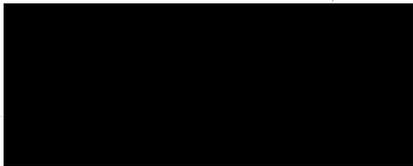


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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536



File: WAC 01 297 50752 Office: CALIFORNIA SERVICE CENTER

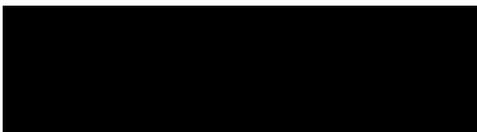
Date: **DEC 18 2003**

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 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is described as a seller of used clothes. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the beneficiary has not been and will not be employed in a primarily managerial and executive capacity.

On appeal, counsel states that the beneficiary is eligible for this classification "since the beneficiary has been employed in an executive or managerial capacity."

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(1)(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 (1)(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.

Furthermore, 8 C.F.R. § 214.2(1)(14)(ii) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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.

The United States petitioner was incorporated in 1997 and states that it is a wholly-owned subsidiary of West Corporation, located in Japan. The petitioner declares one employee and approximately \$196,000 in gross sales on the Federal Corporate Income Tax return of 1999. The 2000 Federal Corporate Income Tax return was not provided. The initial petition was approved and was valid until September 24, 2001, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for one year at an annual salary of \$42,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed primarily in a managerial or executive capacity.

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.

On December 11, 2001, the director issued a request for additional information regarding the executive or managerial capacity in the U.S. that requested:

The U.S. entity's organization chart with the beneficiary's position and other named employees in the chart.

Provide a detailed description of the beneficiary's specific job duties, including the percentage of time to be spent on each duty.

Clearly indicate whether the beneficiary controls the work of other supervisory, professional or managerial employees. The evidence should include name, job title entry date of employment, education level, salaried wages and evidence they are actually employees of the U.S. entity.

A list of employees currently under the beneficiary's supervision, including name, job title and duties,

entry date of employment, education level, annual salaries/wages.

Submit DE-6 for the last four quarters.

In response counsel for the petitioner provided a description of the beneficiary's job duties that included the following:

- Take orders from customers
- Attend trade shows: Las Vegas, Long Beach and San Diego
- Purchase merchandise from vendors
- Inspect merchandise for quality
- Transporting customers to trade shows
- Sending merchandise to Japan to customers
- Travel out of state to purchase merchandise
- Meet potential customers
- Warehouse merchandise
- Handling administrative aspect of business: bookkeeping; record keeping; inventory control; inspection of goods.
- Planning: Planning strategy with parent company; selling; reporting on operations to parent company.
- Buying merchandise: Beneficiary spends most of his time on this part of the business, purchasing merchandise from rag companies, thrift companies, and flea markets (approximately 75% of his time).

In her decision, the director determined that there was insufficient evidence to establish that the beneficiary will be managing or directing the management of a department, a subdivision or a function of the U.S. entity. The director concluded that the beneficiary has not been and will not be employed in a primarily executive or managerial capacity.

On appeal, counsel asserts that the beneficiary has:

[D]irected the management of the organization or function of the organization. As the sole employee and chief executive officer, [the beneficiary] has been responsible for managing all aspects of the business. As previously indicated, he has managed all of the activities in support of the company's business. He manages all activities in connection with the purchase of merchandise.

Counsel's assertions are not persuasive. The day-to-day description of the beneficiary's duties and responsibilities indicates that the beneficiary is providing the necessary services

to the petitioner to allow its continued operation. 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel asserts that the beneficiary "had planned to hire one or more employees to assist him in the expansion of the business. However, due to a slow down in the economy and sluggish recovery, he has decided that it would not be feasible or prudent to undertake such a plan until the recovery is more stable." Counsel then admits, "there is a substantial overlap in the management and the operation the business." The record reveals that at the time of filing the petition, the petitioner did not have a staff sufficient to relieve the beneficiary from performing nonqualifying duties. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The plans of the petitioner to hire additional staff subsequent to the filing of the petition do not contribute to the beneficiary's eligibility at the time of filing the petition. The regulation 8 C.F.R. § 103.2 (b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." The evidence supplied by the petition demonstrates that the beneficiary was performing and continued to perform non-qualifying duties at the time the petition was filed.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner is a company that buys and exports used clothes. The beneficiary is the sole employee and performs all the duties of the business. The beneficiary visits flea markets and used clothing stores and buys the clothes and other items to ship to Japan. The fact that an individual operates a business does not necessarily establish eligibility for classification in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly performing the operations of the organization, that is, exporting commodities on behalf of the petitioner. The fact remains that the description of the beneficiary's primary duties indicates that they are not in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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.