Also indicate percentage of time spent in each of the listed duties.

On September 26, 2002, the petitioner responded to the director's request for evidence. The petitioner provided an organizational chart of the U.S. company and the overseas company. The petitioner's organizational chart indicated [REDACTED] as president, [REDACTED] (beneficiary) as manager and [REDACTED] functional manager. The chart indicated that the beneficiary oversees a henna artist and a licensed cosmetologist. The chart is unclear if the beneficiary oversees the function manager. Additionally, the chart indicated a sales manager and a part-time bookkeeper. The organizational chart for the foreign company indicated the same personnel, [REDACTED] as president, [REDACTED] (beneficiary) as executive manager/vice-president and Vibhor Vineet as a sales manager as well as another manager, an office assistant and two sales executives. The AAO notes that the petitioner indicated on the organizational charts that [REDACTED] works as a "functional manager" for the U.S. and as a sales manager/director for the foreign company yet provided no additional information about this employee, such as a job description and proof of employment.

Additionally, the petitioner submitted a newsprint article describing the owner and the type of business. The article described the petitioner as a wholesale business in music CDs and cassettes. The article stated that the president of the petitioning organization and his wife, the beneficiary, have opened a beauty salon. In an attached letter, counsel for the petitioner restated the previously provided beneficiary's job description and added that the beneficiary is "[i]nvolved also in new investments along with the President of the Company and supervision as indicated above [of] other professions and to hire other management staff members." In response to the

director's specific request for the percentage of time spent in each of the beneficiary's listed duties, counsel stated the beneficiary will spend " 70 % of her time exercising her discretionary authority in managing professional staff members and client relations [and] 30% of her time developing and conducting information on the trends of the Product in the U.S. market."

On November 15, 2002, the director issued a decision denying the petition. The director found that the job description provided by the petitioner is insufficient to establish that the beneficiary has been and will be employed as a manager. The director stated the information provided by the petitioner describes the beneficiary's duties only in broad general terms. Additionally, the director found that the Internal Revenue Service (IRS), Form 1120, U.S. Corporation Income Tax Return for the year 2001 indicated the salaries and wages of employees as \$14,000.00. The director further noted that this information does not relate to the information provided by the petitioner on the U.S. organizational chart. The director noted that the salaries of the employees indicated on the organizational chart exceed the total salaries and wages indicated on the U.S. Corporation Income Tax Return. The director determined the petitioner had not explained these inconsistencies in the record.

In conclusion, the director determined the evidence submitted with the petition was insufficient to demonstrate that the beneficiary will function in a managerial or executive capacity. The director found there is no indication that the beneficiary will exercise significant authority over generalized policy or that the beneficiary's duties will be primarily managerial or executive in nature.

On appeal, counsel states that the additional evidence and information that were provided in response to the director's request were not taken into consideration. Additionally, counsel for the petitioner asserts that the beneficiary will be employed in both a managerial and executive capacity. Therefore, petitioner 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 since it is representing that the beneficiary is both an executive and a manager.

On appeal, counsel asserts that the director misread the Form 1120 Corporate Tax Return when he indicated his concerns over the discrepancies between the organizational chart and the salaries listed. Counsel explains that the salaries and benefits for 2001 total \$50,100 taking into account both the line items for salary and wages and compensation for officers. Counsel also explains that there have been new hires that would not be reflected in the 2001 tax return. The AAO acknowledges that the petitioner compensated its officer but the payroll information provided in the record only indicates three employees including the president, the beneficiary, and a sales manager. The petitioner did not provide any additional evidence that the petitioner has hired additional employees. 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. 582, 591-92 (BIA 1988).

On appeal, counsel states that the beneficiary is employed in both a managerial and executive capacity. Counsel generally states that the beneficiary takes charge of the company when the president is absent. Counsel states that the beneficiary directs the management of the U.S. company and "not only tried to accomplish the organization's mission and objectives set by the Board and the President but also helps the

employees to accomplish their own career objectives.” Counsel added that the beneficiary “is involved in developing the business mission, objectives, goals and policies in association with the [p]resident has directed the company’s operations and development strategy, coordinating with the management of the large parent company.” In reviewing the record, the petitioner has not sufficiently described the responsibilities of the beneficiary in order for the AAO determine whether the beneficiary’s position is executive. The petitioner has not provided any specifics as to the nature of the beneficiary’s job 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).

The description of the duties employed words such as “developing the business mission, objectives, goals and policies” and “setting out of [the petitioner’s] overall growth strategy”. These words and phrases are generalities. For example, they do not identify what “objectives, goals and policies” and “growth strategies” the beneficiary will develop and establish. In sum, the petitioner described the beneficiary’s duties in general terms, largely paraphrasing the statutory and regulatory executive and managerial requirements. Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel’s assertions are not persuasive. The petitioner has not submitted a sufficiently detailed description of the beneficiary’s current and proposed job duties and day-to-day activities to establish whether the position is executive. The petitioner has submitted general statements which vaguely describe the beneficiary as performing executive duties. Half of the duties described state that the beneficiary manages a professional staff when there is no evidence that the petitioner employs a professional staff. Furthermore, the petitioner has not demonstrated that the beneficiary directs the management of the organization or a major component or function of the organization.

As indicated above, the petitioner stated the beneficiary spends 70 percent of her time managing professional staff members. The evidence provided by the petitioner does not demonstrate that the beneficiary manages professional staff members. The organizational chart and statements from the petitioner and counsel indicate that the beneficiary supervises a sales manager, a henna artist and a cosmetologist. Furthermore, counsel asserts that the beneficiary supervises a part time bookkeeper. However, none of these positions are professional. 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).

Counsel continuously asserts that the beneficiary will manage professionals. Based on the information provided in the organizational chart and on appeal, the subordinate employees who will report to the beneficiary do not qualify as professionals as defined by the regulations and as described in pertinent case law. Therefore, the beneficiary will not supervise and control the work of other supervisory, professional or managerial employees pursuant to Section 101(a)(44)(A)(2) of the Act.

Based on the record of proceeding, the petitioner provided insufficient evidence to determine whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy. Further, the petitioner's evidence is not persuasive in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing non-qualifying duties. The provided descriptions of the beneficiary's primary duties indicate that the beneficiary is not primarily acting in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner stated that the record contains evidence that the foreign entity and the U.S company employ the same three people as president, manager and functional/sales manager. The AAO notes that though the petitioner provided some profit and loss statements for the foreign company, the petitioner has not provided any evidence that the foreign company is doing business as required at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). As defined in the regulation at 8 C.F.R. § 214.2 (l)(1)(ii)(H), "doing business" means the regular, systematic provision of goods and/or services by a qualifying organization. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.