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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: SRC 02 243 53936 Office: TEXAS SERVICE CENTER Date: **APR 21 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

[Redacted]

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prevent clearly unwarranted
invasion of personal privacy

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, 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 is engaged in the development and wholesale of special metallic modeling paints. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. 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 findings and submits an appellate brief to support 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 states that it was established in 2001 and that it is an affiliate of Alclad Two Lacquers, Ltd., located in the United Kingdom. The petitioner indicates that the initial petition in order to open the new office was approved and was valid until August 6, 2002.¹ The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$30,000.

¹ This petition was filed on August 9, 2002. Although not a matter under the appellate jurisdiction of the AAO, it is noted that the beneficiary would not have been eligible for an extension of stay even if this petition had been approvable. See 8 C.F.R. § 214.1(c)(4).

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 proposed job duties:

1. [H]e is really the only person who can properly represent the product in its present and expanding market uses. He is the only one with the capacity to meet with potential retailers and make modifications to the product to accommodate their specific needs.

2. Because of his knowledge of the product he will play an integral part in the patent application process and in the registration of the product names.
3. As new or different needs arise for the product [the beneficiary] will need to develop new formulas. . . .
4. Because with a product of this type quality control is essential, [the beneficiary] will need to determine how mass production is going to be undertaken. . . .

On October 17, 2002, the director denied the petition concluding that the petitioner has not established that the beneficiary's proposed duties are of an executive nature.

On appeal, counsel asserts that the beneficiary "is solely responsible for the development and direction of the U.S. affiliate" and restates the description of duties provided initially in support of the petition. Counsel further claims that the beneficiary's employment in the United States is crucial to the success of the petitioning entity because the beneficiary is the only one who can negotiate contracts with buyers and distributors. Although the AAO acknowledges the essential role the beneficiary has within the petitioning organization, the needs of the petitioner do not override the burden of establishing that the beneficiary performs primarily managerial or executive duties. CIS must examine the duties to be performed by the beneficiary in order to determine whether he is eligible for classification as a manager or executive. See 8 C.F.R. § 214.2(l)(14)(ii)(C). In the instant case, the petitioner has indicated, by virtue of providing the beneficiary's proposed list of duties, that the beneficiary will continue to develop the product based on market needs, and he will also market and solicit buyers for the product. It is noted, however, that 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). In the instant case, the record of proceedings suggests that the petitioner's reasonable needs are such that the beneficiary is required to be directly involved in both producing the product and subsequently providing the services necessary to sell that product. Further review of the record shows that a majority of the sales invoices dated from August 2001 to May 2002 name the beneficiary as the person who processed the invoice, thereby indicating that the beneficiary has been and will be directly involved in selling the product of the petitioning organization. As such, the AAO cannot conclude that the petitioner has a need for a primarily managerial or executive position.

Counsel also states that the director erred in applying the definition of "managerial capacity" to the beneficiary's listed duties in light of the petitioner's claim that the beneficiary's duties are of an executive capacity. Contrary to counsel's interpretation, it is part of CIS's general practice, as a courtesy to the petitioner, to consider the beneficiary's eligibility in light of the definition of both managerial and executive capacities, even when the petitioner specifies the beneficiary's desired classification. In the instant case, the director clearly gave the petitioner this dual consideration. Her only mistake was her failure to restate the statutory definition of "managerial capacity" in her denial. This oversight on the director's part is not germane to deciding whether the beneficiary's duties are qualifying. The director's decision clearly indicates that she considered such crucial factors as the beneficiary's job duties and the composition of the petitioner's organizational structure prior to rendering the denial. Therefore, the director's harmless error cannot serve as the basis for reversing an otherwise sound decision.

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 beneficiary is the owner and operator of a three-person operation where the beneficiary is claimed to be the one who provides the product to be sold. However, 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 product and services of the business. Although the beneficiary's role in the overall success of the petitioning entity is acknowledged, this does not override 8 C.F.R. § 214.2(l)(1)(ii)(C), which requires that the beneficiary primarily perform managerial or executive duties. The fact that the beneficiary produces the petitioner's product, no matter how essential that service is, negates the claim that the beneficiary will primarily perform qualifying executive duties. For this reason, the petition may not be approved.

Beyond the decision of the director, the record of proceeding lacks sufficient evidence of a qualifying relationship. The petitioner claims to have an affiliate relationship with the foreign entity as a result of the beneficiary's 50% ownership of each entity. In support of this claim, the petitioner submitted two share certificates, one indicating that the beneficiary owns 50 shares in the foreign entity, and the other showing that the beneficiary owns 500 shares of the petitioning entity.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, in pertinent part:

Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

As the petitioner claims that more than one individual owns it, in order to establish whether it has an affiliate relationship with the foreign entity, according to the above definition, the petitioner must provide all pertinent evidence regarding the petitioner's and the foreign entity's ownership and control. In the instant case, the petitioner claims that the remaining 50% of its shares are owned by C&C Aerospace, Inc. However, 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). The petitioner has not submitted any evidence to support its claim regarding C&C's alleged ownership of 50% of the petitioner's shares. The petitioner has also failed to provide information regarding the remaining 50% of the foreign entity's ownership. Moreover, the petitioner has not provided CIS with any information regarding the number of shares that were authorized for sale or the total number of shares that were actually issued. All this information is crucial for the purpose of identifying the parties that own and control the petitioning and foreign entities. The current record of proceeding does not contain evidence of a qualifying relationship between the petitioning entity and the foreign entity. For this additional reason, this 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.

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ORDER: The appeal is dismissed.