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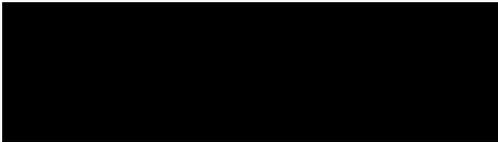
U.S. Department of Homeland Security
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U.S. Citizenship
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File: EAC-03-180-51194 Office: VERMONT SERVICE CENTER Date: FEB 18 2005

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, Vermont 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 and 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), in order to open a new office in the United States. The petitioner is a corporation organized in the State of New Jersey that intends to operate a dollar store. The petitioner claims that it is the affiliate of [REDACTED] located in Gujarat, India.

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 within one year.

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 beneficiary will be employed in a primarily managerial or executive capacity, and that the director's decision erroneously relies on the petitioner's small staff size to find otherwise. In support of this assertion, counsel submits a brief statement on Form I-290B. While counsel indicated on Form I-290B that he would be submitting a brief and/or additional evidence within 30 days of filing the appeal, as of the date of this decision, the AAO has received no further documentation or correspondence from counsel or the petitioner.

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(1)(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 (1)(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 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 within one year.

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 May 31, 2003, on Form I-129 the petitioner stated that the beneficiary will "[d]irect and coordinate all company activities to start a new business for the foreign entity, [h]ire and fire personnel, [and] make all company decisions." In an attached letter, the petitioner further described the beneficiary's job duties as follows:

1. Directing and coordinating activities of the organization to obtain optimum efficiency and economy of operations and maximizing profits.
2. Planning and developing organization policies and goals, and implements goals through subordinate administrative personnel
3. Coordinating activities of divisions or departments, such as operating, manufacturing, engineering, planning, sales, maintenance, or research and development, to effect operational efficiency and economy
4. Directing and coordinating promotion of the services performed by the company to develop new markets, increase share of market, and obtain competitive position in industry.

5. Analyzing division or department budget requests to identify areas in which reductions can be made, and allocated operating budget
6. Conferring with administrative personnel, and reviewing activity, operating and sales reports to determine changes in programs or operations required
7. Directing preparation of directives to division or department administrators outlining policy, program, or operations changes to be implemented
8. Promoting organization within the industry, manufacturing or trade associations
9. Planning, developing, and establishing policies and objectives, the business organization in accordance with Board directives and the corporate charter
10. Conferring with company officials to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments and to establish responsibilities and procedure for attaining objectives
11. Reviewing activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions.
12. Directing and coordinating formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity.
13. Planning and developing public relations policies designed to improve the company's image and relations with customers, employees, and the public
14. Evaluating performance of executives for compliance with established policies and objectives of the firm and contributions in attaining objectives

In a second attached letter, the petitioner provided that the beneficiary "will be hiring management and support personnel to support the business of the company."

On June 9, 2003, the director requested additional evidence. Specifically, the director requested: (1) a more comprehensive business plan for commencing the petitioner's start-up, indicating specific dates for each proposed action for the next two years; (2) evidence to show how the petitioner will grow to be of sufficient size to support a managerial or executive position, including a demonstration that the beneficiary will be sufficiently relieved from performing non-qualifying, day-to-day tasks; and (3) an indication of how many individuals the petitioner intends to hire during the next year, including their position titles and required educational qualifications.

In a response dated August 28, 2003, the petitioner submitted a business plan addressing the director's concerns. In pertinent part, the petitioner again stated that it will operate as a general store in which all items are priced under one dollar. The petitioner's business plan contains the results of market research and demographic studies for the region in which its store will be located. The petitioner stated that it intends to hire one full-time cashier, two part-time cashiers, and one part-time helper during its first year of operation. The petitioner described the duties of its proposed staff members as follows:

Employee Title	Requirements	Job Functions
Cashiers	<ul style="list-style-type: none"> - No degree required - Experience as a cashier preferred - Must be able to deal with customers in an amicable manner - English language required 	<ul style="list-style-type: none"> - Perform cash functions at register - Handle Phone calls, faxes and letters - Deal with customers in an amicable manner - Must be able to arrange and keep a clean store inventory in lieu of helper - Knowledgeable about customer returns function
Helper	<ul style="list-style-type: none"> - No degree required - No experience necessary - English language preferable 	<ul style="list-style-type: none"> - Keep the store clean - Arrangement of inward / outward inventory - Arrangement of items on shelves - Must be results oriented

The petitioner stated that the beneficiary "will be responsible for the entire . . . business function and his credentials and profile indicate that he is the key to governing the business."

On September 5, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity within one year. Specifically, the director stated "it does not appear that [the petitioner], which will be a dollar store and will employ roughly four non-professional, non-managerial individuals would realistically utilize the beneficiary as a veritable manager within one year's time" The director further stated that:

[The petitioner's] plan does not clearly identify potential professional subordinates to relieve the beneficiary of non-managerial duties. While the beneficiary apparently carries a multitude of managerial titles, this service is not convinced that an organization of your

proposed size and nature would require the beneficiary to perform primarily executive or managerial job duties. Rather, it appears that he would be engaged in the non-managerial, day-to-day operations involved in providing a service.

On appeal, counsel for the petitioner asserts that:

The law has been too narrowly applied to the facts in this case. The basic proposition reflected in the Denial is that a small business, in this case a start-up retail business with one manager and four non-professional employees, cannot sponsor an intra-company transferee because such a business doesn't really need a manager during start-up and will not need a manager after one year of operations. This proposition is clearly erroneous.

As noted above, counsel and the petitioner provide no additional evidence to support these assertions.

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.*

The job description submitted by the petitioner is vague and bears little relation to the petitioner's stated intention to open a dollar store. For example, the petitioner indicated that that beneficiary will be responsible for "[c]oordinating activities of divisions or departments, such as operating, manufacturing, engineering, planning, sales, maintenance, or research and development, to effect operational efficiency and economy." Yet, the petitioner has not indicated that its dollar store will be divided into separate departments, or that such an operation requires a "manufacturing," "engineering," or "research and development" division. The petitioner further stated that the beneficiary will "[promote the] organization within the industry, manufacturing or trade associations," yet it is unclear what manufacturing or trade associations are relevant to a dollar store. The petitioner provided that the beneficiary will be responsible for "[e]valuating performance of executives for compliance with established policies and objectives of the firm and contributions in attaining objectives," yet the petitioner has not indicated that it intends to hire executives, or that the beneficiary will have supervisory authority over employees other than cashiers and a helper. Thus, the beneficiary's job description contains assertions that are not relevant to the petitioner's business. As a result, the accuracy of the entire job description is in question. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Further, many of the beneficiary's stated duties are vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. 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 actual duties themselves reveal the true

nature of the employment. *Id.* The provided job description does not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

The petitioner states that the beneficiary will have supervisory authority over four employees, including three cashiers and a helper. 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 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 clearly states that the beneficiary's subordinates are not required to have any specific academic preparation. Thus, they are not professional employees as contemplated by section 101(a)(44)(A)(ii) of the Act.

The petitioner's prospective organizational chart reflects that none of the beneficiary's subordinates will have supervisory authority over other employees. Thus, they are not supervisory employees. *See* § 101(a)(44)(A)(ii) of the Act. Nor has the petitioner shown that any of the beneficiary's subordinates manage a clearly defined department or function of the petitioner, such that they could be classified as managers.

Based on the above, the petitioner has not shown that the beneficiary's subordinate employees will be supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel correctly observes that a company's size alone may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for 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). As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The petitioner intends to operate a dollar store. Thus, it is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive tasks such as placing orders for goods, answering questions about merchandise from customers, tracking the petitioner's inventory, stocking shelves, managing a checking account and paying bills, answering telephones, receiving deliveries, conducting sales transactions using a cash register, and providing custodial services. The petitioner has indicated that it intends to hire three cashiers and a helper to perform many of the above-referenced tasks. Yet, the evidence of record shows that, within one year, the petitioner will not utilize intermediate managers to supervise the cashiers and helper. Thus, as stated by the director, the beneficiary will act as a first-line supervisor to manage his subordinates. 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 reasonable needs of the petitioner clearly show that the beneficiary will spend a significant amount of time acting as a first-line supervisor. The petitioner has failed to establish that this non-managerial and non-executive role will not constitute the majority of the beneficiary's time. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity within one year, as required by 8 C.F.R. § 214.2(l)(3)(v)(C). For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it has secured sufficient physical premises to house its dollar store, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner submitted a copy of its lease for "virtual office" services, including mail-forwarding, telephone reception, and use of office space based on availability and an hourly rate. Thus, the petitioner has not submitted documentation to show that it has secured sufficient space to commence doing business as a retail dollar store. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.