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and Immigration
Services

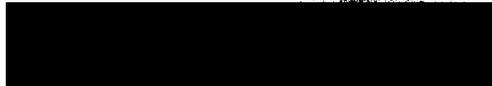
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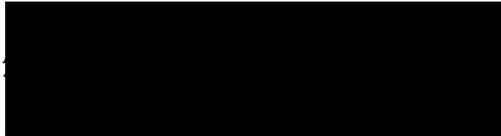
File: WAC-04-054-52358 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



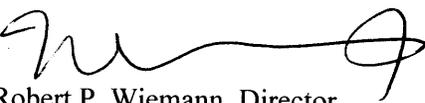
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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 Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its Vice President as an L-1A nonimmigrant intracompany transferee 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 limited liability company organized in the State of California that operates as a real estate holding and management company, and seeks to serve as an importer and exporter in the auto parts industry. The petitioner claims that it is the subsidiary of Spectra Industries Ltd., located in Mumbai, India. The beneficiary was initially approved for L-1 status in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that, contrary to the director's finding, the petitioner filed a timely response to the director's Notice of Intent to Deny and the petition should be approved. In support of this assertion, counsel submits a short brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. In addition, 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 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 (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 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 issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 letter submitted with the initial petition on December 18, 2003, the petitioner described the beneficiary's job duties as follows:

[The beneficiary], has intimate knowledge of both the technological and physical resources available to [the petitioner] and [the foreign entity] and is uniquely placed to formulate and implement policies and to market the services to clients in the US as well as provide the necessary direction to the service providers located in India Being a senior executive of the company and a member of the board of directors, he has great latitude in the execution of corporate strategy and establishing the goals and policies pertaining to marketing and client relations as well as responsibility for making all decisions in the area.

[The beneficiary] supervises 2 professionals and 5 contract employees. He supervises a professional who has a BS degree in Economics and a Manager of New Development who has a BS degree in Business. We anticipate hiring at least 3 to 5 professional employees in the coming year to implement the management plans that are in place at this time. These professionals will include an Accountant, a Marketing Management Executive and a Real Estate Planner.

* * *

We are requesting the extension of the L-1A visa to accomplish the following tasks:

1. Direct the management of Strategic Marketing and client relations, maintain and expand the company's relationship with existing and future clients and negotiate with them on behalf of the company.
2. Realign the focus of [the petitioner] to stay in tune with the ever-changing marketplace.
3. Coordinate management and marketing of various residential and commercial real estate investments.
4. Draw upon his intimate knowledge of the resources at the disposal of [the petitioner] and [the foreign entity] in India
5. Coordinate and direct the company's services to the American Industry.
6. Confer with select customers to determine special needs.
7. Design and implement budget.
8. Hire and train professional staff
9. Coordinate activities between [the petitioner] and [the foreign entity] in India.

The petitioner submitted its organizational chart that reflects that it employs a president, the beneficiary as vice president, a supervisor, a coordinator, a manager new development, a general repairs contractor, a mechanical contractor, a roofing/stucco contractor, and an electric/plumbing contractor. The petitioner further provided a copy of its California Form DE-6, Quarterly Wage and Withholding Report, for the third quarter of 2003, reflecting that it had three employees during that period. The beneficiary and one other employee were paid \$3,000 for the quarter, and the remaining employee was paid \$1,500 for the quarter. The petitioner submitted a summary of IRS Forms 1099-MISC, Miscellaneous Income, issued for 2002, including

payments to four individuals ranging from \$940 to \$2,130. The petitioner submitted illegible copies of Forms 1099-MISC to accompany the summary.

On January 30, 2004, the director issued a Notice of Intent to Deny the petition. Specifically, the director stated the following:

[T]he most current Form DE-6 ending September 30, 2003 indicates only three salaried employees namely, the beneficiary as vice-president [REDACTED] (Development Mgr) and [REDACTED] as bookkeeper. Regarding the claimed executive/managerial duties, there is insufficient evidence to establish that the beneficiary will be managing or directing the management of a department, a subdivision or a function of the U.S. entity, other than in position title. When a company of this size appears to have an abundance of executives and managers (3) and has a very limited number of employee staff (1) it becomes questionable as to whether the beneficiary is engaged primarily in managerial or executive duties. For instance, there is no evidence on record that the other managers are being paid the appropriate compensation that is due to a corporate officer. Although, salary or compensation is not determinative in establishing executive/managerial capacity, it is generally indicative of the importance of the duties and function that an employee performs for a company. The petitioner has already a president who is in charge overall of the company's operations and personnel decisions. The petitioner fails to demonstrate how the beneficiary and the other manager's daily activities or the specific scope and nature of . . . their activities will be managerial or executive capacity. Further, since the evidence has not established that the beneficiary supervises a subordinate staff of professional, managerial, or supervisory personnel, it appears that the beneficiary has been and will be performing non-qualifying duties.

In a response dated February 24, 2004, the petitioner submitted a letter addressing the director's concerns as follows:

- 1) We wish to bring into your notice what has been stated earlier. The [petitioner] has only 3 employees on a W-2 form. The rest of the employees are hired on a contract based. [sic]

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- 1) As described in our previous correspondence, the beneficiary . . . supervises 2 professionals and 5 contract employees. The two professionals that he supervises and their job duties and their qualifications are as follows:
 - Prakash Gupta: Explores new opportunities to find new properties. Explores areas for goods that can be exported to India or imported from India to the U.S. Discusses the newfound opportunities with the Vice President. Supervises the projects of the company by making field trips and ensures the

quality and timeliness of work done. He holds a bachelor's degree in Management.

- [REDACTED] Prepares and maintains office operations including all accounting work. Corresponds with tenants, banks, attorneys and CPA's. Coordinates work schedules for the workers and organizes procurement of goods. He holds a Bachelor's degree in Economics.
- [REDACTED] Coordinates the internal legal paperwork for acquisition of properties and manages the development of these projects including leasing, selling and renting of properties. He holds a Bachelor's degree in Political Science.

It is evident that the beneficiary supervises personnel all of who perform managerial duties and they all possess at least a Bachelor's degree. As for the compensation to the officers is concerned, we again wish to draw your attention to the fact that they receive [a] compensation package that includes compensation paid in the US and in the home country. The W-2 forms only show the US income The nature of business of the company involves, in large part, management decisions and actual field work. The negligible clerical work of the company is handled by the supervisor of the in-house accounting and other work. This should not be interpreted to suggest that [the beneficiary] is not performing executive duties because his duties are primarily and predominantly executive in nature.

On March 30, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director reiterated his findings that were presented in the Notice of Intent to Deny. The director stated that the petitioner was afforded 30 days to respond to the notice, yet failed to do so. Therefore, the director found that the petitioner failed to rebut the grounds for denial.

On appeal, counsel for the petitioner asserts that, contrary to the director's finding, the petitioner did in fact file a timely response to the director's Notice of Intent to Deny. The petitioner submits evidence that the response was delivered to the Citizenship and Immigration Services (CIS) California Service Center on February 27, 2004, 28 days after the date of the director's decision. Counsel makes no new assertions and submits no new evidence regarding the beneficiary's employment capacity or the petitioner's eligibility.

Upon review, counsel has established that the petitioner's response to the Notice of Intent to Deny was received by CIS in a timely manner. In fact, to corroborate counsel's claim, CIS is in possession of the petitioner's response with the receipt date stamped as February 27, 2004. Thus, the director's assertion that the petitioner failed to respond to the notice was in error, and the director's finding on this point will be withdrawn. The AAO will consider the petitioner's response to the notice of intent to deny, and the petitioner's eligibility.

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(1)(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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant case, the petitioner indicates that the beneficiary will have an executive position and he will supervise subordinate employees. Thus, it appears that the petitioner intends to represent that the beneficiary will be primarily engaged in both managerial duties and executive duties. To sustain such an assertion, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity. *See* 8 C.F.R. § 214.2(1)(3)(ii).

The beneficiary's job descriptions submitted by the petitioner are brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the statement that the beneficiary "is uniquely placed to formulate and implement policies" does not indicate what actual measures he will take to accomplish this duty. The petitioner makes ambiguous statements such as the beneficiary will "[r]ealign the focus of [the petitioner] to stay in tune with the ever-changing marketplace" and "[c]oordinate and direct the company's services to the American Industry," yet such representations fail to explain what the beneficiary will do on a daily basis. The petitioner provides that the beneficiary will "market the services to clients in the US," "[c]onfer with select customers to determine special needs," and he "has great latitude in the execution of corporate strategy and establishing the goals and policies pertaining to marketing and client relations." Without further explanation, these duties appear to be non-qualifying sales and marketing tasks. 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). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job descriptions do not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

The petitioner asserts that the beneficiary will have supervisory authority over subordinate employees, including a supervisor, a coordinator, a manager new development, a general repairs contractor, a mechanical contractor, a roofing/stucco contractor, and an electric/plumbing contractor. Yet, the petitioner has failed to provide sufficient documentation to show that it currently employs outside contractors. The evidence of record contains a summary of IRS Forms 1099-MISC issued for services received from four individuals in 2002. Yet, the petitioner has provided no documentation to show that these or other individuals are presently providing services on an ongoing basis. The petitioner submitted invoices from the mechanical contractor dated from December 11, 2002 to April 17, 2003, yet no documentation reflects that he is currently providing services to the petitioner, such that managing his work is an ongoing responsibility of the beneficiary and the petitioner's staff. The petitioner submitted a single invoice from the roofing/stucco contractor dated March 1, 2003, yet this document does not show that this contractor is providing services on a regular basis. The

record contains no evidence of services provided by the general repairs contractor at any time, or by the electric/plumbing contractor after 2002. 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). The petitioner has failed to establish that it currently employs outside contractors that require managerial oversight from the petitioner's staff.

Further, the petitioner has failed to submit documentation to support that it employs a coordinator. As noted by the director, the petitioner's Form DE-6 for the third quarter of 2003 indicates only three salaried employees, including the beneficiary as vice-president, [REDACTED], and [REDACTED]. Though the petitioner claims that its employees are also paid by the foreign entity, the petitioner has failed to submit any evidence of such payments. 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. As the petitioner's documentation does not corroborate the employment of the coordinator, he will not be considered in this proceeding.

The Form DE-6 for the third quarter of 2003 reflects that the supervisor was paid a total of \$1,500 for that period. As the petitioner's evidence only shows that he was compensated an average of \$500 per month, the evidence reflects that he is a part-time employee. The beneficiary and the manager new development both were compensated \$3,000 for the period. Thus, the petitioner has documented that the beneficiary has, at most, one part-time subordinate and one subordinate that is compensated at the same rate as the beneficiary.

The petitioner claims that "the beneficiary supervises personnel all of who perform managerial duties and they all possess at least a Bachelor's degree." 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 a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner claims that the manager new development earned a bachelor's degree in management, and the supervisor earned a bachelor's degree in economics. However, the petitioner has not sufficiently described their duties such that the AAO can determine if a bachelor's degree is,

in fact, required to successfully perform their respective duties. Thus, the petitioner has failed to show that these subordinates are professionals.

Nor has the petitioner shown that the manager new development and supervisor have authority over subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it has a qualifying corporate relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(3)(i). On the initial petition, the petitioner indicated that it is the subsidiary of the beneficiary's foreign employer. In an attached letter, the petitioner stated that the foreign entity owns 51 percent of the petitioner's stock. The petitioner submitted copies of its 2000, 2001, and 2002 IRS Forms 1065, U.S. Return of Partnership Income. The Schedules K attached to each of these returns reflect that the beneficiary owns 51 percent of the petitioner and [REDACTED] owns 49 percent. Schedules B of the returns further state that the petitioner has no foreign partners. Thus, the petitioner's documentation is inconsistent with its claim to be a subsidiary of the foreign entity. See 8 C.F.R. § 214.2(l)(1)(ii)(K). The petitioner further submitted a document titled "List of Promoters of [The foreign entity] and Their Shareholding as of 31/12/2002," which reflects that the beneficiary owns at most 111,300 of 3,495,599 shares of the foreign entity's stock. Thus, the beneficiary does not own and control the foreign entity and the petitioner, and the two companies cannot be deemed affiliates. See 8 C.F.R. § 214.2(l)(1)(ii)(L). Accordingly, the petitioner has provided inconsistent information regarding its relationship to the foreign entity. For this additional reason, the appeal will be dismissed.

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. The petitioner has not met this burden.

ORDER: The appeal is dismissed.