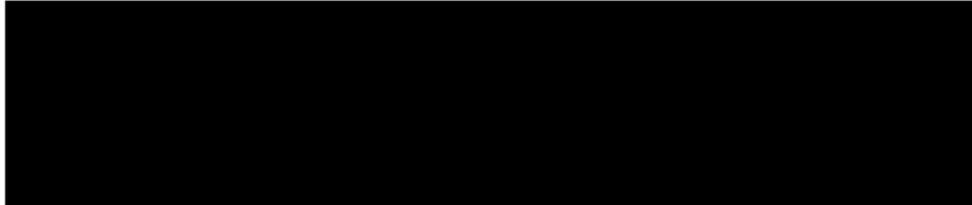


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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

**U.S. Citizenship
and Immigration
Services**



D7

DATE: **OCT 20 2011** OFFICE: CALIFORNIA SERVICE CENTER FILE:

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is engaged in the import and wholesale of handmade jewelry, loose gems and diamonds, and it seeks to continue to employ the beneficiary as the company president. The petitioner states that it is a subsidiary of [REDACTED], located in India. Accordingly, the United States entity petitioned United States Citizenship and Immigration Services (USCIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 was initially granted an L-1A classification for one year and is now filing an extension of the beneficiary's stay.

The director denied the petition on May 27, 2009, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that it did not appear that the beneficiary supervises a staff of professional, managerial or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, and thus the beneficiary will be primarily involved in performing the day-to-day services essential to running a business.

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.

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.

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.

In the letter of support, dated January 7, 2009, the petitioner stated that when the beneficiary entered the United States in the initial L-1A status, he "assumed the duties of president in charge of all operations of the business including hiring and firing of employees, creation of administrative policies, and overall executive decision-making." The petitioner further explained the beneficiary's duties as President as follows:

In 2 years of service, he has expanded the operation of the business to a profitable venture and developed administrative and personnel procedures that govern the operations of the respective managers of each company. In this same time period, he has overseen the development of petitioner from startup phase and through professional management and executive reputation contracts and banking relationships that ensure continued growth.

The petitioner submitted invoices as evidence that the petitioner is doing business. The petitioner also submitted the Quarterly Wage and Withholding Reports for 2008. According to the reports, the petitioner employed one individual, the president, from January until June 2008; and zero employees from July through September 2008; and three employees for the last quarter of 2008 from October through December. The petitioner also submitted the Certificate of Business Tax; the California State Board of Equalization Seller's Permit; phone and bank statements; and applications submitted by the petitioner to participate in jewelry fairs.

On March 18, 2009, the director determined that the petitioner did not submit sufficient evidence to process the petition and requested additional evidence of the qualifying relationship between the foreign company and the U.S. subsidiary; evidence to establish that the beneficiary will be performing duties of a manager or executive with the U.S. company; and additional evidence that the U.S. branch office is doing business.

In a response letter, dated April 14, 2009, the petitioner responded to the director's request for evidence showing that the beneficiary will be performing the duties of a manager or executive with the U.S. company as follows:

The Beneficiary is currently in the United States and has been here organizing and setting up the company. Beneficiary was needed due to his knowledge of the Parent Company's product, procedure and policies. As such he possesses the experience representing the Parent Company in various Jewelry Shows and Conventions in the United States. He is the only current manager, and the business would not function without his presence. Parent Company retains its higher archaic structure and higher level management and will continue with its normal functions.

Beneficiary entered the United States on L-1 status, in May of 2007, to serve as president of the petitioner and through his leadership and guidance, establish the company. Beneficiary will oversee the entire operation of the company's policies, goals and administration as such he will have the complete discretion of the day to day labor assigning subordinates employees to work related tasks assigned to promote his policies. He has the sole authority to hire and fire employees as necessary. He currently supervises two employees; one possessing a professional degree in Finance, this employee is the Office Administrator. He also individually supervises the employees in charge of wholesale, through his instruction communications via the administrator.

The petitioner also submitted the Form 1120, U.S. Corporation Income Tax Return, for 2008 that stated that the U.S. company has gross receipts of sales of \$126,050.00 and that it paid \$23,159 in salaries and wages. The petitioner also submitted photographs of the U.S. office which consists of one small office with a big desk and a smaller desk in the room. The petitioner also submitted a letter from the landlord that indicated the office space leased by the petitioner is 200 square feet.

In addition, the petitioner submitted a list of current employees which included the president, the beneficiary, and an office administrator and an employee in wholesale operations. The office administrator and the wholesale operations employee receive a salary of \$271.16 a week and, thus, it appears that their positions are part-time. In addition, the office administrator and the wholesale operations employee were just hired in October 2008.

The duties of the office administrator are: "Maintain accounts, data entry and updating e-mail and contact lists; reception of general telephone enquiries and occasional visitors; taking messages; general office duties, including filing, copying, making up information kits and updating records. Implement procedures to improve productivity and customer service." The duties of the wholesale operations employee are: "Interest wholesale and retail buyers and purchasing agents in Company's products and to address clients' questions and concerns; demonstrate Company's products. Show samples or catalogs that describe items, company stocks and inform customers about prices, availability. Obtaining new accounts. Arrange promotional programs, store displays, and advertising. Analyze sales statistics, prepare reports; and handle administrative duties, such as filing expense account reports."

On appeal, the petitioner states that it submitted a statement that described a “typical, not an eventful, date for the executive.” The petitioner also states that the “nature and scope of the duties described in this letter, the status and activities of his subordinate’s staff and his responsibilities and obligations clearly demonstrate that substantially all of his activities are at the managerial executive level.” Furthermore, the petitioner states that it is “reasonable to assume that the Petitioner requires a president or executive to run their business at this critical stage of development” as a start up company. The petitioner also stated that the “definition for executive capacity does not make any reference to the supervision of other employees, especially subordinate managers,” thus, the decision should not be based on the fact that the petitioner only has three employees. The petitioner also pointed out the recession and the difficulty of maintaining a jewelry store and contends that even if the petitioner’s gross income is low and it hired few employees, the beneficiary has been able to maintain the business. Finally, the petitioner states that the beneficiary is performing as a function manager as he manages an essential function.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a 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(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.*

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).

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. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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 International*, 19 I&N Dec. at 604.

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner’s description of his proposed duties suggest that the beneficiary’s actual duties include a number of non-managerial and non-executive duties.

The beneficiary's proposed job description includes vague duties such as “oversee the entire operation of the company’s policies, goals and administration as such he will have the complete discretion of the day to day labor assigning subordinates employees to work related tasks assigned to promote his policies,” and “he has the sole authority to hire and fire employees as necessary.” Reciting the beneficiary's vague job responsibilities or broadly-cast business

objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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).

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform or how his time will be divided among managerial and non-managerial duties. 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)).

Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As of October 2008, the petitioner employed three individuals: the President, an office administrator, and a wholesale operations employee. The office administrator and wholesale operations employee receive a salary that indicates that these individuals are working part-time. In addition, the petitioner did not explain where the wholesale operations employee works since the office is only 200 square feet and according to the photographs, the office is full with one big desk and one small desk. Although the new office administrator and wholesale operations employee will assist the beneficiary, it appears that the beneficiary will be performing many of the various operational tasks inherent in operating the company, such as acquiring information, negotiating contracts, preparing the human resources policies for the U.S. office, customer service and public relations, marketing, inventory, and participate in jewelry fairs and conventions. Based on the record of proceeding, it appears that the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. To establish eligibility, the petitioner must establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The beneficiary's job description was not sufficient to establish that he would be employed in a primarily managerial or executive capacity, and the petitioner has not identified sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of an executive or manager as contemplated by the governing statute and regulations.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. The AAO has also, however, long required the petitioner to establish

that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. It is the petitioner's obligation to establish, through independent documentary evidence, that the day-to-day non-managerial and non-executive tasks of the petitioning entity are performed by someone other than the beneficiary, although, as correctly noted by the petitioner, these employees need not be professionals. Here, the petitioner has not met this burden.

In addition, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the warehouse functions of the warehouse operations employee, or the office duties of the office administrator, who are the beneficiary's only confirmed subordinate employees. Although the beneficiary maintains a managerial title, the petitioner has not submitted sufficient evidence to substantiate the claim that he is employed in a primarily managerial or supervisory role.

On appeal, the petitioner indicates that the beneficiary manages an essential function for the organization. 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 furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish 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

employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

The totality of the record supports a conclusion that the beneficiary would be required to perform primarily non-qualifying duties associated with the petitioner's day-to-day functions, as the petitioner has not identified sufficient staff within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations. Again, the actual duties reveal the true nature of employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1103.

On appeal, the petitioner states that the beneficiary is employed in an executive capacity as the president of the business. 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.* As discussed above, the beneficiary supervises one office administrator and one warehouse employee and does not direct or supervise a subordinate staff in the operations of the business such as a sales and marketing department, a customer service department, an inventory and warehouse department or a human resources department. Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily 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. The petitioner has not met that burden.

ORDER: The appeal is dismissed.