

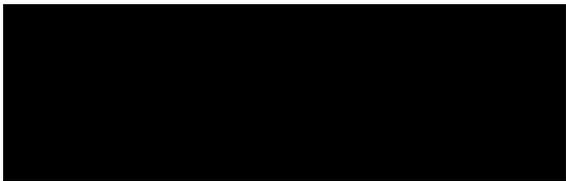
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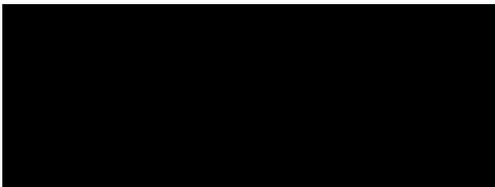
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FILE: WAC 03 186 54009 Office: CALIFORNIA SERVICE CENTER Date: JUL 29 2005

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, Director
Administrative Appeals Office

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

According to the documentary evidence contained in the record, the petitioner was incorporated October 15, 2002, and claims to be a weight control clinic. The petitioner claims to be a subsidiary of the medical office of [REDACTED], located in Uruguay. The petitioner seeks to employ the beneficiary temporarily in the United States as the director of services of its new office for a period of one year, at an annual salary of \$34,000.00. The director determined that the petitioner had submitted insufficient evidence to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity or that the U.S. entity will be able to support such a position within one year of operation.

On appeal, counsel disagrees with the director's decision and asserts the evidence submitted is sufficient to establish that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity, and that the entity will be able to support a managerial or executive position within one year of operation.

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)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary 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 (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.

The regulation at 8 C.F.R. § 214.2(1)(3)(v) states that 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 (I)(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 this proceeding is whether the evidence submitted is sufficient to demonstrate that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity, and whether the entity will be able to support such a position within one year of operation.

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.

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The petitioner initially stated that the beneficiary would be responsible for the performance of weight control technicians. In the letter of support, the petitioner described the beneficiary's proposed duties at the U.S. entity as:

[The beneficiary] will plan, develop and supervise our weight control programs. He will direct and coordinate the formulation of dietary plans developed for each individual client. He will evaluate the performance of managerial personnel under his command for compliance with company policies.

The petitioner submitted a proposed organizational chart that depicted the U.S. entity's hierarchy. The chart demonstrated a clinical records administrator, records clerks, a technician supervisor, and weight control technicians all to be under the direction of a services administrator.

The director determined that insufficient evidence had been submitted to establish the beneficiary's eligibility, and subsequently requested the petitioner submit a copy of the U.S. entity's organizational chart to demonstrate the proposed employees under the beneficiary's supervision. The director further stated that the list of employees should include their job titles, job duties, education level, and annual salaries/wages. The director also requested the petitioner submit the U.S. entity's most recent DE-6 and Form 1120, U.S. Corporate Income Tax Return, to demonstrate that the U.S. entity had employees.

In response to the director's request for evidence, counsel stated that the U.S. organization had been functioning in a "skeletal" mode, and thus, the petitioner was only able to submit a proposed organizational chart. Counsel also stated that the Form DE-6 submitted by the petitioner further evidenced that the organization functioned in a "skeletal" mode. Counsel further stated the U.S. entity's organizational chart showed that the company would be able to support a managerial or executive position within one year of operation. The petitioner submitted an addendum to the U.S. entity's organizational chart, which listed the proposed staffing positions and position descriptions of subordinates who would be under the direction of the beneficiary. The list read in part:

Clinical Records Administrator: Supervises employees engaged in the maintenance of client's records, weight charts, diet plans and modifications, medical history, etc. Develops methods for record maintenance and retrieval of paper and computer records for all Center's clients and activities. This position requires a Bachelor's degree in Records Administration or five years records experience with a weight management clinic, plus fluency in oral and written Spanish as our services will be geared principally to the Hispanic community. Salary offered is \$28,000/annum.

* * *

Technician Supervisor: Supervises employees engaged in measuring body fat, weighing in the clients at each visit, giving weight control advice, reviewing nutritional plans with clients, suggesting alternative menus for maximum benefits and monitoring weight loss progress. This position requires a minimum of 3 years prior experience. The wage that will be offered is \$18,000/yr.

The director subsequently denied the petition noting that there was no evidence to show that the beneficiary would exercise significant authority over generalized policy. The director further noted that although the U.S. entity's organizational chart indicated that the beneficiary would supervise a clinical records administrator, record clerks, and technician supervisor, this evidence was insufficient to establish that the U.S. entity contained the organizational complexity to support a managerial or executive position. The director also noted that the evidence submitted was insufficient to establish that the beneficiary would be supervising supervisory, professional, or managerial employees.

On appeal, counsel argues that the beneficiary's title is that of "services administrator" not "general manager." Counsel further asserts that the beneficiary will direct or supervise two divisions within the organization, each having a first line supervisor and several subordinates. Counsel further argues that the

clinical records administrator position is both professional and supervisory, and that the technician supervisor position is also that of a first line supervisor. Counsel also argues that the petition, Form I-129B, the letters of support, the organizational chart, and the response to the director's request for evidence all specify that the beneficiary will plan, develop, and supervise the weight control programs, will direct and coordinate the formulation of dietary plans, and will evaluate the management personnel's performance under his direction. Counsel contends that the beneficiary will supervise the work of other supervisors and professional employees, and that he will manage and direct a function or component of the organization. Counsel also contends that the beneficiary will function at a senior level within the organization or with respect to the function he is to manage, that he will exercise discretion over the day-to-day operations of the business or function, and that he will be supervising an employee who holds a professional level position. Counsel continues by reiterating the regulatory and statutory definitions of "executive" in describing the beneficiary's proposed duties. Finally, counsel claims that the petitioner has submitted ample evidence to demonstrate that the U.S. entity will have the organizational complexity to support an executive or manager within one year of operation

On appeal, counsel expanded the beneficiary's proposed job duties to include:

- Manages a department within the corporation, supervises and controls the work of other supervisors and evaluates the work of subordinate staff allowing him to recommend promotions, demotions, firing or adding personnel as needed [;]
- Works closely with the company's executive team in defining organizational strategy and carrying out the company's vision, mission and objectives. Provides collaborative leadership and works with company managers to develop and retain highly competent, service-oriented staff [;]
- Works in conjunction with the company's President to develop the company's growth and financial objectives. At the same time he works with subordinate personnel to insure that all employees meet company standards and in removing those who do not meet those standards [;]
- Supervises the activities of the department supervisors to ensure that everyone follows the policies and strategies which he, as Service Administrator has established [;]
- Takes a lead role in all budgeting activities for his department, and is specifically responsible for financial profit and loss of his department [;]
- Establishes goals for the department under his command [; and]
- Takes an oversight role in the department's structure.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. The petitioner claims that the U.S. entity is a newly established weight control clinic. 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(1)(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. In this matter, the petitioner's evidence demonstrates that the U.S. entity intends to hire employees who will be employed as service administrator, clinical records administrator, records clerk, technician supervisor, and weight control technician. Counsel states that the beneficiary will be the services administrator and will direct and supervise the work of the clinical records administrator and weight control technician. Contrary to counsel's contentions, there is insufficient evidence to show that the proposed positions will be filled by the U.S. entity within the first year of its operation or that the employees hired to fill the positions will perform in a supervisory, professional, or managerial capacity. See section 101(a)(44)(A)(ii) of the Act. 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. Because the beneficiary will be primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

In evaluating whether the beneficiary will be managing 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 the 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. Counsel has stated that the clinical records administrator's position requires a bachelor's degree or five years experience in the field. The petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the administrative work of the clinical records administrator, who is among the beneficiary's subordinates.

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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. In the instant matter, although the petitioner claims that the beneficiary will perform managerial and executive duties, it has failed to demonstrate how much of the beneficiary's time will be devoted to each.

The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will be doing on a day-to-day basis. For example, the petitioner states that the beneficiary's duties will include establishing goals and policies, and exercising discretion over the day-to-day activities of the organization. The petitioner did not, however, define the beneficiary's goals and policies, or clarify how he will exercise discretion over the day-to-day activities. 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 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).

Rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as directing the operation of the organization, establishing goals and policies of the organization, and exercising sole discretionary decision making. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd.* at 1108; *Ayvr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

On appeal, counsel claims the beneficiary will manage and direct a function or component of the organization, in that he will plan, develop, and supervise weight control programs, direct and coordinate the formulation of the dietary plans, and evaluate the performance of managerial personnel under his direction. Contrary to counsel's claims, the evidence of record is insufficient to establish that the beneficiary will be managing a function or component of the organization rather than performing the duties of the function. 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). 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. There has been insufficient evidence submitted to establish that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, a related issue is whether the petitioner has established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity for one continuous year within three years preceding the filing of the petition. Although the petitioner stated that the beneficiary had worked for the foreign entity for the past two years in the capacity of director of services, in that he directed and supervised, through subordinate personnel, the functions of the nursing staff and weight management technicians, there is nothing in the record to substantiate this claim. Further, there is nothing in the record to show how the foreign entity will continue to function in the absence of the beneficiary for an extended period. For these additional reasons, the petition may not be approved.

Beyond the decision of the director, the petitioner's description of the stock distribution of the companies does not meet exactly the definitions constituting a qualifying relationship between the United States and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner stated in the petition that [REDACTED] owned 60 percent and [REDACTED] owned 40 percent of the stock in the U.S. entity. The petitioner submitted as evidence one stock certificate made out to [REDACTED] as holder of sixty thousand shares of U.S. entity stock and a blank stock ledger. There is no documentary evidence in the record to demonstrate who owns the foreign entity. For this additional reason, the petition may not be approved.

Beyond the decision of the director, another issue is whether the petitioner has secured sufficient physical premises to house the new office pursuant to 8 C.F.R. § 214.2(1)(3)(v)(A). The petitioner submitted a commercial lease agreement that does not contain the name of the lessor, does not specify the duration of the lease, and does not contain the signature of the lessee. For this additional reason, the petition may not be approved.

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 sustained that burden.

ORDER: The appeal is dismissed.