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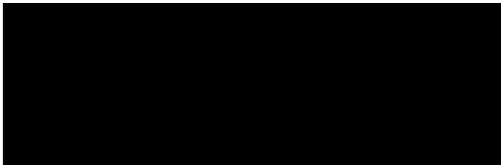
FILE: EAC 03 028 54916 Office: VERMONT SERVICE CENTER Date: JUN 14 2005

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner endeavors to classify the beneficiary as a nonimmigrant 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 is a wholly-owned subsidiary of [REDACTED] located in the United Arab Emirates. The petitioner is engaged in the import and export of used spare auto parts. The initial petition was approved 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 president. The petitioner was incorporated in the State of New Jersey on March 22, 1999 and claims to have four employees.

On February 7, 2003, the director denied the petition because the petitioner had not established that the beneficiary has been and will be primarily performing duties in an executive or managerial capacity.

On appeal, the petitioner's counsel states that the director did not consider the nature of the petitioner's business and failed to recognize that the beneficiary "manages an essential function of the organization." Counsel submits a brief and additional evidence in support of appeal.

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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act 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 (1)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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 petitioner will employ the beneficiary in a primarily managerial or executive capacity.

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 November 5, 2002, the petitioner filed Form I-129. The petitioner stated that the beneficiary's "duties as President include day-to-day management of the operations, sourcing new products, coordinating purchase, resale, and shipping of product." In addition, the petitioner further described the beneficiary's U.S. duties in an October 21, 2002 letter as "establishing other relationships with other related business entities and institutions in the [U.S.], and entering into purchase and sale contracts in the [U.S.] for products to export, as well as shipping contracts and warehousing contracts in order to expand the business." The petitioner also stated that the beneficiary is an "executive" and listed the beneficiary's duties and responsibilities as:

- Coordinating the day-to-day operations of the business enterprise and expanding it[s] facilities and operations.
- Managing the day-to-day operations of the business: identifying and acquiring new facilities for the operation of the business; sourcing new suppliers of product.
- Ensuring adequate capitalization of the corporation, including availability of adequate working capital funds; staffing and managing the personnel of the corporation.
- Entering into purchase and sale contracts for the business, as well as shipping and warehousing contracts.
- Continuing to coordinate with [the foreign entity], the parent company, with respect to its supply needs and its market demands.
- Sourcing outside consultants for legal and financial advice and preparation of appropriate documentation.

On November 13, 2002, the director requested additional evidence. In particular, the director requested a description of the beneficiary's proposed duties, the number of hours devoted to each duty, a description of the U.S. entity's staffing, and a description of the employees' duties.

In response, the petitioner submitted the U.S. entity's organizational chart showing the beneficiary as president, an independent consultant legal advisor, a human resources/office administrator, an operations manager, a yard manager, and an independent consultant accountant. The petitioner also submitted a description of the administrator's duties and brief descriptions of the yard and operations managers' duties. The petitioner submitted evidence of wages paid for "labor" and the petitioner's New Jersey Form WR-30, Employer Report of Wages paid, for the first quarter of 2002. This employee is not reported on the petitioner's Form WR-30 for the third quarter of 2002, which lists only the beneficiary. The petitioner also submitted an offer letter addressed to the "yard manager" which is dated December 15, 2002. The record contains no evidence of payments to the "operations manager," who was identified as "recently hired" in the petitioner's letter of January 21, 2003. Additionally, the petitioner described the number of hours the beneficiary devotes to each of the beneficiary's U.S. duties:

- 10-12 hours each week are devoted to developing the yard on the leased real property in New Jersey;
- 15-20 hours per week are devoted to managing administrators, managers and consultants;
- 4-5 hours per week are devoted to coordinating with the parent company with respect to developments in the U.S. market and the parent company's markets, customer bases and short and long term plans for development of the U.S. business;
- 4-5 hours per week are devoted to managing the financial affairs of the company;
- 10-12 hours per week are devoted to developing new customer bases, sourcing new suppliers for product needs of overseas customers and developing new product lines in demand by overseas customers; and
- 10-15 hours per week are devoted to developing and evaluating the logistics for transportation, shipment and handling of product to New Jersey and then for export out of the USA, however, these tasks are in the process of being transferred to the recently hired operations manager.

On February 21, 2003, the director denied the petition because the petitioner had not established that the beneficiary will be primarily employed in a managerial or executive capacity. The director found that there was an insufficient staff to relieve the beneficiary from performing non-qualifying managerial or executive duties.

On appeal, counsel claims that the beneficiary manages an essential function of the organization and that the director failed to consider the reasonable needs of the U.S. entity's business.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the AAO will look to the description of the beneficiary's U.S. job duties to determine whether the beneficiary is primarily acting in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to establish what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "[c]oordinating the day-to-day operations of the business enterprise," "developing the yard on the leased property," "expanding its facilities and operations," and "sourcing new products." However, these duties are generalities that fail to explain what specific tasks the beneficiary will perform in order to expand the entity's facilities or source new products. Without additional explanation, the AAO cannot conclude that these duties are managerial or executive. 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).

Further, the petitioner claims that the beneficiary's U.S. duties include tasks such as "establishing other relationships with other related business entities and institutions," "entering into purchase and sale contracts," "developing new customer bases," "sourcing new suppliers for product needs of overseas customers," and "developing new product lines." However, the record does not indicate who actually performs these marketing related tasks and develops relationships. Since the beneficiary develops new product lines and a customer base for the U.S. entity then the beneficiary is performing the operational marketing tasks of the business. 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). Similarly, the petitioner indicated that the beneficiary devoted ten to fifteen hours per week to performing tasks related to transportation, shipment, and handling of products. Although the petitioner claimed that these operational duties would soon be transferred to another employee, 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).

Counsel also claims that the beneficiary fits the definition of a function manager and "manages an essential function within the organization specifically the marketing function." However, the AAO is not persuaded that the beneficiary's described duties establish that the beneficiary has managerial control and authority over a function of the company. 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. In the instant matter, the petitioner claims the beneficiary's vital function is "marketing." The petitioner also claims that because the beneficiary "exercises wide latitude in discretionary decision making as to day to day operations of the business development of the corporation" and is "solely responsible for the formulation of the company's development goals and strategies," he manages an essential function of the company. However, to allow the broad application of the term "essential function" to include such broad claims, without identifying specifics, would render the term meaningless. In addition, the description of the beneficiary's duties indicates that the beneficiary performs the actual function rather than manages the function, as he is the only employee tasked with performing any marketing duties.

Moreover, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel. The petitioner claims that the beneficiary spends "15-20 hours per week . . . managing administrators, managers, and consultants." 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 U.S. organizational chart indicates that the beneficiary's subordinates include an operations manager, a yard manager, an office administrator, and two independent consultants. However, although the petitioner claims that these employees are managers, these employees have no subordinates to manage, nor is there any evidence that any employee could be considered a function manager.

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 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 a bachelor's degree is actually necessary, for example, to perform the administrative work of the office administrator or operations manager, who are among the beneficiary's subordinates.

The AAO notes that although the petitioner claims that it employs three full-time employees and two independent contractors, including an attorney based in the United Arab Emirates. The 2001 U.S. Corporation Income Tax Return Form 1120 indicates that the petitioner paid \$3,500 in

salaries and wages and no costs of labor for independent contractors. On review of the documents submitted, it is evident that the yard manager and operations manager were hired after the petition was submitted in November 2002. The petitioner submitted an offer letter to the yard manager dated December 15, 2002. The record does not contain evidence that the petitioner employed the claimed operations manager prior to filing the petition, and the petitioner indicated that he was "recently hired" as of January 2003. Although the petitioner claims that it has two contractual employees in the area of accounting and legal services, the petitioner has not presented sufficient evidence to document the existence of these employees nor specifically 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. 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 claimed that the beneficiary plans to "hire additional persons to source products throughout the U.S. for purchase and export." The petitioner also submitted a projected future U.S. organizational chart showing a more complex organizational structure. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. Again, 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).

Moreover, counsel claims that CIS used staffing levels as a factor in its determination and failed to take into account the reasonable needs of the organization. Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. 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.

At the time of filing for the extension, the petitioner was a three-year old import and export company that claimed to have a gross annual income of \$500,000. As of November 2002, the firm employed the beneficiary as president, an office administrator, an operation manager, a yard manager, and two independent consultants. The AAO notes that most of the employees have managerial or executive titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president, an office administrator, and two independent consultants. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Finally, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. At the time of filing, the petitioner had not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. After careful consideration of the evidence, the AAO concludes that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that it maintains a qualifying relationship with the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner claims to be a wholly-owned subsidiary of the foreign entity and submitted a stock certificate and its stock transfer ledger indicating that the foreign entity was the U.S. company's sole stockholder at the time the company was established. However, the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2001 indicates that the beneficiary owns 100 percent of the petitioner's stock. This conflicting information has not been resolved. 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). In addition, the petitioner has not established that the foreign entity continues to do business as defined at 8 C.F.R. § 214.2(l)(1)(ii)(H). Therefore, the petitioner has not established that the U.S. company and foreign entity are still qualifying organizations as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). For this additional reason, the petitioner may not be approved.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted invoices suggesting that it has been selling its goods on a regular basis. The earliest invoice documenting the sale of the petitioner's goods dates back to September 2002. However, the petition was approved in January 2002 of that year. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. The petitioner also appears to have been operating its business from its home office in an apartment. In the instant matter, there is insufficient evidence that the petitioner was doing business from January through September of 2002. For this additional reason, the petition may not be approved.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.

