



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: EAC 01 008 52006 Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

[Redacted]

APR 28 2004

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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**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.

[Handwritten signature]
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner, WIA International Limited, is located in London. The petitioner is engaged in the wedding design and supply business. The petitioner seeks to hire the beneficiary as a new employee to open its new U.S. branch office, WIA International Limited, t/a Ms. Afrique Inc., located in Maryland. Accordingly, in October 2000, the foreign entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for one year. The petitioner endeavors to employ the beneficiary's services as the U.S. entity's executive manager for a period of three years.

On June 18, 2002, the director denied the petition. The director determined that the petitioner has not been and will not be employed in a managerial or executive capacity abroad.¹

On appeal, the petitioner's counsel claims that the beneficiary has been employed in a managerial and executive capacity at the London office and that she is "the top executive in all aspects of the United States operation."

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 meet certain criteria. 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. Furthermore, 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.

Pursuant to 8 C.F.R. § 214.2(l)(3), 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;

¹ The AAO acknowledges that the beneficiary may perform some non-managerial or non-executive tasks during the first year of operation. The director's managerial and executive analysis may, however, be relevant after the petitioner has been in operation for one year. Nevertheless, as explained in this decision, the director properly concluded that the new office is not established.

(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's prior year of employment abroad 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.

(iv) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to 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 (1)(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 issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties. 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 examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of job duties. *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. 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. *Id.* Therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of each capacity.

On October 7, 2000, the petitioner filed Form I-129. On Form I-129, the petitioner described the beneficiary's foreign entity duties as "executive manager of bridal attire and wedding supplies store geared to Caribbean and African brides and grooms. Designer of Caribbean and African wedding attire for entire wedding party." In addition, the petitioner described the beneficiary's proposed duties for the United States entity as "establish branch of business geared toward African-American brides and grooms who wish to incorporate ethnic design into their weddings through clothing, invitations

and other wedding needs.” Also, in a September 14, 2000 letter, Eddie Orah described the beneficiary as:

Our bridal shoppe, previously known as WIA Brides, has been managed by [the beneficiary] since its inception in 1995. [T]alented as both a designer or wedding attire and as a businesswomen. It was her idea to market our products to the Carribean and African bride and wedding party. We have been highly successful in carrying her original designs as well as a full line of wedding invitations and social stationary, flowers, napkins, matchbooks and other associated products.

On November 24, 2000, the director requested additional to determine whether the beneficiary was employed in a primarily managerial or executive capacity abroad. In particular, the director requested evidence showing the management and personnel structure of the foreign entity including the number of employees and duties performed by each.

The director also requested additional evidence for the United States entity including a description of the staff, number of employees, job titles, duties to be performed, salaries or wages, and a description of the management and personnel structure.

In response to the request for additional evidence, the petitioner submitted job descriptions of some of the vendors and contract employees WIA uses for its U.S. entity. Counsel asserted that a permanent staff is not needed for the U.S. operation and that the U.S. and foreign entities primarily use contract workers. Counsel described the beneficiary’s duties as:

[The beneficiary], under the title of Executive Manager is responsible for every detail of formulation and successful business operations of this branch of the London company. She will directly supervise some workers while contracting for the services of others. . . . This is initially hands-on type of operation, where she will tend to advertising, contracts, hiring, firing, and merchandising. However, as the business prospers, she will hire additional managers and supervisors to work under her. It is foremost an executive position, using her several years of experience at WIA in London in running the bridal division.

In addition, the petitioner submitted the following job descriptions for the U.S. entity employees:

Sample Stitcher: Marks and cuts out material and sews parts of new style garments

Pattern Maker: Draws and cuts out sets of master patterns for wedding attire following sketches sample articles and design specifications

Shop Taylor: Performs specialized hand and machine sewing operations in manufacture of made-to measure or ready-to-wear clothing

Sewing Machine Operators: Operate regular sewing machines, tending semiautomatic machines to sew garments

Pinner: decorates fabrics or garments with embroidery or appliqué

Sewer, Hand: Joins and reinforces parts of garments and attaches fastners to articles, or sews decorative trimmings to articles, using needles and thread

On March 14, 2001, the director denied the petition. The director determined that the beneficiary has not been employed in a primarily executive or managerial capacity. The director found that: 1) there was no conclusive documentary evidence to establish that the beneficiary was running the bridal division of the foreign entity; 2) the descriptions provided were very general in nature and did not describe the beneficiary's duties in detail to determine the actual function of the beneficiary while employed overseas; and, 3) the number and types of employees supervised, if any, have not been described other than an indication that contract laborers are used by the overseas operation. The director also determined that the U.S. operation would not support an executive or managerial position within one year of operation because the beneficiary will work primarily as a designer and may possibly oversee contracted laborers as needed.

On appeal, the petitioner's counsel asserts that the beneficiary "was the Bridal division in London, and ran every aspect of WIA Brides as the top executive. . . . [T]he fact that she is a clothing designer is merely an enhancement to her managerial and executive roles. . . . [H]er designer talents [are] an adjunct function to her executive and managerial roles." The petitioner submitted additional copies of correspondence "reflecting her work overseas as an executive." This correspondence includes financial matters, ordering material and merchandise from vendors, invitations to vendor shows, leasing contract documents, and advertising. The petitioner also submitted evidence that the beneficiary was recognized by a professional organization and invited to speak for pay to twelve individuals on how to set up a business and claims only an experienced manager or executive would receive such an invitation. The petitioner claims that the beneficiary was the "key contact and final authority for vendors of stationary, bridal supplies and accouterments."

In addition, counsel asserts that:

[The beneficiary's] proposed duties in the United States are bluntly as the top executive in all aspects of the United States operation. She will direct the management of the organization's bridal component, establish personnel policies for contractual and permanent employees over the next year and be the only person who can make the day to day decisions that will assure the success of the U.S. operation. . . . There is no-one else in the U.S. to lead the operation. If she is not the top official in the U.S., then who is? It is therefore obvious that she is the executive in charge, the one who will direct all employees, contractual or not.

On review, the beneficiary's title and duties abroad are described utilizing the following vague phrases: "executive manager" of the bridal attire and wedding supplies store; the "key contact" and "final authority" for vendors of stationary, bridal supplies, and accouterments; "designer" of Caribbean and African wedding attire; the person who "ran every aspect" of WIA Brides as the top executive and whose talents are an "adjunct function" to the beneficiary's executive and managerial roles. These phrases are vague and general. The petitioner has not provided details of the

beneficiary's primary duties as the executive manager, key contact, final authority, or designer, or what aspects of the business the beneficiary actually ran. The petitioner fails to elaborate how the entity abroad has been managed or how the beneficiary has primarily served as 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).

In reference to the United States entity, the petitioner claims that the beneficiary has several years of experience at WIA in London in "running" the bridal division and will be the executive manager responsible for "every detail of formulation" and "successful business operations" who can make the "day to day" decisions that will assure the success of the U.S. operation. However, the petitioner fails to identify how the beneficiary will specifically draw upon the foreign entity's knowledge. The petitioner also describes the beneficiary as the top executive in "all aspects" of the United States operation who "will direct" the management of the organization's bridal component, and "establish personnel policies" for contractual and permanent employees over the next year. These duties are generalities that fail to list any concrete policies that will be established or what management the beneficiary will direct. The petitioner did not enumerate any of these aspects, policies, or the component that the beneficiary will manage. Although the petitioner asserted that the beneficiary is a "top executive" or "executive manager," the AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title.

Further, counsel asserts that since the beneficiary was recognized by a professional organization and invited to speak on how to set up a business, CIS must recognize "only an experienced manager or executive would receive such an invitation." Counsel also asserts that the position is "foremost an executive position," and that "there is no-one else in the U.S. to lead the operation. If [the beneficiary] is not the top official in the U.S., then who is? It is therefore obvious that she is the executive in charge." However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. It is the petitioner's burden to establish that the beneficiary is a "top official" who will be primarily performing managerial or executive duties. The AAO is not in a position to ponder who else may be the "top official."

In this matter, the beneficiary appears to be primarily involved in the daily operations abroad and in the United States as indicated in the record. Based upon the correspondence submitted, the beneficiary is involved in "financial matters," "ordering material and merchandise from vendors," "invitations to vendor shows," "leasing contract documents," and "advertising." These duties primarily appear to comprise daily tasks. In addition, the beneficiary is primarily engaged as a designer. It is noted that the petitioner did not describe any designers, other than the beneficiary, that are employed by the shop. Accordingly, it can only be assumed, and has not been proven otherwise, that the beneficiary is performing all of the design functions for the overseas shop. The beneficiary's design duties qualify as performing a task necessary to provide a service or product. 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).

Further, counsel asserted that the beneficiary will “directly supervise some workers while contracting for the services of others” and “will direct all employees, contractual or not.” These assertions are contradictory and not persuasive in establishing that the beneficiary is primarily acting in a managerial capacity. As previously stated, in 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(1)(3)(2). In the instant matter, the beneficiary’s job description suggests that a majority of her time is spent overseeing the tasks of her subordinate non-contractual and contractual employees. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. According to the petitioner’s description of the beneficiary’s job duties, the beneficiary supervises “some” or “all” of the subordinate employees. These employees include a sample stitcher, pattern maker, shop taylor, sewing machine operators, pinner, and hand sewer. Based on the job descriptions of the beneficiary’s subordinates, it is apparent that the beneficiary’s subordinates are not managerial nor supervisory as they have no subordinates to manage or supervise.

In addition, section 101(a)(32) of the Act states that the term “profession” includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teachers of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. 204.5(k)(2), the term “profession” includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. Even though no educational levels or names were provided for the beneficiary’s subordinates, it is apparent that these types of positions are not those that would normally require college graduates. The petitioner has not established that those subordinates are professional employees within the statutory and regulatory definitions. Therefore, the description of the beneficiary’s job duties and the job duties of her subordinates lead the AAO to conclude that the beneficiary is performing as a first-line supervisor of non-professional employees, rather than as a manager or executive. As stated in the Act, “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)(A)(iv) of the Act.

Moreover, the AAO notes that the petitioner never effectively clarified whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. Regardless, the petitioner must establish that the beneficiary is acting primarily in an executive capacity or in a managerial capacity by providing evidence that the beneficiary’s duties comprise duties of each of the four elements of the two diverse statutory definitions. A beneficiary may not claim to be employed as a hybrid “executive-manager” and rely on partial sections of the two statutory definitions.

After careful consideration of the evidence, the AAO must conclude that the beneficiary has not been and will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO notes that there is a discrepancy in the record regarding the foreign entity’s business. On March 9, 2000, a letter from Sherwood Wheatly Solicitors, a law

firm, was addressed to the beneficiary, at the London office located on 395 Walworth Road, indicating that a counterpart lease would be exchanged for an original lease. The letter stated that “[we] understand you have changed the use of the shop and it is now used for the sale of computers. This is within the use authorized by the Lease and our Clients’ consent is not required to change of use.” This statement is contrary to Form I-129 supplement and a letter signed by [REDACTED]. The Form I-129 was filed on October 7, 2000, and stated that WIA International Limited was located on 395 Walworth Road, London and that the beneficiary had been the executive manager of a bridal attire and wedding supplies store. The letter, signed by [REDACTED], indicated the foreign entity’s address as 395 Walworth Road, London, and stated that “[o]ur bridal shoppe . . . has been managed by the [beneficiary]. . . .” These statements appear to indicate that the foreign entity is not operating as a bridal shop but had changed its operation to a computer business. Since the petitioner filed for L-1 classification for the beneficiary on March 9, 2000, the evidence appears to indicate that seven months prior to filing for the classification, the foreign entity was no longer engaged in the bridal shop business. As a result, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, the fact that the foreign corporation may not be operating as a bridal attire and wedding supply store raises the question of whether the parent organization is still doing business so that a qualifying relationship exists pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G).

Another issue in this proceeding, not raised by the director is whether there is a qualifying relationship between and U.S. and foreign businesses pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). On Form I-129, the petitioner indicated that the U.S. business is a branch of the foreign entity. When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick*, 13 I&N Dec. 649-50 (Reg. Comm. 1970). To establish that a qualifying relationship exists between the foreign company and the claimed U.S. branch, the petitioner must submit probative evidence that include documents such as the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer’s Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

Initially, on October 12, 2000, the petitioner submitted minimal documentation to establish that a qualifying relationship exists between the U.S. business and foreign entity. On November 24, 2000, the director requested additional evidence. Specifically, the director requested share certificates, stock ledgers, or other evidence documenting the ownership and control of each company.

In response, on February 15, 2001, the petitioner submitted evidence that it filed for a federal tax identification number. However, the petitioner filed for a federal tax identification number on February 14, 2001, more than four months after the time of filing the nonimmigrant visa 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). A

petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner also submitted an Application for an Employer Identification Number, Form SS-4, indicating that the U.S. business will operate as a personal service corporation. Since the petitioner submitted evidence to show that it is a personal service corporation in the United States, then that entity will not qualify as “an . . . office of the same organization housed in a different location,” since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Although CIS must examine the ownership and control of the corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer, the petitioner has submitted no evidence to establish that the U.S. business qualifies as an affiliate or subsidiary of the foreign entity. 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*.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.