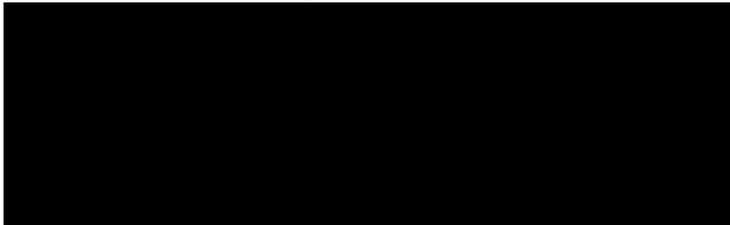


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: EAC 02 237 52297 Office: VERMONT SERVICE CENTER Date: APR 28 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:



PUBLIC COPY

**identifying data deleted to
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.

[Signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 a new U.S. office engaged in providing information technology services and software development to the garment industry. It seeks to temporarily employ the beneficiary as its managing director, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee.

The director denied the petition concluding: (1) that the beneficiary was not employed abroad for one year in the three years preceding the petition in a primarily managerial or executive capacity; and (2) that the new U.S. operation would not support a primarily executive or managerial position within one year of approval of the petition.

Counsel for the petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for further review. On appeal, counsel asserts that the beneficiary has been employed abroad in an executive capacity for at least one year in the three years preceding this petition, and that the new U.S. organization is "a viable concern capable of employing and supporting the beneficiary at the L1A level." Counsel submits a brief in support of the assertions.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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) further 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.
- (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.

Moreover, pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) sufficient physical premises to house the new office have been secured;
- (B) the beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;
- (C) the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) the organizational structure of the foreign entity.

The first issue in this proceeding is whether the beneficiary was employed abroad for one year in the three years preceding the petition in a primarily 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 and attached documentation, the petitioner stated that the beneficiary was employed in the foreign company since 1997 as its managing director, and that the beneficiary's job responsibilities included: developing the company's organizational structure; leading the management system; developing the multi-functional technology modeling process; and, developing the corporation's business strategy. The company's organizational chart reflects four direct subordinates of the beneficiary – a sales and marketing head, an operations manager, the chief executive officer/technology, and chief financial officer – and three additional levels of subordinate employees. Additional evidence confirms that the beneficiary received a Bachelor of Commerce degree, and completed supplemental courses in apparel merchandising and marketing, and international trade.

In a request for evidence, the director asked that the beneficiary submit the following documentation: (1) a detailed statement of the specific duties performed by the beneficiary in the foreign company, including the number of hours spent on each job duty on a weekly basis, and the managerial and executive nature of each job duty; (2) documentary evidence of the staffing of the foreign company, including a list of employees, job titles, and minimum educational requirements; (3) evidence such as payroll records and tax withholding forms confirming employment of the company's workers; and, (4) a statement of the primary function of the foreign company, and how the beneficiary's services are utilized.

In response, the petitioner explained that the beneficiary serves as the managing director and chief executive officer of the foreign company, and is responsible for: strategic development, team building, allocating resources/budgeting, organizing the company's processes and structures to meet the needs of the market, and guiding and monitoring senior management's performances to meet the company's objectives. The petitioner also stated that the beneficiary is "heavily involved with procuring strategies involving setting the direction for the company," including determining which markets the company should penetrate, differentiating the company's services from its competitors, implementing the development of products and services to meet the market's needs, and setting the annual budget and financial projections. The petitioner also provided the following breakdown of the beneficiary's job duties on a weekly basis:

Strategy related activities	4 hours
Budgeting and financial control	4 hours

Business development and related activities	6 hours
Operations review	8 hours
Technology modeling and development	6 hours
Investor relationship management	2 hours
Client meetings	6 hours
Supplier meetings	4 hours

With regard to the employment of subordinate employees, the petitioner submitted a certified statement identifying the company's thirty employees, and each worker's title, annual salary, educational qualifications, and job duties.

In his decision, the director determined that the beneficiary was not employed abroad in a primarily managerial or executive position. The director stated that while some of the beneficiary's job duties appear to have been managerial, "[CIS] is not convinced that, in an organization of the size and nature of the foreign business, the beneficiary's duties are primarily managerial or executive." The director further noted that the petitioner's description of the beneficiary's job duties is vague, and does not provide a "clear idea of what the beneficiary is doing on a day-to-day basis." The director consequently denied the petition.

On appeal, counsel asserts that the beneficiary was employed abroad in an executive capacity as the managing director/chief executive officer. Counsel provides previously submitted payroll records, which counsel states "clearly establish that the Beneficiary has been with the foreign affiliate at least one year in the three years preceding . . . as a Managing Director." Counsel also claims that the job duties provided in the petitioner's response to the director's request for evidence give an hourly day-to-day description of the beneficiary's position; additionally, as the job description was referenced from the Dictionary of Occupational Titles, it is not "vague," as determined by the director.

On review, the petitioner has provided sufficient evidence to demonstrate that the beneficiary has been employed abroad in a primarily managerial or executive capacity for at least one year during the three years preceding the filing of the petition. The job duties outlined in response to the director's request for evidence combined with the organizational chart and employee records, which substantiate the employment of subordinate workers who perform the daily functions of the company, establish the beneficiary's employment as an executive. The director's decision on this issue will therefore be withdrawn.

The second issue in this proceeding is whether the new U.S. office, within one year of approval of the petition, will support employment of the beneficiary in a primarily managerial or executive capacity.

On the petition, the petitioner outlined the proposed job duties of the beneficiary as managing director as: design and lead the management system of the U.S. company, develop the company's organizational structure, develop a multi-functional technology modeling process, and raise funding for the U.S. organization. In a business plan also submitted with the petition, the petitioner stated that the objective of the U.S. company is "to provide rapid response sourcing solutions for US based sourcing organizations, [and] sourcing and technology solution[s] for [the] fashion industry." The petitioner also provided a lease agreement, evidencing that it secured "a retail store location" in which to operate. Lastly, a proposed U.S. organizational chart identified the beneficiary as managing director with four direct subordinates – marketing manager, sourcing coordinator, design manager, and technology architect – and additional subordinate employees including account executives, designers, and sales agents.

The director subsequently requested additional evidence that within one year of approval of the petition, the new U.S. office will be sufficient to support the beneficiary as a manager or executive, including: (1) a more specific business plan evidencing each proposed action for the next two years, as well as when new employees would be hired and the salaries to be paid to each; (2) a more detailed description and breakdown of the beneficiary's proposed job duties; and (3) detailed descriptions of the job duties to be performed by the proposed employees. The director noted that the descriptions should clearly outline the business to be performed by the U.S. entity, and how the employees will carry out the functions of the business.

Additionally, the director requested evidence regarding the size of the U.S. investment and the financial ability of the foreign entity to remunerate the beneficiary and commence doing business in the United States. The director stated that the documentation should include: original bank statements for the U.S. company identifying all deposits and withdrawals, copies of the foreign entity's bank statements for April, May and June 2002, any wire transfers documenting a transfer of funds from the foreign company to the new U.S. office, the foreign entity's most recent business tax form, and evidence to confirm the level of funding of the foreign company by ICIC, a large investment bank, as previously claimed by the petitioner.

In response, the petitioner submitted an amended business plan identifying the corporation's goals for the first eight quarters. As the business plan is part of the record it will not be repeated herein in its entirety. The business plan as it pertains to the first year, however, projects that, among other things, the beneficiary will establish the office infrastructure, develop working and outsourcing relationships with factoring and logistics companies, formulate and introduce a marketing strategy to specialty retailers, hire a sales and marketing manager and a designer or outside design services, and introduce quick response supply services to retailers.

The petitioner also provided an additional description of the beneficiary's job responsibilities including: building and leading the organizational structure, formulating business and marketing strategies, strategic alliances, business acquisitions, and allocating resources for the new company. In addition, the petitioner outlined the beneficiary's weekly job duties as follows:

Strategy related activities	6 hours
Alliances building and networking	6 hours
Customer meetings	8 hours
Budgeting and financial control	2 hours
Business development review related activities	6 hours
Operations review and exceptions handling	6 hours
Investor relationship management	2 hours
Team building	4 hours

The petitioner noted that over the next two years the petitioning organization planned to hire the following employees: a designer, a sales and marketing manager, a technology officer, and a marketing manager/business process framework.

With regard to the financial size of the U.S. and foreign entities, the petitioner made reference to a previously submitted letter from a U.S. financial institution acknowledging that the U.S. entity holds a checking account at the bank. The petitioner also stated that upon approval of the petition, "\$80,000 will be wired immediately to pay for the operational costs for [the petitioning organization] (i.e. Beneficiary's salary, lease payments,

office expenditures, etc.).” With regard to the foreign company, the petitioner noted that the foreign company “has been recently funded by India’s largest investment bank” for \$833,333.00, and provided a certified statement from the bank confirming the investment. An additional bank statement for the foreign company identified a bank balance of approximately \$211,000 as of June 2002. The petitioner also submitted copies of the foreign entity’s audited balance sheet for the period ending March 2001, and its unaudited balance sheet for the period ending March 2002.

The director denied the petition concluding that the beneficiary would not be employed in a primarily managerial or executive capacity within one year of approval of the petition. The director acknowledged both business plans submitted by the petitioner, yet stated that neither plan specifically indicated how the petitioner would accomplish its goal of “capturing a large share of the ‘quick response supply’.” The director further stated that there is no evidence that the U.S. entity has experience in the type of business that it proposes to conduct. Additionally, the director noted that it is unlikely that the beneficiary will be relieved from performing non-qualifying duties within one year of approval of the petition, as the petitioner plans to hire only two employees, a designer and a sales and marketing manager. Lastly, the director stated that the petitioner had failed to provide any evidence that the foreign company funded the new U.S. operation, or that the U.S. company has sufficient funds to begin operating, and to pay the beneficiary’s salary.

On appeal, counsel asserts that the petitioning organization will support the beneficiary “at the L1A level” within one year of approval of the petition. Counsel claims that the business plans submitted by the petitioner clearly establish that the U.S. company will be profitable within one year of commencing operations. Counsel also contends that the evidence submitted by the petitioner in response to the director’s request “details the nature and scope of the duties the Beneficiary will be responsible for and the duties clearly illustrate that the skills needed to perform these duties require an individual at a managerial or executive capacity.”

With regard to the director’s conclusion that the foreign company had insufficient funds to commence operations in the U.S., counsel explains that, as reflected in the submitted bank statements for the foreign company, the foreign entity experiences “consistent and ongoing capitalization” after it has paid necessary business expenses. Counsel contends that this capital, which counsel indicates to be \$854,166.00 at the end of March 2002, is then available and “used for future business planning and recruiting of employees.” Counsel further asserts that “under the Act [the petitioner] is not required to transfer funds from its foreign affiliate to the U.S. Subsidiary up until the [CIS] grants the L1A petition.”

On review, counsel’s assertions are not persuasive in establishing that within one year of approval of the petition the beneficiary will be employed in the U.S. entity in a primarily managerial or executive capacity.

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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* Additionally, as noted above, if a beneficiary is coming to the U.S. as a manager or executive to open or be employed in a new office, the AAO will review: the proposed nature of the U.S. entity, including its scope, organizational structure, and financial goals; the financial status of the U.S. and foreign entity, and, the organizational structure of the foreign entity. *See* 8 C.F.R. § 214.2(l)(3)(v).

When reviewing the proposed job duties of the beneficiary, the AAO acknowledges that, as a beneficiary of a new office, the beneficiary in the present matter may be engaged in non-managerial and non-executive functions during the first year of the company's establishment. However, within one year of approval of the petition, the regulations require that the U.S. entity be able to support an executive or managerial position; there is no extension of this one-year period. *Id.* In the present matter, while the descriptions of the beneficiary's job duties identify managerial and executive duties to be performed by the beneficiary as a managing director, the record does not support a finding that within one year of approval of the petition the beneficiary will be primarily performing these duties.

The petitioner's amended business plan submitted in response to the director's request for evidence, does not establish that the U.S. entity will employ a subordinate staff sufficient to relieve the beneficiary from performing non-managerial and non-executive functions of the petitioning organization. The AAO acknowledges the requirements in section 101(a)(44)(C) of the Act, which states that managerial or executive capacity may not be determined solely on the number of employees supervised by the beneficiary. The Act further provides though that if staffing levels are considered, CIS shall take into account the reasonable needs of the organization in light of the overall purpose and stage of development of the organization. In the petitioner's business plan, the petitioner indicated that during its first year of operation it planned to hire a sales and marketing manager, and a designer. If a designer was not hired, the petitioner noted that it would outsource the design services. As noted by the director in his decision, the petitioner does not anticipate hiring any other employees within the first year. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as managing director and two additional employees. If this were in fact true, the petitioner would not need to hire a technology officer, a business process framework manager, account executives, and sales managers, as projected by the petitioner in its business plan and proposed organizational chart.

Moreover, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). As addressed above, it appears from the record that the company's manager and designer will not relieve the beneficiary from performing non-managerial or non-executive functions of the U.S. business. Because "a network of independent sales associates" will not be established until after the first year of operation, the beneficiary will likely participate in selling the services of the company. Additionally, there is no indication that within the first year of approval of the petition the petitioner will employ any workers to perform the routine daily functions of the business, including administrative, accounting, and personnel matters. 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).

Furthermore, as noted above, although the beneficiary's job description includes some managerial and executive job duties, the petitioner has not specifically indicated in which capacity the beneficiary will be employed. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. Therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of either capacity. In the present matter, counsel claims only that the beneficiary will be employed at the "L1A level." Neither the petitioner nor counsel, however, established that the beneficiary's job duties would satisfy the requirements of both a manager and an executive. 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).

Finally, the financial documentation submitted by the petitioner does not demonstrate the size of the U.S. investment, or the financial status of the foreign entity. With regard to the U.S. company, the petitioner submitted a bank letter certifying that the petitioner held a business checking account at a U.S. financial institution; the letter however, did not reference the account balance. Additionally, the petitioner stated in its response to the director's request for evidence that upon approval of the petition, the petitioner would receive a wire transfer of \$80,000.00. While it is implied that the foreign company will initiate this transfer, the petitioner did not specifically state that the foreign company would contribute the funds. Moreover, although counsel asserts on appeal that the foreign company has "consistent and ongoing capitalization," the financial statements for the period ending March 2002 indicate an overall loss. Absent additional documentation, the record does not demonstrate the financial status of the U.S. company, or the foreign entity's ability to remunerate the beneficiary and commence operations in the United States. Again, 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, supra*.

For the foregoing reasons, the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year of approval of the petition. Consequently, 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. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.