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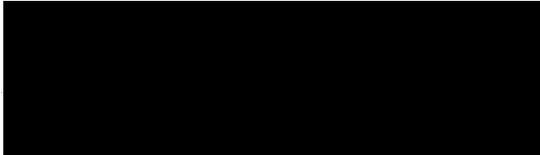


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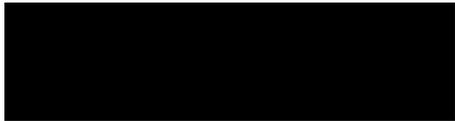
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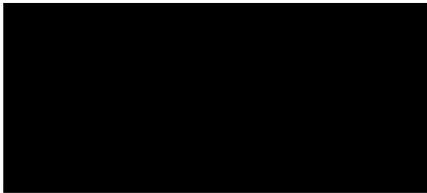
FILE: EAC 02 110 52068 Office: VERMONT SERVICE CENTER Date:

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

The petitioner is described as being in the wholesale general merchandise business. The petitioner seeks to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner failed to establish that the beneficiary has been or would be primarily employed in a managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and submits a brief in opposition thereto.

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(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. 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 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 (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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1993 and claims to be in the wholesale and general merchandise business. The petitioner claims that the U.S. entity is a subsidiary of Ifran Mirza d/b/a Azkis Cosmopolitan, located in Pakistan. The petitioner declares three employees. The petitioner seeks to employ the beneficiary for three years at an annual salary of \$40,000.

The issue presented in this proceeding is whether the petitioner has established that the beneficiary has been and will be primarily employed 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.

In the petition, the petitioner described the beneficiary’s job duties as: “[r]esponsible for running the company including formulating all policies and goals and ensuring that policies are carried out, reviews all financial

information and is in charge of all financial policies and operations and all decisions regarding purchases, acquisitions, contracts and agency agreements.”

In the petition, the petitioner described the beneficiary’s proposed job duties as “[r]eorganize operations, set policy and goals and insure that goals are met; frequent travel to parent company.”

The petitioner submitted copies of payroll records from the foreign entity, of which the AAO will examine those dated January 2001 through February 2002. The payroll records list the beneficiary’s salary and his title as chief executive. It also lists titles and salaries of other employees. The titles consist of manager, assistant manager, export manager, marketing executive, two office assistants, and a messenger.

The petitioner submitted a copy of the 2001 Corporate Tax Return (Form 1120) for the U.S. entity. The petitioner also submitted a Quarterly Employer Tax Return (Form 941) for the quarter ending December 31, 2001.

In response to the director’s request for additional evidence concerning the beneficiary’s job duties, the petitioner submitted a business plan which described the beneficiary’s proposed duties as:

[Responsible for] making policy decisions and setting the goals of the company, using wide discretion as delegated by the Board of Directors. This will involve strategic planning including development and modification of business plan, reviewing company’s organizational and financial structure and making modifications to suit the new business; setting goals and policies, initially reviewing staff requirements and objectives and hiring staff. He will have full discretion over daily operations including all financial matters. Responsible for delegating high level duties and assignments, creating a focused vision for the company, defining strategy for operations, business development, marketing and management and making contacts with US companies at the highest level to discuss alliances.

The director determined that the record did not establish that the beneficiary had been or will be employed in either a managerial or an executive capacity. The director stated that the evidence of record did not provide a comprehensive description of the beneficiary’s duties sufficient to establish that the beneficiary has or will have managerial control and authority over a functioning department, subdivision or component of the U.S. or foreign entity. The director also stated that the evidence of record had not established that the beneficiary has or will function as an executive or manage a subordinate staff of employees who will relieve him from performing non-executive duties. The director stated that the evidence of record did not establish that the beneficiary had primarily performed executive or managerial duties abroad for one continuous year of full-time employment within the three years prior to entering the United States as a nonimmigrant.

On appeal, counsel asserts that the petitioner has provided sufficient evidence to establish that the beneficiary has been and will continue to be employed in a managerial or executive capacity. Counsel continues by stating that it appears that the director did not take all evidence into consideration prior to denying the visa application. The petitioner submitted additional evidence in support of its claim that the U.S. entity is doing sufficient business and that the beneficiary has been and will continue to function in a managerial or executive capacity and will not directly perform the functions that he manages. The petitioner submitted as evidence bank statements, financial statements, employer quarterly reports, and business invoices.

The petitioner has failed to present sufficient evidence to establish that the beneficiary's job duties for the foreign entity have been managerial or executive in nature. Evidence consisting of the foreign entity's payroll records, contracts between the Ministry of Defense and the foreign entity, bank statements, letters of confirmation, invoices, and tax records, dated subsequent to the filing of the petition, will not be considered by the AAO in evaluating the petition. 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 evidence submitted in response to the director's request for additional evidence such as contract agreements, payroll records, quarterly tax returns, the U.S. entity business plan, bank statements, and statements of account, do not adequately address the director's concerns regarding the beneficiary's job duties at the foreign entity and his proposed duties at the U.S. entity.

In addition, there is no evidence in the record to establish that the beneficiary has been employed for one continuous year, within three years preceding the filing of the petition, for a qualifying organization, in a qualifying managerial or executive position. The record reflects that the beneficiary has been employed by the foreign entity as chief executive. The foreign entity payroll records reflect that the beneficiary was on the foreign company's payroll from January 2001 to January 2002. However, the petitioner has admitted that the beneficiary arrived in the United States on November 18, 2001 on a B-2 visa. The petitioner also submitted as evidence a copy of the B-2 non-immigrant tourist visa issued to the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and 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). 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Furthermore, the description given by the petitioner of the beneficiary's job duties with the foreign entity are broad and general. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Many of the beneficiary's duties such as being responsible for running the company including formulating all policies and goals and ensuring that policies are carried out, reviewing all financial information, and being in charge of all financial policies and operations, are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive in nature. In addition, evidence presented by the petitioner fails to demonstrate that the beneficiary has managed the organization, department, subdivision, function, or component of the foreign entity. The petitioner has failed to submit sufficient evidence to establish detailing the duties of the foreign entity's employees and how their duties correlate to that of the beneficiary. 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).

Furthermore, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed by the U.S. entity in a primarily executive or managerial capacity. Although the petitioner contends that the beneficiary will be responsible for the day-to-day operation of the company, there has been no documentary evidence submitted detailing how he will carry out those duties. The petitioner has provided no comprehensive description of the beneficiary's or the subordinate's duties that would demonstrate that the beneficiary will be directing the management of the U.S. entity. There is no evidence submitted to show what percentage of time will be attributed to each of the beneficiary's managerial or executive versus non-

executive duties. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). The evidence of record does not establish that the three U.S. employees have received any type of professional training or education, nor does it show that they manage or supervise a subordinate staff on a full-time basis. There is no evidence to show that the full-time workers' daily work will be sufficient to relieve the beneficiary from performing non-qualifying duties. Moreover, the evidence of record demonstrates that the beneficiary will perform the services of the organization, rather than directing the activities of the organization. As case law confirms, 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). The petitioner stated in the evidence submitted that the U.S. entity already has a president.

Finally, there has been no plausible explanation given for the need to hire another president and demote the current president to a general manager's position. Further, in its business plan the petitioner stated that the U.S. entity's new staff would consist of a president, general manager (currently the president), marketing/business development staff (to be hired), and an office assistant/secretary (to be hired). On the other hand, the petitioner's Quarterly Employer Tax Return ending December 31, 2001 showed three current employees employed by the U.S. entity. The petitioner submitted a list of current employees consisting of a president, vice president, and office clerk. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and 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, supra*. Based upon the evidence submitted it does not appear that the reasonable needs of the petitioning company would plausibly be met by the services of the beneficiary as president.

On review of the record, it cannot be found that the beneficiary will be employed primarily in an executive or managerial capacity. The information provided by the petitioner describes the beneficiary's proposed duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the issues raised by the director. The following duties are without any context in which to reach a determination as to whether they are qualifying as executive or managerial: responsible for making policy decisions and setting the goals of the company, strategic planning including development and modification of business plan, reviewing company's organizational and financial structure and making modifications to suit the new business, setting goals and policies, initially reviewing staff requirements and objectives and hiring staff.

The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he will be establishing goals and policies, that he will be exercising a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Paraphrasing the regulations as a substitute for a day-to-day description of the beneficiary's job duties is insufficient to demonstrate the beneficiary is acting in an executive or managerial capacity. *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); *Ayvr Associates, Inc. v. Meissner*, 1977 WL 188942 at *5 (S.D.N.Y.). There has been no evidence presented to demonstrate what goals and policies have been and will be established by the beneficiary in his capacity. Based upon the evidence submitted, it does not appear that the U.S. entity is or will be in a position to support a managerial or executive position. Further, company tax records demonstrate that only \$6,000 was paid in salaries and wages in 2001.

In summary, 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. Absent details concerning the

beneficiary and his subordinates daily activities and percentage of time spent, and to be spent performing each duty, the record is insufficient to establish that the beneficiary has been or will be performing primarily in an executive or managerial capacity. The CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The evidence of record does not demonstrate that the U.S. entity is in a financial position to support a managerial or executive position, nor has it been shown that the petitioning entity possesses the organizational complexity to warrant supporting a managerial or executive position. Accordingly, the appeal will be dismissed.

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 sustained that burden.

ORDER: The appeal is dismissed.