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File: EAC 07 040 51043 Office: VERMONT SERVICE CENTER Date: OCT 17 2007

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, Chief  
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 appeal will be dismissed.

The petitioner is engaged in the sale of electronic and security equipment and seeks to extend the employment of its chief executive officer in the United States as an 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, an Arizona corporation, claims to be the subsidiary of Neza Electronica, located in Mexico City, Mexico. The beneficiary was initially granted an eleven-month period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition, finding that the petitioner had not demonstrated that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.<sup>1</sup>

On appeal, the petitioner asserts that the beneficiary was in fact acting in a primarily executive capacity, and submits a brief and additional evidence in support of this contention.

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.

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<sup>1</sup> The AAO notes that the director incorrectly concluded that the petitioner was established in September 2006, and thus was to be treated as a new office for purposes of review, pursuant to 8 C.F.R. § 214.2(l)(3)(v). The corporate documentation in the record indicates that the petitioner was incorporated in September 2005, and that the beneficiary was granted an eleven-month period in L-1 classification to open a new office in January 2006. Consequently, since the petitioner had been operational for nearly sixteen months at the time of filing, the AAO will treat this petition as a new office extension pursuant to 8 C.F.R. § 214.2(l)(14)(ii).

- (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.

This primary issue in this 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.

The nonimmigrant petition was filed on November 29, 2006. In a letter of support dated November 21, 2006, the petitioner alleged that the beneficiary is employed in the United States in a primarily executive capacity. The petitioner also claimed that the beneficiary was required to frequently travel to Mexico City.

Counsel provided the following overview of the beneficiary's duties:

As Chief Executive officer he establishes goals and business policies. He manages the company's executive operations and explores investment opportunities for [the petitioner]. [The beneficiary] will dedicate approximately 15% of his time performing these duties.

He develops the company's marketing campaigns. [The beneficiary] dedicates around 10% of his time to performing this duty.

He reviews the activity reports and financial statements in order to increase productivity. He spends approximately 15% of his time performing this function.

He is the hiring authority at the company and evaluates personnel performance. He dedicates 5% of his time to this duty.

[The beneficiary] performs exclusively executive duties in the Company. He is a senior level executive; there is no one supervising his job.

The director found this evidence insufficient to warrant approval of the petition and consequently issued a request for evidence on December 6, 2006. The director requested a definitive statement describing the management and personnel structure of the U.S. entity, including the number of subordinate employees under the beneficiary's supervision as well as their job titles and duties. The director also requested a description of the executive and technical skills required to perform the duties of the beneficiary, as well as a statement explaining who runs the petitioner in the beneficiary's absence.

On December 20, 2006, the petitioner, through counsel, provided a brief response which addressed the director's requests. With regard to the beneficiary's subordinate employees, the petitioner indicated that he supervised three persons: [REDACTED] vice president of operations; [REDACTED], who is in charge of the sales department; and [REDACTED] who also served as vice president of operations. The petitioner explained that [REDACTED] ran the petitioner's operations in the absence of the beneficiary, and further claimed that the beneficiary's wife would also be capable of running the business once she obtained an employment card.

With regard to the beneficiary's executive and technical skills, the petitioner provided the following brief statement:

[The beneficiary] is the Company's Chief Executive officer. He **directs the management of the organization in the US**. He establishes goals and policies of [the petitioner] and he is also the company's hiring authority. Thus, he is employed in an executive capacity. He exercises discretionary decision-making and he receives only general supervision from the Mexico City parent company.

Emphasis in original.

On January 8, 2007, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States. Specifically, the director concluded that given the small number of personnel, it appeared that the beneficiary would be acting as a first-line supervisor as opposed to a manager or executive.

On appeal, the petitioner alleges that the director's decision was erroneous, and contends that he is in fact working as an executive. The petitioner provides evidence on appeal that the beneficiary is a certified public accountant, and restates that the beneficiary is clearly operating as an executive. The petitioner also contended that the director's decision was inappropriately based on the number of employees to be supervised by the beneficiary, and that as a result, the director erroneously concluded that the beneficiary was acting as a first-line supervisor.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the fact that his subordinates are not professional employees, the petitioner has failed to establish that it will employ the beneficiary in a capacity that is primarily managerial or executive in nature. In addition, the AAO notes that the description of duties provided, both in the initial letter of support and in response to the request for evidence, was too vague to ascertain whether the

beneficiary will be acting in a primarily managerial or executive capacity. While the beneficiary is the intended chief executive officer of the company, there is insufficient evidence to show that he will be acting primarily in a managerial or executive capacity during his U.S. employment.

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(l)(3)(ii). In this case, the petitioner vaguely described the beneficiary's duties but failed to provide a specific overview of how he will refrain from performing non-qualifying tasks. Despite the director's specific request for a definitive overview of the executive and technical skills required to perform the duties associated with the beneficiary's position, the petitioner elected to submit a description very similar to the initial description of duties provided in the initial petition. The AAO notes that the description of duties submitted in response to the request for evidence merely quotes the regulatory definition of executive capacity, and provides no insight on the nature of the beneficiary's daily tasks or his day-to-day duties. Counsel continues this same line of reasoning on appeal, and instead of provided more details regarding the nature of the beneficiary's role in the petitioning enterprise, counsel merely concludes that "We believe that the record proves that [the beneficiary] will be employed in an executive capacity and not just as a supervisor." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

In this matter, counsel specifically limits his arguments to the executive capacity of the beneficiary. However, it was still claimed that the beneficiary is the petitioner's sole hiring authority and thus a major part of the beneficiary's duties include overseeing staff. Although the beneficiary is not required to supervise personnel, if it is claimed that his managerial duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial for the purpose of determining whether he meets the alternative requirement for a managerial capacity position. 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 duties of the two vice presidents of operations and the sales person. Additionally, no evidence pertaining to the educational credentials has been submitted, and on appeal, counsel acknowledges that these three subordinate employees are not in fact professionals.

Counsel also provides evidence on appeal that the beneficiary is a certified public accountant, and thus, as a professional, is employed in an executive capacity with the petitioner.<sup>2</sup> While these credentials are certainly impressive, the petitioner made no assertion prior to appeal that the beneficiary would be performing any accounting services during his tenure in the United States. The mere possession of a bachelor's or master's degree does not automatically confer managerial or executive status upon a beneficiary; the totality of the organizational hierarchy and the beneficiary's role therein must be examined when determining if a beneficiary is primarily engaged in managerial or executive duties.

Most importantly, the petitioner has provided little or no evidence to corroborate its claims. Although three subordinate employees are allegedly on the petitioner's payroll, no evidence of wages paid to these persons has been submitted. Furthermore, no specific illustrations of the beneficiary's day-to-day duties has been provided, and the description of duties repeatedly furnished by counsel merely cites the regulatory definition of executive capacity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, without documentary evidence to support the claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In this matter, there is no evidence that the beneficiary oversees a staff of professional employees. In addition, there is no documentary evidence to support a finding that such subordinates are actually employed by the petitioner. As such, the AAO concurs with the director's finding that the petitioner has failed to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it is eligible for an extension of the initial one-year "new office" validity period. As previously noted, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not submitted evidence that the United States entity has been doing business for the previous year as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H). While the director incorrectly concluded that the petitioner had only been in operation since September of 2006 and thus was afforded

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<sup>2</sup> It is noted that copies of educational credentials that appear to pertain to the beneficiary accompany the appeal brief. However, these documents are not translated. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

consideration under new office provisions, the record indicates that the petitioner was established in September 2005. The petitioner, therefore, is required to demonstrate that it has been doing business continually for the year preceding the filing of the instant extension.

The petitioner submitted a number of invoices and documents suggesting that it has been selling its goods on a regular basis. However, the earliest invoice documenting the sale of the petitioner's goods dates back to September 2006. Since the petition was approved in January of that year, the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business from January through September of 2006, as required by the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B). Additionally, the AAO notes that the record contains minimal evidence of the financial status of the U.S. entity as required by the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(E). For these additional reasons, 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.

**ORDER:** The appeal is dismissed.