

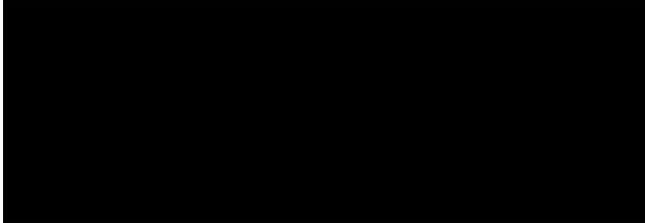
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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DH

File: EAC 04 032 53496 Office: VERMONT SERVICE CENTER

Date: NOV 01 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)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Vermont 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 president and chief executive officer 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. § 1401(a)(15)(L). The petitioner claims to be a corporation organized in the State of New York engaging in export operations and hardware and software supply and maintenance. The petitioner claims that it is the subsidiary of [REDACTED] located in Moscow, Russia. The beneficiary was initially granted a one-year period of stay to open a new office 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 would 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, the petitioner asserts that the beneficiary is employed by the U.S. entity in a primarily managerial or executive capacity, and that the beneficiary has managed, directed and supervised the work of four subordinate professionals and/or managers in the U.S. entity. In support of these assertions, the petitioner submits 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(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.

At issue in the present matter is whether the beneficiary would 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 dated November 14, 2003 accompanying the initial petition, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] provides overall management to the U.S. business operations and direct development, implementation of trading projects and contracts, and directs purchasing and shipping of the products to Russia. The position requires that [the beneficiary]:

- 1) select a project to be of significant interest and profitable for [the] company;
- 2) inspect and analyze the performance of the contracts and agreements, execute new contracts and agreements with [the company's] current and prospective customers;
- 3) supervise and direct purchasing of the subject merchandise for shipment;
- 4) supervise and direct inspecting and analyzing of the subject merchandi[s]e and equipment to determine the quality and value attributed to the Russian marketplace;
- 5) select and order the products from either manufacturing representatives or from the open market basing the selections on customers' requirements, or the demand for particular specifications;
- 6) oversee shipping of the products overseas with various carriers;
- 7) authorize payments of invoices or return of the products;
- 8) conduct meetings to introduce new products and services, and develop new customer bases;
- 9) maintain regular communication with [REDACTED] Russia, regarding the shipping and distribution of the products and services, and
- 10) select, hire and supervise training of new personnel while expanding our company's intervention onto the U.S. market and supervise existing personnel in terms of performance of their corresponding duties.

Additionally, [the beneficiary] participates in formulating overall activities within the company's business operations scope, review analyses of activities, costs, operations and forecast data to determine the progress of [the] U.S. operations. Overall, his regular day is devoted to executing [sic] of approximately 90% of the managerial duties, and 10% non-managerial duties.

On November 25, 2003, the director requested additional evidence. Specifically, the director noted that the beneficiary's duties as previously described do not appear to relate primarily to policy and general operations oversight, but instead, to the day-to-day operations involved in producing a product or providing a service as well as the supervision of non-qualifying employees. The director requested that the petitioner submit a comprehensive description of the beneficiary's duties, indicating how such duties will be managerial or executive, and demonstrating that the beneficiary will function at a senior level within the organizational hierarchy as well as in position title, or that he will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The director also requested a list of the U.S. entity's employees, with each employee's name, title, job description, and breakdown of the number of hours devoted to each of the employee's job duties.

In a letter dated December 10, 2003 responding to the request for further evidence, the petitioner stated the following with respect to the beneficiary's job duties:

[The beneficiary] provides overall management to the U.S. business operations and direct[s] development, implementation of trading projects and contracts, and directs developing, purchasing, and shipping of the products to and from Russia. In addition to the duties described in the original extension letter, the position requires that [the beneficiary] continues providing the following:

- 1) Determination of the strategy of the Company's development, formation and amendment of the Company's business structure; making of decisions on payments of the dividends of the Company [at] the end of the fiscal year – 2 hours per week;
- 2) Selection, hire of new key personnel and supervision over performance of the existing personnel's duties; making decisions on additional hire of new personnel and fire current employees; determination of subordination hierarchy between the existing managerial personnel; assignment of projects to subordinated personnel and review the work for quality; setting up of amounts of remuneration and system of motivation for the Company's managers – 5 hrs;
- 3) Inspection and analysis of the performance of the contracts and agreements, execution of new contracts and agreements with our current and prospective customers; making of the resolutions and orders for the Company's personnel; disposition of the Company's assets – 5 hrs;
- 4) Supervision and direction of the key merchandize [sic] and equipment's acquisition aiming at the determination of the quality and value attributed to the Russian

marketplace; control over the subordinated personnel proper execution of their corresponding duties – 10 hrs;

- 5) Organization of fund raising for the Company's current and future projects – 6 hrs;
- 6) Setting up the rules for pricing for the Company's products and services – 2 hrs;
- 7) Determination of the conditions and methods of attraction of investors, conduct meetings with current and prospective investors; conduct of systematic meetings with the Company's managers with their regular reports on business operations; setting up of deadlines for the personnel [sic] – 4 hrs;

* * *

- 8) Select a project to be of significant interest and profitable for the company – 2 hrs;
- 9) Oversee[] shipping of products – 1 hr;
- 10) Authorize[] payments of invoices or return of products – 1 hr;
- 11) Maintain[] regular communications with Russian parent company re shipping and distribution of products and services – 2 hrs.

* * *

Additionally, [the beneficiary] will participate in formulating overall activities within the U.S. company's commercial, financial, budget and credit operations, review figures of its economic activity, costs, operations, and forecast data to determine the progress of our U.S. operations.

The petitioner indicated that the beneficiary directly oversees four other employees in the U.S. entity – a virtual reality systems engineer, a technical support and maintenance manager, and office manager, and a customer service manager. The petitioner also provided the names, job duties, and hourly breakdown by duty for these employees. The petitioner stated that during the next fiscal year, the company expects to hire three additional employees – a home automation systems engineer, a home automation systems technician, and a logistic specialist.

On December 22, 2003, the director denied the petition concluding that the record does not establish that the beneficiary has been or will be employed in either a managerial or an executive capacity within the U.S. entity. Specifically, the director found that the beneficiary's job description includes several duties that would not be considered managerial or executive, and the record does not show that the beneficiary is indeed being relieved from performing duties of the daily operation of the company. Further, the director found the petitioner has not established that the beneficiary will function at a senior level within the organization's hierarchy other than in title, or that he would be involved in the supervision or control of the work of other supervisory, professional, or managerial employees who would relieve him from performing the services of the corporation.

On appeal, the petitioner contends that the beneficiary actually manages the business operations of the company, as well as the work of the four subordinate employees, whom it maintains are professionals and/or

managers. The petitioner claims that the tasks that the director found to be "non-managerial" comprised less than 25% of the beneficiary's duties, and that "80% of the listed duties correspond to a higher managerial or executive position." The petitioner contends that the beneficiary's subordinates are professional or managerial employees, drawing extensive comparison between the descriptions of their jobs and those of "corresponding" jobs listed in the *Occupational Outlook Handbook (OOH)*. Finally, the petitioner argues that the petitioner was not given sufficient time to fulfill its goal of hiring three more employees.

Upon review, the AAO finds that the record as presently constituted is insufficient to demonstrate that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

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. In the instant matter, the petitioner has not made clear whether the beneficiary is to be employed in a managerial or executive capacity. In fact, the petitioner initially stated in the November 14, 2003 letter that the beneficiary's day "is devoted to executing ... approximately 90% of the managerial duties," but later indicated in response to the director's request for further evidence and on appeal that the beneficiary's duties "correspond to a higher managerial or executive position" (emphasis added). A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Moreover, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The petitioner has not made that showing in this matter.

The petitioner's claim that 80% of the beneficiary's job duties are "managerial or executive" is not supported by the record. The petitioner submitted two descriptions of the beneficiary's job duties. The initial job description listed a number of duties, but failed to indicate the time spent on these duties. At the director's request, the petitioner submitted another job description enumerating some of the duties on the earlier list as well as a number of new duties. On the second job description, the petitioner did set forth the number of hours allocated to each duty listed, totaling 40 hours per week. However, the petitioner indicated that the set of duties listed in the later job description are "[i]n addition to the duties described in the original extension letter." Since there remain a number of duties on the initial job description for which no time allocation was provided, it cannot be determined based on the present record how much time the beneficiary actually worked per week and, consequently, what percentage of the beneficiary's workweek certain duties comprised.

Moreover, in stating that "[t]he position description provides several duties that would not be considered managerial or executive such as executing contracts, organizing fundraising or making resolutions and orders for company's personnel," the director has only listed some of the beneficiary's non-qualifying tasks. Upon

reviewing the record, the AAO finds that a number of the beneficiary's other duties also do not appear to be managerial or executive in nature. For example, the duties on the beneficiary's initial job description also include "select and order the products from either manufacturing representatives or from the open market basing the selections on customers' requirements, or the demand for particular specifications," and "conduct meetings to introduce new products and services, and develop new customer bases." These duties appear to be tasks necessary to provide the company's services or products and therefore cannot be considered managerial or executive in nature. In addition, the petitioner claims that the beneficiary "supervise[s] and direct[s] purchasing of the subject merchandise for shipment," "supervise[s] and direct[s] inspecting and analyzing of the subject merchandi[s]e and equipment to determine the quality and value attributed to the Russian marketplace," "oversee[s] shipping of the products overseas with various carriers," and "authorize[s] payments of invoices or return of the products." However, based on the job descriptions of the beneficiary's subordinate employees, it does not appear that any of those employees actually perform the merchandise purchasing, inspection, and shipping functions listed above. Thus, either the beneficiary himself is performing such functions, or he does not actually oversee and supervise those functions as the petitioner claimed. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Moreover, as discussed above, the record is insufficient to determine what percentage of the beneficiary's workweek these non-qualifying tasks actually comprise. 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 of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner also challenges the director's finding that the beneficiary does not supervise professional, supervisory or managerial employees. Although the beneficiary is not required to supervise personnel, since the petitioner claims that his duties involve supervising employees, the petitioner must establish that the beneficiary's subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The petitioner has failed to do so here. 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). As such, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employees. 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, while the petitioner indicated that the beneficiary's subordinates all possess advanced degrees, the petitioner has not provided sufficient evidence to establish that an advanced degree is actually necessary for the positions occupied by those employees. At the same time, despite their managerial titles, the record does not show that any of the beneficiary's subordinate employees supervise other 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 AAO further notes that on appeal, in support of the claim that the beneficiary's subordinate employees are actually managerial and professional, the petitioner asserts that the positions of these employees are comparable to certain positions listed in the *OOH*, and the petitioner refers at length to the descriptions for those positions in the *OOH*. The AAO finds the petitioner's references to the *OOH* to be lacking in probative value. While the *OOH* may provide useful guidance with respect to general categories of jobs, the information therein does not pertain to the specific jobs in this particular company. The petitioner's facts in this matter must speak for themselves. The actual duties of the employees themselves 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).

Finally, the AAO notes the petitioner indicated that it plans to hire three additional employees in the future, and argues on appeal that it was not given sufficient time to fulfill its hiring goals. 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). Furthermore, 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. There is no provision in the regulations governing the Citizenship and Immigration Services (CIS) that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

In light of the foregoing, the AAO finds that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the record contains insufficient evidence to establish that a qualifying relationship exists between the U.S. and foreign entities pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner claims that it is a corporation organized in the State of New York and that it is 100% owned by the beneficiary, who also owns 70% of the foreign entity. However, the petitioner has failed to provide any formation documentation, such as the articles of incorporation or by-laws of the company, to establish that the U.S. entity is in fact a corporation legally formed under the laws of the State of New York as claimed. The petitioner also has failed to submit any evidence of the ownership and control of the U.S. entity at the time the petition was filed.¹ Based on the evidence of record, the AAO is unable to determine that the U.S. entity is a

¹ The AAO notes that the record does contain the petitioner's U.S. Corporation Income Tax Return for the year beginning July 1, 2002 and ending June 30, 2003, which indicates that the beneficiary owns 100% of the U.S. entity's stock during that period. However, without further evidence, that document alone is insufficient to establish the ownership and control of the U.S. entity at the time the petition was filed in November 2003.

qualifying organization and that it has a qualifying relationship with the foreign entity, as required under 8 C.F.R. § 214.2(l)(1)(ii)(G). 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). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.