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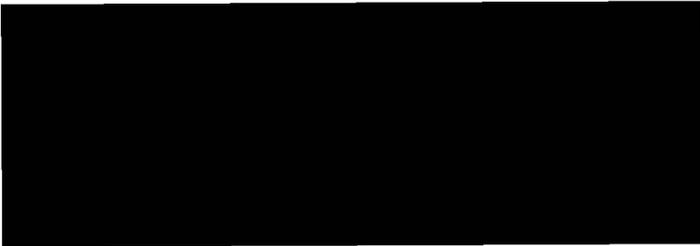
U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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File: EAC 07 156 51760 Office: VERMONT SERVICE CENTER Date: **JUL 03 2008**

IN RE: Petitioner:  
Beneficiary:



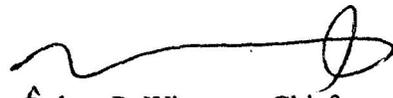
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 employ the beneficiary 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, a Puerto Rico corporation, operates a jewelry store. The petitioner states that it is an affiliate of A Touch of Gold, located in Cozumel, Mexico. The petitioner seeks to employ the beneficiary as its general manager for a three-year period.

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, counsel for the petitioner disputes the director's findings and asserts that the beneficiary will have the authority to manage the petitioner's "essential function," hire and fire employees, and exercise discretion over the day-to-day operations of the petitioner's store. Counsel submits a brief and additional evidence in support of the appeal.

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 sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity under the extended petition.

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 April 20, 2007. The petitioner indicated on Form I-129 that the beneficiary would serve as the general manager of the U.S. company, which operates a retail jewelry store

and claims to have ten employees. The petitioner indicated on the L Classification Supplement to Form I-129 that the beneficiary will perform the following duties:

Oversee operation of [the petitioner's store] in San Juan, manage inventory, hire and train salesmen, select jewels which are appealing and marketable to tourists which are the main clients, maintain tight security precautions because of high incidence of theft.

The petitioner submitted a letter in support of the petition, but it did not include any further description of the beneficiary's proposed duties as general manager.

Upon reviewing the initial submission, the director determined that a favorable determination could not be made. Accordingly, on June 29, 2007, the director issued a request for evidence (RFE), in which the petitioner was instructed to submit the following: (1) an organizational chart for the U.S. entity which clearly specifies the beneficiary's proposed subordinates; (2) a complete position description for the beneficiary's proposed subordinates in the United States which includes a breakdown of the number of hours devoted to each of the subordinates' job duties on a weekly basis; and (3) copies of the petitioner's 2005 and 2006 IRS Forms W-2 and payroll rosters. The director advised that the petitioner had not established that the beneficiary would function at a senior level within the organizational hierarchy other than in position title, or that he would be involved in the supervision and control of the work of supervisory, professional or managerial employees who would relieve him from performing the services of the company.

In response to the RFE, counsel for the petitioner submitted a letter dated September 21, 2007. Counsel provided the following statement regarding the beneficiary's proposed duties as general manager:

He is responsible for the store's day-to-day operation and has full discretion to open and close the store, hire, train, suspend, or terminate employees. He sets the price for the gold jewelry according to its weight and price of gold at that moment. The Beneficiary has discretion to accept or decline a customer's offer for a particular piece of jewelry which is different from the price tag. Because of his knowledge of Spanish, English and French, and 15 years of experience in the sale of jewelry, 13 of them with [the petitioner's organization], the Beneficiary is well qualified and very knowledgeable of his highly specialized trade and of the Petitioner's quality and customer service standards. However, of utmost importance to the Petitioner is that the Beneficiary enjoys their complete trust. Because jewelry is so desired by many, and its size so compact, it is highly susceptible to theft by unscrupulous employees and customers. Therefore, a strong and knowledgeable Manager is essential to the successful operation of a jewelry store.

The petitioner also provided an organizational chart which indicates that the beneficiary would supervise the following positions: secretary and cashier, floor supervisor, gold supervisor, pearl supervisor, diamond supervisor, fancy jewelry supervisor, associate sales person, and security. The petitioner provided a brief position description for each employee. The floor supervisor is responsible for floor inventory, sales, overseeing all displays, and verifying price tags, while the four jewelry supervisors are responsible for their respective sales, displays, inventory, and pricing.

Finally, the petitioner submitted the requested wage and payroll records for 2005 and 2006. In 2006, the petitioner paid \$72,623 in commissions to 23 employees, with minimal payroll expenses of approximately \$7,000. Four of the beneficiary's eight proposed subordinates received commission payments from the petitioner in 2006; however, as the director did not request wage records from 2007, it is not possible to confirm who was working for the petitioning company as of the date the petition was filed.

The director denied the petition on November 19, 2007, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director determined that the petitioner did not establish that the beneficiary would supervise and control the work of professional, supervisory or managerial employees who would relieve him from performing the services of the company. The director further found that the position description for the beneficiary's proposed position did not include duties that would normally be required of or associated with a managerial or executive position, nor did the petitioner establish that it has a need for a bona fide manager or executive. The director concluded that it appears that the beneficiary would be engaged in performing the non-managerial, day-to-day operations of the petitioner's business.

On appeal, counsel asserts that the beneficiary's proposed duties "fit squarely in the definition of 'managerial capacity' since he is the Store Manager and manages the Puerto Rico store of the Petitioner, which is essential to the Petitioner's ability to do business in Puerto Rico." Counsel further describes the beneficiary's duties as follows:

[T]he beneficiary hires, fires, and trains the employees he oversees and the Beneficiary exercises discretion over the day-to-day operations, including extending hours of operations to fit the arrival of customers from cruise ships in San Juan. Moreover, the Beneficiary has been given the authority to negotiate the price of the jewelry sold at [the petitioner's store] beyond that he gives to the Gold Supervisor, Diamond Supervisor, Pearl Supervisor, and Fancy Jewelry Supervisor.

In addition, the petitioner submits the following expanded position description for the beneficiary, who is now identified as "store manager," and depicted as reporting to the store owner:

- The Store Manager is responsible for opening and closing the store everyday. He, in conjunction with the owner, are the only persons who have keys to the store, and to the vault.
- He is responsible to supervise the merchandise retrieved from the vault every morning, the organization of jewelry in the sales floor, and for supervising the merchandise which goes back into the vault at the end of the day.
- The Manager is responsible for personally supervising the counting of the jewelry exhibited daily in the sales floor, and managing a report with such daily information.
- The Manager oversees all sales operations during the day, and in many occasions assists in the closing of the sale, since he is the only one with authority to give discounts and adjust pricing of the pieces, following the guidelines established by the store owner.

- The Manager is responsible for supervising all of the store's sales personnel and support personnel, who include: Floor Supervisor, Secretary, Cashier, Gold Supervisor, Pearl Supervisor, Diamond Supervisor, Fancy Jewelry Supervisor, Associate Sales person, Security Employee, Maintenance Employee.
- He is responsible for hiring, training and when necessary terminating employees. He is also responsible for enforcing the store's strict policies and motivating personnel to achieve the sales forecasts established by the owner.
- The manager is responsible for making suggestions to the owner, following his observations of the customers who enter the store and the different requests these customers make. This task is critical to maintain pieces which appeal to the target market of the store.
- Responsible for coordinating vendor appointments and monitoring merchandise shipments.
- The Manager is responsible for supervising the cashier's transactions, counting the store sales for the day, and retrieving all cash from the establishment.
- The manager is responsible for the store's allover appearance; this includes coordinating with suppliers for necessary improvements or repairs and suggesting upgrades or other useful improvements to the store. . .
- The manager, in conjunction with the owner, is responsible for promoting the store to cruise ships which arrive on a weekly basis to port . . . .

The petitioner also provides expanded position descriptions for the beneficiary's proposed subordinate employees in support of the appeal.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity in the United States.

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). 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.* In addition, 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 show 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).

Here, the petitioner has consistently claimed that the beneficiary will be employed in a managerial capacity. However, as noted by the director, the duties described, when considered in conjunction with the totality of the record, do not rise to the level of managerial capacity. Many of the beneficiary's tasks appear to be supervisory in nature and include supervising the movement of merchandise to and from the store's vault, supervising the counting of jewelry and the organization of the jewelry on the sales floor, overseeing all sales and assisting in the closing of sales, supervising the store's sales and support staff, counting the stores sales

for the day, and supervising the cashier's transactions. All of these tasks involve the first-line supervision of personnel, who, as discussed *infra*, have not been shown to be professional staff. Several of the beneficiary's other tasks, such as coordinating vendor appointments, monitoring merchandise shipments, closing sales with customers who wish to negotiate prices, suggesting store improvements or product recommendations with the store owner, and opening and closing the store, indicate that the beneficiary is also directly involved in the day-to-day operational tasks of the petitioner's store. The petitioner did not explain how these tasks would elevate the beneficiary's position to managerial or executive capacity. The actual duties 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). The beneficiary would be employed in a position of trust with some discretion over the day-to-day operations of the store, but the record does not demonstrate that his actual duties would rise to the high-level responsibilities specified in the statutory definition of managerial capacity. Rather, the beneficiary serves in a first-line supervisory capacity over sales matters and personally performs other operational functions, including some sales and marketing tasks.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the petitioner indicates that the beneficiary would have the authority to hire and fire employees. However, the petitioner has not established that the beneficiary's subordinates are supervisory, professional, or managerial employees. Although four of the beneficiary's subordinates have the designation "supervisor" in their job titles, none of these employees have been shown to perform any supervisory duties or to have any subordinates. The petitioning organization, based upon the organizational chart submitted, consists of three tiers of employees: an owner at the top of the organizational hierarchy, the beneficiary's proposed position of store manager, and a bottom tier of employees consisting of sales and support staff. The "supervisors," based on a review of their position descriptions, are sales staff. Therefore, the record does not demonstrate that the beneficiary's proposed subordinates are managers, supervisors, or professionals. A managerial 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 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, while one member of the company's staff is stated to have a bachelor's degree in education, the petitioner has not established that a bachelor's degree is actually necessary, for example, to perform the duties of a jewelry salesperson, cashier or security officer, who are among the beneficiary's subordinates.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must provide a detailed job description that specifies the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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).

Counsel claims on appeal that the beneficiary "manages the essential function of operating the store," but provides no other evidence or explanation to demonstrate how the beneficiary qualifies as a function manager. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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). As discussed above, the beneficiary's duties with respect to the store's operations have been shown to be primarily those of a first-line supervisor of the stores' sales and merchandising activities. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. The petitioner has not met that burden. Furthermore, the petitioner indicates that the beneficiary reports to a store owner/president, thus the beneficiary would not serve at a senior level with respect to the claimed function managed. The petitioner has not established that the beneficiary would be employed as a function manager.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(iv). The petitioner indicated that the beneficiary's last position abroad was as general manager of an affiliate store in Cozumel, Mexico, where he was responsible for promoting jewelry on board cruise ships, establishing relationships with cruise lines based in Miami, selecting merchandise for sale, "handling" inventory, training and supervising employees, implementing merchandise guarantees and promoting customer service. No other information regarding the beneficiary's duties, level of responsibility or the organizational structure of the foreign entity were provided. Without further explanation, these duties suggest that the beneficiary was directly involved in day-to-day operational tasks such as marketing, purchasing, monitoring inventory and other tasks which do not typically fall under the statutory definitions of managerial or executive capacity. Absent a more detailed job description, an organizational chart, and evidence documenting the number and types of employees the beneficiary supervised, it cannot be determined that he performed primarily managerial or executive duties. For this additional reason, the petition cannot 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 he or 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 and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.