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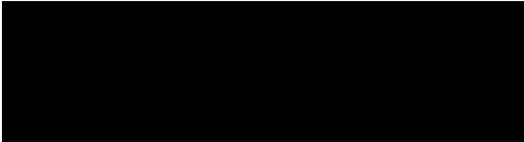


FILE: EAC 02 232 54203 Office: VERMONT SERVICE CENTER Date: JUN 10 2005

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, Vermont 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 subsidiary of Sumit Gems, located in India and is engaged in the business of importing, distributing, and selling of gems. It seeks to extend the petition's validity and the beneficiary's stay for two years as the U.S. entity's vice president of sales. The petitioner was incorporated in the State of New York in 1998 and claims to have six employees.

On January 22, 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.

On appeal, the petitioner's counsel submits a brief and claims in an attachment to the Form I-290B that the beneficiary "has acted and will act as an executive" and "supervises important managerial personnel." Counsel also states that the director's decision is arbitrary, capricious, and contrary to the weight of the evidence. Counsel claims that the director failed to take into account the reasonable needs of the organization and based his decision on the number of employees that the beneficiary supervises and the size and nature of the operation.

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)(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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(i), if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation requires that, "the petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required,

unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.” *Id.*

The issue in this proceeding is whether the beneficiary 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.

In a June 24, 2002 letter submitted with the Form I-129, the petitioner described the beneficiary’s proposed U.S. duties as:

1. Direct and administer the sales and marketing operations of the U.S. subsidiary and coordinate the same with the parent company;
2. Hire and discharge employees to enforce the established corporate policies and objectives;
3. Develop and implement sales/marketing plans and policies. Create, devise, develop, and execute enhanced policies and strategies for domestic and international clients and customers;
4. Conduct research studies using primary [and] secondary data sources to determine market potential in the United-States. Implement sales and marketing programs for new diamond and jewelry items. Implement plans for long term growth, goals and objectives;
5. Compile [and] prepare periodic sales reports using spreadsheets, tables, graphs, charts showing sales volumes and potential sales, and report the results to Managing Director;
6. Devise, develop, manage, and supervise advertising, publicity, and direct mail programs and campaigns. Supervise the creation and production of brochures, proposals, and other promotional materials;
7. Determine the demands for our products and study the marketing strategies of our competitors using tools such as the Internet, trade magazines, periodicals, industry reports, and publications;
8. Conduct customer service surveys to determine market trends in the United States. Analyze and develop a pricing strategy to enable us to compete in the industry, as well as increase our market share;
9. Plan, select and attend nationwide trade shows. Represent [the petitioner] at these professional fairs and participate in specific industry-related events[;]
10. Develop and implement long term growth plans, set and enforce compliance with corporate policies, goals, objectives, and legal requirements.

In addition, the petitioner claimed that the beneficiary “has been vested with wide discretionary power with respect to handling day-to-day decision making and hiring, training, retaining and discharging support staff. . . . [In addition, he] has been engaged in directing the business operations of the petitioner . . . and will be responsible for overseeing its sales operations and managing administrative operations.”

The petitioner also stated that the beneficiary “clearly manages an essential function of the company, to wit, the import and marketing of diamonds as well as precious and semi-precious stones. It must be emphasized that the beneficiary does not directly perform the function” (emphasis omitted).

Finally, the petitioner claimed that the beneficiary directly supervises four employees who include the sales and purchasing supervisor, the head of the assortment department, and two administrative personnel employees. The subordinate employees duties are described as: “The Sales and Purchase supervisor is responsible for diamond inventory controls and diamond sales and purchase and other requisitions. The head of assortment department is responsible for assortment’s management[,] and the administrative personnel handle bookkeeping and other administrative tasks.” The petitioner also claimed that it hires additional part-time employees on an as needed basis.

In a request for additional evidence, dated August 28, 2002, the director requested: 1) a comprehensive description of the beneficiary’s duties indicating how the beneficiary’s duties have been or will be managerial or executive in nature; and, 2) a complete description of the U.S. employees including the number of hours devoted to each of the employees job duties on a weekly basis.

In response to the request for additional evidence, the petitioner submitted a November 19, 2002 letter describing the beneficiary’s and subordinate employees’ U.S. duties:

[The beneficiary] performs the following strictly executive/managerial level duties: He personally directs, administers and oversees the entire sales and marketing operations of the company; analyzes, develops, implements and evaluates sales and marketing plans and policies; analyzes and conducts sales and marketing studies; determines the demand for the [petitioner’s] diamond products in the overall marketplace, both in the U.S. and abroad; analyzes and studies the marketing strategies of [the petitioner’s] competitors and makes recommendations to the [p]resident with a view towards increasing sales and revenues; analyzes and develops pricing strategies to enable [the petitioner] to compete in the industry as well as to increase its market share; analyzes, develops and implements plans and strategies designed to increase long term growth and increase sales/revenues.

\* \* \*

[N]inety [percent] of [the beneficiary’s] work time consists of the following executive/managerial activities:

- a. Handles executive/management level functions such as directing the marketing operations, logistics, capital budgeting, hiring and supervision of subordinate managerial personnel.

- b. Oversees the management of the administrative operations of [the petitioner] including the handling of personnel and general administrative affairs and coordinates the same with the parent entity in India to ensure efficiency and maintain quality control.
- c. Analyzes, develops and implements corporate policies, goals and objectives, designed and intended to increase and enhance sales and revenues.
- d. Analyzes, coordinates and implements all marketing and strategic growth planning with managerial and supervisory personnel and parent company executives abroad.
- e. Oversees the maintenance of sales records and inventory purchasing as well as formulation of corporate policies regarding the same.
- f. Establishes overall quality control guidelines and procedures which are critical to the diamond industry.
- g. Directs the examination and identification of product lines for potential purchase, sale and distribution.
- h. Analyzes, devises and implements innovative policies, procedures and strategies designed to increase efficiency and profitability for the company.
- i. Hires, supervises and oversees assistant managers and subordinates. Delegates responsibilities to his subordinates and consults with them on a regular basis.

Additionally, the petitioner further described the beneficiary's subordinate employees' duties. The petitioner claimed in part that: 1) the sales and purchasing supervisor "supervises sales associates and representatives who are directly involved in selling [the petitioner's] lines of diamonds" (emphasis omitted); 2) the head of the assortment department is involved in assorting various diamonds; 3) the administrative personnel handle the day-to-day administrative office operations; 4) the systems accountant is a new position that had been recently initiated to oversee accounting and systems operations; and, 5) the other personnel who include assorters, sales, and independent contract employees whom the petitioner claims the beneficiary does not directly supervise but consults with lower level supervisors concerning the need for these additional employees.

On January 22, 2003, the director denied the petition concluding that 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) it appeared that there are no salespersons employed or others to provide the services to the company's customers; 2) one of the most recent Form 941's Quarterly Tax Return appears to indicate that only two employees are compensated at

a rate that would indicate full-time employment; 3) the beneficiary is involved in the day-to-day operations of the business providing sales services to the organization's clients; and, 4) the petitioner has not shown that the beneficiary will be involved in the supervision and control of the work of other supervisory, professional, or managerial employees.

On appeal, the petitioner's counsel submits a brief and claims in an attachment to the Form I-290B that the beneficiary is "definitely not a first-line supervisor and has acted and will act as an executive" and "supervises important managerial personnel." Counsel also states that the director's decision is arbitrary, capricious, and contrary to the weight of the evidence. Counsel claims that the director failed to take into account the reasonable needs of the organization and based his decision on the number of employees that the beneficiary supervises and the size and nature of the operation. Counsel further claimed that the beneficiary has been and will continue to supervise four employees.

The AAO notes that the petitioner claims that 90 percent of the beneficiary's work time consists of "executive/managerial activities." 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.

In 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). On review, the petitioner has failed to establish that the beneficiary has been and will be employed in a primarily managerial or executive capacity. In the instant matter, the petitioner has provided a broad description of the beneficiary's duties that appear to indicate that the beneficiary performs the daily activities of the business. For example, the petitioner stated that the beneficiary's duties include "[a]nalyz[ing], develop[ing] and implement[ing] corporate policies, goals and objectives, designed and intended to increase and enhance sales and revenues," "develop[ing] and implement[ing] sales/marketing plans and policies," and "analyz[ing] and develop[ing] pricing strategies." The petitioner also claimed that the beneficiary will be involved in "direct[ing], administer[ing] and oversees[ing] the entire sales and marketing operations of the company." However, the petitioner's description of the beneficiary's duties is contradictory because it is unclear whether the beneficiary primarily develops and implements the sales and marketing plans or directs the sales and marketing operations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, 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, in the June 24, 2002 letter submitted with the Form I-129, the petitioner stated that the beneficiary is "vested with wide discretionary power with respect to handling day-to-day decision making." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely

repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

In addition, the petitioner described the beneficiary as being involved in developing and implementing plans and strategies designed to increase long-term growth and increase sales and revenues. Since the beneficiary is actually involved in the development and implementation of plans to increase sales and revenues, he will be providing the services of the business rather than directing such activities. Although the petitioner claimed that the beneficiary will oversee a sales and purchase supervisor who is responsible for diamond sales and purchases, the AAO is not persuaded that the beneficiary will only direct or manage the sales 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).

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. On appeal, counsel claims that the beneficiary has been and will continue to supervise four employees that are "important managerial personnel." The petitioner claimed that the beneficiary directly supervises four employees who include the sales and purchasing supervisor, the head of the assortment department, and two administrative personnel employees. The petitioner also indicated that the beneficiary indirectly supervises "as needed other personnel." However, it is unclear as to whom these "important managerial personnel" actually managed or supervised as there is no evidence to establish that the petitioner actually employed these "as needed personnel." The AAO also concurs with the director's findings that the most recent Form 941's, Quarterly Tax Return appears to indicate: "only two employees are compensated at a rate that would indicate full-time employment, with one of them being the beneficiary" and the other being Mr. [REDACTED], the president/managing director at the time (EAC-02-041-54988). In addition, if the four subordinate employees are managerial personnel this raises the question of who would be performing the lower-level nonmanagerial or nonexecutive duties of the company. 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 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. In the instant matter, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the bookkeeping duties and administrative work of the administrative personnel, whom are among the beneficiary's subordinates.

The AAO notes that the petitioner also claimed that the petitioner hires, as needed, other personnel including: "assorters, sales, and independent" contract employees whom the petitioner claims the beneficiary "does not directly supervise" but consults with lower-level supervisors concerning the need for these additional employees. Although the petitioner claims to have contractual employees, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. The petitioner submitted its 2001 U.S. Income Tax Return for an S Corporation indicating that there was no cost of labor for these employees. Therefore, if the company, as it claims, uses independent contractors then why doesn't the tax return reflect the cost of the labor for these independent contractors? Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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 "clearly manages an essential function of the company, to wit, the import and marketing of diamonds as well as precious and semi-precious stones. It must be emphasized that the beneficiary does not directly perform the function" (emphasis omitted). 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. 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.

Moreover, counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, 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). The size of a company may be especially

relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

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

Beyond the decision of the director, the petition also may not be approved because there is insufficient evidence of a qualifying relationship between the petitioner and the Indian entity. The petitioner claims that it is a wholly-owned subsidiary of the foreign entity. The petitioner submitted a copy of a U.S. Income Tax Return for an S Corporation (Form 1120S). To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See Internal Revenue Code, § 1361(b)(1999)*. A corporation is not eligible to elect S corporation status if a foreign corporation owns it in any part. Accordingly, since the petitioner would not be eligible to elect S corporation status with a foreign parent corporation as a shareholder, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved.

Further, in the course of examining whether a petitioning company has been doing business as an import and export firm, it is reasonable to request that the company produce copies of documents that are required in the daily operation of the enterprise due to routine regulatory oversight. Upon the importation of goods into the United States, the Customs Form 7501, Entry Summary, serves to classify the goods under the Harmonized Tariff Schedules of the United States and to ascertain customs duties and taxes. The Customs Form 301, Customs Bond, serves to secure the payment of import duties and taxes upon entry of the goods into the United States. According to 19 C.F.R. § 144.12, the Customs Form 7501 shall show the value, classification, and rate of duty for the imported goods as approved by the port director at the time the entry summary is filed. The regulation at 19 C.F.R. § 144.13 states that the Customs Form 301 will be filed in the amount required by the port director to support the entry documentation. Although customs brokers or agents are frequently utilized in the import process, the ultimate consignee should have access to these forms since they are liable for all import duties and taxes. Any company that is doing business through the regular, systematic, and continuous provision of goods through importation may reasonably be expected to submit copies of these forms to show that they are doing business as an import firm. In this matter, the petitioner failed to comply with the director's request for documentation from the United States Customs Service. Although the petitioner submitted copies of the invoices from the two claimed customs brokers, the petitioner failed to comply with the director's request. Again, 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. at 190.

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 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 appeal will be dismissed.

**ORDER:** The appeal is dismissed.