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File: SRC 05 065 50770 Office: TEXAS SERVICE CENTER Date: DEC 06 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)

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, Texas 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 visa petition seeking to extend the employment of its general manager 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 is a corporation organized under the laws of the State of Texas and is allegedly engaged in the business of importing garments and other ethnic products.¹ The petitioner claims a qualifying relationship with White Swan Trading, located in the United Arab Emirates. The beneficiary was granted a two-year period of stay in 2002 following an initial one-year period of stay to open a new office. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director erred and that the beneficiary will be employed primarily as an executive or manager.

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.

¹According to Texas state corporate records, the petitioner's corporate status in Texas is not in good standing. Therefore, as the State of Texas has forfeited the petitioner's corporate privileges, the company can no longer be considered a legal entity in the United States. Therefore, this issue raises the critical question of the company's continued existence as a legal entity in the United States and its eligibility for the benefit sought in this matter.

- (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 primary issue in the present 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 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. 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 is indeed representing 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 the Form I-129 petition, the petitioner described the beneficiary's job duties as follows:

General manager; continue to direct and develop the new U.S. subsidiary; hire and fire employees; define and implement company's goals and policy; select products for import; define and implement marketing plan; report to company abroad.

The Form I-129 is signed by the husband of the beneficiary who is identified in the Form I-129 as the "president."

On March 10, 2005, the director requested additional evidence. Specifically, the director requested, *inter alia*, an organizational chart for the petitioner, information regarding the subordinate employees, a more specific description of the day-to-day duties of the beneficiary, and a breakdown of the amount of time spent by the beneficiary on each duty.

In response, the petitioner submitted an organizational chart identifying the beneficiary as the manager and CEO and placing her at the very top of the organization directly supervising two sales persons, one store administrator (her husband, who is also identified as the "president" of the petitioner in the Form I-129), and three contracted service providers. The petitioner also provided wage reports and an employee roster confirming that the petitioner hired two sales persons in the summer of 2004 and that the store administrator/president (the beneficiary's husband) is not paid a salary.

In response to the request for evidence, the petitioner provided the following description of the beneficiary's duties as well as a breakdown of the amount of time spent on each duty:

- ▶ Develop budget for the store and web site. Plot all annual fiscal responsibilities and undertake for the year. Responsible for handling all upper level accounting activities and signoff on all financial transactions. [15%]
- ▶ Maintain employee payroll, conduct employee salary evaluations. Responsible for the hiring and firing of all employees. Responsible for all HR decision making needs of employees. Manages the HR needs for employees. [10%]
- ▶ Responsible for company direction and future growth. Conduct market trend analysis to decide the goods and services that need to be offered by us so that we can stay on top and be

- ▶ competitive. [8%]
- ▶ Interact with corporate lawyer in relation to taxes, customs and other legal matters related to the company. Since the entity is a subsidiary of a foreign company therefore the management of legal matters is a must. [7%]
- ▶ Manage not only the local entity but also responsible for managing activities related to the [foreign entity]. [30%]
- ▶ Visit customers and vendors to secure future growth. Give presentations about company and perform marketing at the director level. Stay tuned to business intelligence trends. [15%]
- ▶ Map out geographical and area based products that are hot selling items and result in better yield. Plot the fastest way to get these items to the customers on time. This item is related is [sic] to serving as a middle man to take items from one shop and supply them to another. This requires conducting an area survey so that an efficient supply chain can be found in which we are serving the goods at a better price. [10%]
- ▶ Collect fiscal data and product data and use it to make time based reports and charts to predict market weakness and trends. [5%]

The petitioner also described the duties of the two sales persons directly supervised by the beneficiary. These employees generally staff the retail store, clean, operate the cash register, and price items. The petitioner also lists various administrative and operational tasks performed by the uncompensated store administrator/president (the beneficiary's husband). Consistent with the organizational chart, supervising the sales persons is not listed as a duty of the store administrator/president.

On June 24, 2005, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the director's decision was made in error and that the record establishes that the beneficiary will be employed primarily as an executive or manager.

Upon review, the petitioner's assertions are not persuasive.

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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing 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.

The petitioner has failed to prove that the beneficiary will act in a "managerial" capacity. In support of its application, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The vague descriptions provided by the petitioner fail to establish that the beneficiary will be employed primarily as a manager and, in fact, appear to indicate that the beneficiary will spend the majority of her time engaged in performing non-qualifying administrative and operational tasks. For example, the beneficiary is described as spending the majority of her time developing budgets, visiting customers, conducting marketing trend analyses and area surveys, and collecting fiscal data. Such tasks are generally not managerial in nature and would not qualify her as a manager without further evidence that she is not performing the actual tasks related to these functions. 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 Intl.*, 19 I&N Dec. 593, 604 (Comm. 1988). The record is devoid of any evidence that anyone other than the beneficiary is performing these tasks. Finally, the time allocated to managing the overseas entity (30% of her time) cannot be used to qualify her as a manager of the petitioner. Only those duties performed in the United States on behalf of the petitioner may qualify the beneficiary as a managerial employee. However, as indicated above, as the record indicates that the majority of the beneficiary's duties performed for the petitioner are non-qualifying operational or administrative tasks, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

The petitioner also failed to prove that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees or that she will manage an essential function within the organization. While the job descriptions for the beneficiary's subordinates are also vague, they do reveal that these are primarily retail clerks. Based on the record, the beneficiary would appear to be a first-line supervisor, the provider of actual services, or a combination of both. 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. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology Intl.*, 19 I&N Dec. at 604. Since the record fails to reveal the educational or skill level of the subordinate employees, it cannot be determined if they rise to the level of professional employees, although the job descriptions provided by the petitioner are alone disqualifying.² Therefore, the record does not prove

²In 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

that the beneficiary is or will act in a managerial capacity.³

Similarly, the petitioner has failed to prove that the beneficiary will act in an "executive" 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. 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 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-day 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 indicated above, the petitioner has failed to prove that the beneficiary, who is engaged in primarily performing administrative or operational tasks and who is managing no more than two retail employees apparently engaged in providing services to customers, will be acting primarily in an executive capacity.

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).

³While the petitioner has not specifically argued that the beneficiary manages an essential function of the organization, the record nevertheless would not support this position even if taken. 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. 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. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. While the petitioner does provide a breakdown of the time spent on each duty, the duties described are either not managerial in nature (as explained above) or are so vaguely described that it cannot be discerned what proportion of the beneficiary's duties would be managerial and what proportion would be non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce 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).

Finally, it must be noted that the petitioner fails to explain serious inconsistencies in the record which undermine the credibility of the entire petition. While the petitioner lists the beneficiary's husband as the "store administrator" and identifies him as reporting to the beneficiary, this same individual executed the Form I-129 petition as the petitioner's "president," a position which does not exist on the organizational chart and which would not likely be subordinate to a general manager. Further, the petition describes the beneficiary's position for the past three years, which were apparently spent in the United States on L-1A status working for the petitioner, as "retail sales manager" and as reporting to a "general manager," which is her current purported title. However, the current petition does not account for a "retail sales manager" position and does not explain what happened to the former "general manager" to whom the beneficiary supposedly reported. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* At 591.

It is appropriate for Citizenship and Immigration Services (CIS) 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). However, it was not appropriate for the director to rely solely on the number of employees in concluding that the beneficiary will not be employed primarily in a managerial or executive capacity. To the extent that the director relied on the number of employees in denying the petition without considering other factors, such as job duties and the reasonable needs of the organization, those statements are withdrawn.

That being said, counsel's reliance on *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D. Ga. 1988), and *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003), is not persuasive. Section 101(a)(44)(C) of the Act requires CIS to take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, not only has the petitioner not persuasively explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties, neither the Act nor the precedent cited by counsel obviate the need to establish that the beneficiary will be primarily performing managerial or executive duties. As the record establishes that the beneficiary will be primarily engaged in performing non-qualifying administrative or operational tasks and/or serving as a first-line manager, the petitioner has not established that the beneficiary will be primarily employed in an executive or managerial capacity.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(1)(3).

Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361. The prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Therefore, even though the petitioner was successful in the past in petitioning for the beneficiary, the director properly denied the petition in this case.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve an application or petition where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engr. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

Finally, based on the reason for the denial of the instant petition and the outstanding question of the petitioner's legal existence, a review of the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary is warranted to determine if they were also approved in error. Therefore, the director shall review the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary for possible revocation in accordance with 8 C.F.R. § 214.2(l)(9).

ORDER: The appeal is dismissed.

FURTHER ORDERED: The director shall review the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary for possible revocation pursuant to 8 C.F.R. § 214.2(l)(9).