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FILE: WAC 03 006 51556 Office: CALIFORNIA SERVICE CENTER Date:

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, Director
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 AAO will dismiss the appeal.

The petitioner is engaged in the business of importing, exporting, and manufacturing of various handicrafts. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. On appeal, counsel disputes the director's decision and submits a brief in support of his assertions.

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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) 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 (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.

The U.S. petitioner was established in 2001 and states that it is a subsidiary of Kalavastu Exports, located in India. The initial petition was approved and was valid from December 22, 2001 to December 21, 2002, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$42,000.

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

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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 support of the petition, the petitioner provided the following description of the beneficiary's job duties:

The Beneficiary is and will be involved in establishing the company's long and short term goals, establishing and implementing company policies, planning the strategic management of the company to ensure it's [sic] long term goals are met, directing the business activities, supervising all financial aspects of the company, directing and coordinating formulation of financial programs to provide funding for the company, seeking new investment opportunities, and negotiating, reviewing and approving contracts.

He is responsible for planning and developing all aspects of the U.S. corporation, making major decisions concerning management, sales, imports, and hiring of personnel. He is also in contact with the other Partners of Kalavastu to discuss the overall progress of the expansion of the U.S. Handicraft market.

* * *

Specifically, [the beneficiary] will spend approximately 70% of his time exercising his discretionary authority in managing professional staff members and client relations on behalf of [the petitioner] by conducting discussions with clients and the sales/managerial staff to identify client business problems and opportunities for [the petitioner] to solve those problems through improved system capabilities.

In addition to the development as indicated above, [the beneficiary] will spend approximately 30% of his time developing and conducting information on the trends of the Product in the U.S. market, discussing with the Partners in India and formulating policies and procedures.

On October 16, 2002, CIS issued a request for additional evidence. The petitioner was asked to provide a copy of its organizational chart naming all of its employees and pointing out those employees that are under the beneficiary's supervision. The petitioner was also asked to provide brief job descriptions and educational levels for the beneficiary's subordinates, as well as a more detailed position description and percentage breakdown of the beneficiary's duties.

Although counsel addressed CIS's requests, he refused to provide any of the requested evidence based on the claim that all of the requested evidence had already been provided. Counsel stated that CIS "wrongly issued" the request and referred the director to the evidence initially submitted in support of the petition. Counsel provided a copy of the petitioner's organizational chart, which lists the following seven positions: general manager, import manager, purchasing agents, sales manager, sales representative, administrative officer, and an assistant. However, the petition and the petitioner's quarterly tax returns for the first and second quarters of 2002 all indicate that the petitioner had three employees at the time the petition was filed. Therefore, the organizational chart and the information provided in the body of the petition are at odds. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant case, the petitioner failed to acknowledge, much less resolve this considerable inconsistency.

On November 9, 2002, the director denied the petition concluding that the petitioner failed to submit sufficient evidence to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

On appeal, counsel asserts that the petitioning organization is not a "small business," as implied by the director and claims that the director erroneously considered the size of the petitioning organization. Contrary to counsel's argument, the director's consideration of the size of the petitioning organization comports with current law. While size cannot be the sole consideration in determining eligibility for managerial or executive status, the director can and should consider the size of the petitioner's personnel for the purpose of establishing whether the petitioner has a sufficient staff to relieve the beneficiary from performing non-

qualifying duties. The description of the beneficiary's job duties is key to determining a beneficiary's eligibility for classification as a manager or executive as defined in sections 101(a)(44)(A) and (B) of the Act, respectively. However, the description of duties must be considered in light of the petitioner's organizational structure to determine whether the petitioner has a sufficient support staff to relieve the beneficiary from having to perform non-qualifying duties. It is noted that the petitioner need not directly employ the support personnel, as support staff often consists of contractors hired from outside the petitioning organization. Regardless of the petitioner's choice, the evidence of record must demonstrate that someone other than the beneficiary is performing the non-qualifying duties of the organization and that the beneficiary's duties are primarily managerial or executive. In the instant case, even though the petitioner indicates that it has a staff assisting the beneficiary, it failed to provide the requested job descriptions indicating what duties the support staff performs. It is noted that failure to submit requested evidence, which precludes a material line of inquiry, as the petitioner did in the instant case, shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Furthermore, where a petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, the AAO may disregard that evidence when submitted on appeal. Rather, the AAO may adjudicate the appeal based on the record of proceeding before the director. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, the petitioner may file a new petition. As the petitioner in the instant case failed to submit evidence requested by the director prior to the denial notice, the updated organizational chart submitted on appeal will not be considered. Therefore, the petitioner failed to support the claim that the beneficiary's job will primarily consist of managerial or executive duties. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel further claims that the beneficiary manages an essential function of the petitioning organization and states that the petitioner would be unable to continue its progress without the beneficiary's presence. While the AAO acknowledges the beneficiary's significant part in the petitioning entity's success, the petitioner's claim that the beneficiary is a function manager must be supported by evidence that the beneficiary manages, but does not actually perform, the essential function. An employee who primarily performs the tasks necessary to produce a product or to provide a service 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). Although counsel provided a position description in an attempt to establish the beneficiary's managerial role within the organization, that description consists of little more than a paraphrased version of the statutory definition of "executive capacity." Counsel fails to explain why he has introduced portions of the definition of "executive capacity," if the beneficiary will act in a managerial capacity as the petitioner has indicated.

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 did not provide a comprehensive description of the beneficiary's routine duties as instructed in the request for additional evidence. Counsel asserts that the beneficiary's duties include policy-making and "planning and developing all aspects" of the petitioning entity. However, this description is too vague to convey an understanding of what the beneficiary will be doing on a daily basis. Although the petitioner stated that 70% of the beneficiary's time would involve personnel management and client-related matters, it failed to provide a detailed list of duties that the beneficiary would perform on a daily basis. Furthermore, the fact that the beneficiary would be directly involved with client relations suggests that a large portion of his job would

require him to perform the essential tasks of the organization, which contradicts the petitioner's claim that the beneficiary's duties would be primarily managerial or executive. *See id.*

As previously stated by the director, the fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee 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 primarily directing the management of the organization. Rather, the record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or that he will be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily 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.