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FILE: SRC 04 160 51524 Office: TEXAS SERVICE CENTER Date: JUL 27 2006

IN RE: Petitioner:  
Beneficiary:



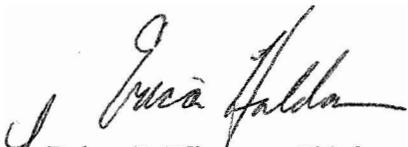
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Chief  
Administrative Appeals Office

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

The petitioner is described as a business dealing with the recording, manufacturing and sales of compact disks and the promotion of artists and musical groups. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager, pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The director denied the petition based on the conclusion that that the petitioner has not established that the beneficiary's duties are primarily that of managerial or executive capacity.

On appeal, counsel states that the petitioner is in a managerial capacity as "the majority of her [the beneficiary] time is spent on duties related to policy and operational management, including management of [REDACTED]"

To establish 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 firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary 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 regulation at 8 C.F.R. § 214.2(l)(3) further 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.

In addition, 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.

The petitioner [REDACTED] claims to be an affiliate of [REDACTED] located in Mexico. The United States entity was incorporated in the State of Georgia on March 13, 2002 and is engaged in the business of recording, manufacturing and sales of compact disks and the promotion of artists and musical groups. Accordingly, the United States entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act as an executive or manager for three years. The petitioner seeks to continue to employ the beneficiary as the U.S. entity’s general manager.

On the Form I-129, the petitioner described the beneficiary's United States duties as: "Manage and direct entire business operations." In addition, in a supporting letter dated May 17, 2004, the petitioner further described the beneficiary's proposed U.S. duties as:

She will continue to manage and direct the entire business operations, including marketing, sales, direct promotion of artist and musical groups, control and training of new employees, all hiring and firing of subordinate personnel and managing all bank related matters. Additionally, she will supervise product inventory and all customer service activities.

On September 13, 2004, the director requested additional evidence. Specifically, the director requested a statement describing the staffing of the United States company which indicated the number of employees, the position and job duties of each employee, and the specific date each employee began employment with the company. In addition, the director requested a copy of the employer's quarterly state tax report for the second quarter of 2004, and evidence of any contract employees.

In response, the petitioner submitted the requested information. The petitioner stated that the United States company is staffed by the beneficiary, a secretary, and a dispatcher/promotion assistant. In addition, the petitioner submitted the work schedule for each employee. The work schedule submitted for the secretary stated that her work schedule is twenty hours per week. Thus, it appears that the secretary is a part-time employee. The petitioner also stated that the company had previously hired two contract employees but at the time of filing the response, the United States company did not have any contract employees on its payroll.

The director denied the petition on January 27, 2005 on the ground that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director also suggested that the beneficiary is called upon to perform many duties associated with running a business that are not managerial or executive since the company has only employed two employees in addition to the beneficiary.

On appeal, counsel submitted a detailed job description for the position of general manager. The description further elaborates the job duties of the beneficiary to include the following:

Duties:

- Meets with Secretary/Office Assistant at the beginning of each day to discuss daily tasks and provide instructions on assignments.
- Check Emails from Foreign Petitioner [REDACTED] and generate reply.
- Discusses financial, personnel, operations, sales, advertising issues with the Foreign Petitioner [REDACTED] either via e-mail, via telephone or facsimile.
- Meets with Dispatcher/Storage Keeper to be sure that all orders have been completed and shipped to customers. Also, to be sure that all arriving shipments from Mexico are counted, stored, and entered into the inventory. And, deals with problematic issues related to merchandise and inventory.
- Check all in coming facsimiles, and generate reply. Then, delegate Secretary to send reply.
- Checks and reply to all correspondence received by Arpon International Records, Inc.
- Contact new and old customers in order to continue our business relationship.
- Set up on new accounts.
- Generates invoices and delegates Secretary to send mail.

- Makes telephone calls to prospect customers interested in Arpon's products.
- Handles all financial and accounting payouts to providers and agents.
- Handles Arpon utility and office bills to be paid.
- Meets with Promoter on daily basis to discuss goals and strategies for advertising in radio stations and activities for "live" advertising promotions at retail stores or Distributor's main officers. Also, to discuss visits to radio stations to conduct promotions, announce presentations of musical groups. Finally, discusses schedule of stores to be visited in order to provide them with promotional compact disks and brochures.
- Supervise and direct all employees.
- Deals directly with Accountant to provide Arpon's documents in order to generate payroll for employees, States and Federal Reports as needed.
- Meets with Accountant twice per month.
- Controls all Bank accounts for [REDACTED]
- Creates a cash flow forecast report for Foreign Petitioner [REDACTED]
- Conducts weekly visits to all distributors and retail stores.

#### Monthly Tasks

- Pays the Payroll taxes based on reports of information provided by Accountant.
- Pays all State and Federal taxes based on figures provided by Accountant.
- Reconciled Bank accounts on behalf of [REDACTED]
- Check inventory, makes decisions on what product is the most wanted by customers and takes care of all new orders with Foreign Petitioner [REDACTED]
- Generates invoices to all customers and delegated Secretary to mail.
- Deals with customers that have past due balances and determined when it becomes necessary to take other legal measures.
- Created budget report.
- Checks that all magazine advertising has been published.
- Chooses material for Marketing advertising placed with [REDACTED] as well as the radio stations and newspapers.

In addition, the petitioner on appeal indicates that the secretary is a full-time employee. However, the response submitted by the petitioner on November 1, 2005 stated that the secretary is a part-time employee. 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).

Furthermore, on appeal, the petitioner asserts that it hired a full-time promoter on February 15, 2005, after filing the petition for an extension of L-1 classification. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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 does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. On appeal, the petitioner asserts that the beneficiary will function as both a managerial and executive employee. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In addition, based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "check all in coming facsimiles, and generate reply," "checks and reply to all correspondence received by [REDACTED]" "contact new and old customers in order to continue our business relationship," "conducts weekly visits to all distributors and retail stores," and "generates invoices to all customers," do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In addition, although the beneficiary is not required to supervise personnel, if it is claimed that her 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. 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 has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the secretarial and inventory work of the office secretary and the dispatcher/storage keeper, who were the beneficiary's only subordinate employees at the time of filing.

Furthermore, a critical analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employees relieve the beneficiary from performing non-qualifying duties. It appears that the only subordinates of the beneficiary, at the time of filing, included a part-time secretary and a part-time dispatcher/storage keeper. Thus, the only individual performing any marketing-related functions, budget preparation and sales operations is the beneficiary herself. As the secretary and the dispatcher have been described as performing only administrative functions for the beneficiary, it can only be assumed, and has not been proven otherwise, that the beneficiary is performing all other marketing and sales functions, including devising marketing plans, contacting advertisers, and performing any public relations tasks. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

If the position offered to the beneficiary is executive in capacity, the statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. **Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).** Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* According to the record, it appears that the beneficiary will primarily perform the tasks necessary to provide services and thus, the petitioner has not established that the position is an executive capacity.

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.