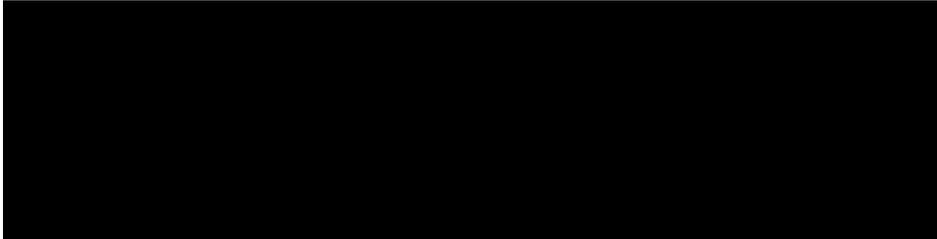




U.S. Citizenship
and Immigration
Services

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FILE: LIN 03 067 51558 Office: NEBRASKA SERVICE CENTER Date: FEB 23 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)

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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] endeavors to classify the beneficiary as a manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims to be a wholly owned subsidiary of [REDACTED] located in India and is engaged in the business of acquiring and operating restaurants and retail stores. The initial petition was approved for one year to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's managing director. The petitioner was incorporated in the State of Minneapolis in 2001 and claims to have two employees.

On April 10, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial 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, the petitioner's counsel claims that the beneficiary has been "primarily engaged in a managerial capacity with the petitioning business."

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(14)(3) state 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.

Further, pursuant to 8 C.F.R. § 214.2(l)(14)(ii), if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation requires:

A visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

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

On December 24, 2002, the petitioner filed the Form I-129. The petitioner described the beneficiary's proposed U.S. duties as "oversee[ing] acquisition and management of restaurants and retail stores, oversee[ing] management of all business operations including financial operations, marketing and sales operations, hiring and oversight of management."

Additionally, the petitioner submitted a December 12, 2002 supporting letter further describing the beneficiary's proposed U.S. duties as:

Oversees management of [REDACTED], a restaurant specializing in Mexican food and [REDACTED] Market, a retail convenience store. Directing and overseeing financial operations, purchasing of inventory items as well as marketing and sales efforts. . . . [R]esponsible for purchasing construction materials to export to affiliate companies. . . . [R]esponsible for the hiring of all management personnel for each business operation and will have discretionary authority over all business operations.

[The Beneficiary] has engaged in the management of essential functions. He has spent the majority of his time negotiating the agreements to purchase restaurants and retail stores; leases for commercial property; and overseeing start up operations for the existing businesses. [The petitioner] currently employs 2 individuals at [the Mexican restaurant] and 3 individuals at the [convenience store]. [The] [b]eneficiary has hired a [m]anager to manage [the convenience store]. Currently, [the] beneficiary is involved in managing the day-today operations of [the Mexican restaurant].

On January 27, 2003, the director requested additional evidence such as a description of the beneficiary's duties performed for the previous year and the duties the beneficiary will perform under the extended petition, a description of the U.S. entity's staff, a detailed description of the employees' duties, and evidence of the wages paid to the employees.

In a February 26, 2003 letter, the petitioner responded to the director's request for additional evidence by reiterating the beneficiary's proposed U.S. duties and stated that "[the] [b]eneficiary will be responsible for identifying business opportunities, negotiating the purchase of businesses and entering into leases or subleases for the premises. Each business will employ three

individuals including a [m]anager.” In addition, the petitioner claimed that it currently employs four employees, two individuals at the restaurant and two individuals at the convenience store. The petitioner stated that the beneficiary currently is involved in “managing the day-to-day operations of the restaurant.” Finally, the petitioner claimed that “as the business further expands [the beneficiary] will hire and oversee the work of a [m]anager who will be responsible for managing the restaurant.”

On April 10, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The director found that 1) the beneficiary will be performing as a first line supervisor rather than in an executive or managerial capacity; 2) the beneficiary will not supervise subordinates that are managerial, supervisory, or professional; and, 3) the beneficiary will perform the day-to-day duties relative to the operation of the restaurant and convenience store.

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, the petitioner’s counsel claims that the beneficiary has been “primarily engaged in a managerial capacity with the petitioning business.” Counsel claims: 1) the supervisory and hands-on functions of the restaurant are performed by two employees; 2) the beneficiary oversees a manager at the convenience store and a supervisor of the restaurant; and, 3) the beneficiary has performed some of the day-to day duties in the start-up operation of the restaurant, however, never at the convenience store, and it currently has two employees performing the day-to-day duties at the restaurant.

The AAO notes that the petitioner claims in its response to the director’s request for additional evidence that the beneficiary “has been working in an executive/managerial capacity.” However, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.¹

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner’s description of job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). On review, the petitioner has not established that the beneficiary has been and will be employed in a primarily executive or

¹ The AAO notes an inconsistency in the record concerning the beneficiary’s duties. The December 12, 2002 letter refers to the beneficiary as “an intra-company executive” whereas on appeal, counsel claims that the beneficiary “has indeed been primarily engaged in a managerial capacity with the petitioning business.” 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).

managerial capacity. The petitioner's descriptions of the beneficiary's proposed U.S. duties are general. For example, the petitioner described the beneficiary's duties as "oversee[ing] acquisition and management of restaurants and retail stores" and "directing and overseeing financial operations." However, the petitioner fails to specify how the beneficiary will oversee the company's businesses or finances. 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). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner described the beneficiary as being involved in "purchasing of inventory items as well as marketing and sales efforts." Since the beneficiary is actually engaged in marketing and sales efforts, it appears that he will be providing the services of the business rather than directing such activities. 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).

Moreover, the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The petitioner stated that the beneficiary "has engaged in the management of essential functions. He has spent the majority of his time negotiating the agreements to purchase restaurants and retail stores; leases for commercial property; and overseeing start up operations for the existing businesses." If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Here, the petitioner has failed to provide a detailed description specifying the duties that the beneficiary primarily performs for the U.S. entity. As previously stated 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. at 593, 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's 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. The petitioner claimed that the beneficiary is responsible for the "oversight of management" and "manage[s] the day-to-day operations of the restaurant." The petitioner

claimed that it employed four workers.² These workers included two employees at the restaurant and two employees at the convenience store. Although specifically requested by the director, the petitioner failed to provide a detailed description of the claimed subordinate employees' duties. Without such specifics, it is difficult to determine whether these employees actually perform the nonmanagerial or nonexecutive tasks of the business. Based upon the petitioner's description of the beneficiary's duties for the U.S. entity, the beneficiary appears to be acting as a first-line supervisor as the beneficiary currently is involved in "managing the day-to-day operations of the restaurant." 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).

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 matter, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the convenience store manager's duties or restaurant employees' duties, which are among the beneficiary's subordinates.

Finally, the petitioner claims that "as the business further expands [the beneficiary] will hire and oversee the work of a [m]anager who will be responsible for managing the restaurant." However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

After careful consideration of the evidence, the AAO concludes that the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

² The Form I-129 indicates that the petitioner has two 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). 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).

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 appeal will be dismissed.

ORDER: The appeal is dismissed.