

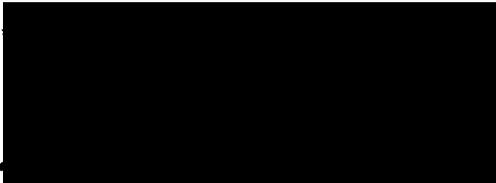
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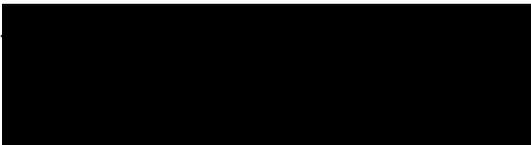
JUN 14 2005

FILE: EAC 03 093 53014 Office: VERMONT SERVICE CENTER Date:

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.


for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner [REDACTED] claims to be an affiliate of Assage Corporation, located in Russia. The U.S. entity was incorporated in the State of New York in 1997 and is engaged in the distribution of refrigerating, heating, industrial furniture, and food processing equipment business. Accordingly, on February 3, 2003, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for three years. The petitioner seeks to employ the beneficiary as the U.S. entity's managing director at a yearly salary of \$65,000. The petitioner claims to have four employees.

On May 8, 2003, the director denied the petition. The director determined that the petitioner had not established that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, the petitioner's counsel disputes the director's decision and claims that the beneficiary qualifies as "both a supervisory manager and as a functional manager." Counsel submits a brief and additional evidence in support of the 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.

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.
- (iii) evidence that the alien's prior year of employment abroad 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.

- (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 issue in this proceeding is whether the beneficiary will be employed 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 February 3, 2003, the petitioner submitted the Form I-129 and an attached statement. On the Form I-129, the petitioner described the beneficiary's U.S. duties as: "[m]anage and direct the company's U.S. operations, and develop and implement business strategies, corporate policies and company goals." In addition, in the attached statement, the beneficiary's proposed duties were described as the following:

[The beneficiary] will direct and manage the company's operations, and develop and implement business strategies, corporate policies and company's goals in the United States. His specific duties will include the following:

- Plan and establish business objectives and long-range goals for the organization.
- Develop business strategies and organizational policies; oversee strategic financial planning.
- Implement operating programs and annual business plans.
- Allocate corporate resources.
- Maximize short and long-term financial results; achieve profit and growth objectives.
- Review analyses of activities, costs, marketing, operations and purchase data; examine financial reports and statements.
- Evaluate performance of the company.
- Ensure compliance with marketing, sales, purchasing and distribution policies and procedures, as well as import/export laws and regulations.
- Confer with trade associations and industry representatives.

On February 6, 2003, the director requested additional evidence. Specifically, the director requested evidence of the current staffing levels in the United States. The director requested a copy of the U.S. company's organizational chart listing the U.S. entity's employees' titles, a detailed description of their duties, and information regarding the employees' educational backgrounds.

In response, the petitioner submitted a copy of the U.S. entity's organizational chart, a description of the subordinate employees' duties, and their educational backgrounds. In addition, the petitioner claimed that the beneficiary will manage subordinate employees and serve as a functional manager. The petitioner claimed that all three employees that the beneficiary will supervise "are employed in a professional or managerial capacity." The petitioner described the duties of the subordinate employees. The petitioner also described the beneficiary's proposed U.S. duties in the letter as:

He will direct and manage the company's operations, and develop and implement business strategies, corporate policies and company goals in the United States. . . . [The beneficiary] most critical function will be to design and implement a new business plan to direct the company's future growth and development. He will be managing this crucial and essential function within the organization.

* * *

As the managing director, [the beneficiary] will exercise broad discretion over [the U.S. entity's] day-to-day operations. He will not be directly involved in the actual production of the company's products and services, but will instead direct such activities through several managerial and professional personnel. He will directly or indirectly supervise the work of all [the U.S. entity's] employees.

On May 8, 2003, the director denied the petition. The director determined that the petitioner had not established that the beneficiary will be employed in a primarily managerial or executive capacity. The director noted that based on the record the beneficiary would be engaged in the non-managerial, day-to-day operations involved in fabricating a product or providing a service. The director further noted that the petitioner did not establish that the beneficiary would manage an essential function or supervise managerial or professional employees.

On appeal, the petitioner's counsel reiterates some of the beneficiary's duties and claims that the beneficiary qualifies as "both a supervisory manager and as a functional manager." Counsel claims that the beneficiary qualifies as a supervisory manager because "he will supervise the work of other managerial and professional personnel, and he will have the authority to make personnel decisions, such as hiring and firing employees."

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 reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what duties the beneficiary will be performing on a day-to-day basis. For example, the petitioner described the beneficiary's duties as "[p]lan and establish business objectives," "evaluate performance of company," "achieve profit and growth objectives," and "direct and manage the company's operations." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *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). 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. *Id.*

In response to the request for evidence, the petitioner claimed that the beneficiary will “not be directly involved in the actual production of the company’s products and services, but will instead direct such activities through several managerial and professional personnel.”

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” The term “profession” contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. Although the petitioner stated in its response to the request for evidence that two of the three employees obtained college degrees and one was trained as an economist, this 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 work of an office manager, who is among the beneficiary’s subordinates. Nor has the petitioner shown that any of the subordinate employees will supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Although the petitioner currently has an acting president who is “responsible for the overall management of the company,” the petitioner did not sufficiently explain in what capacity this employee would serve upon the beneficiary’s transfer to the United States as the company president. Thus, the petitioner has not established that the beneficiary’s proposed subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Further, 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 is responsible for the “design and implement[ation] [of] a new business plan to direct the company’s future growth and development.” However, 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 this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

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, the petitioner was a six-year old company engaged in the purchase, marketing, and distribution of U.S. manufactured equipment and products with a gross annual income of \$890,000. The company claimed to employ a vice president/acting president, an advertising director, and an office manager/internal accountant. The petitioner's state quarterly reports for the first three quarters of 2002 indicate that the vice president/acting president receives an annual salary of \$9,000 and the office manager receives an annual salary of \$3,000. The petitioner claims that the advertising director was hired in July 2002, yet his name does not appear on the quarterly reports. Collectively, this evidence calls into question the extent of these individuals' contributions to the petitioner's business and their ability to relieve the beneficiary from performing non-managerial duties. The AAO notes that the petitioner claimed that all the subordinate employees possess managerial or executive job 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 managing director and two to three part-time managerial or supervisory employees. 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) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

After careful consideration of the evidence, in particular the lack of comprehensive job description for the beneficiary and the lack of subordinate staff to perform the non-managerial functions of the business, the AAO concurs with the director that the beneficiary will not be employed in a primarily managerial or executive capacity. For this 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.