

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

01

[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: AUG 25 2004

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

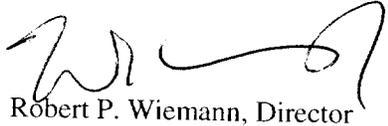
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[REDACTED]

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, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as a retailer and wholesaler. 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 submitted sufficient evidence to demonstrate that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties will primarily be managerial or executive in nature.

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.

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.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that 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 (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- 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.

According to the documentary evidence contained in the record, the U.S. entity was established on December 1, 1998 as a retailer and wholesale business. The petitioner claims that the U.S. entity is an affiliate of Tepee Export Inc., located in Manila, Philippines. The petitioner declares five employees with a gross annual income of \$83,231.70. The petitioner seeks to extend the beneficiary's services as general manager for a period of three years, at a yearly salary of \$60,000.00.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity has been and will continue to be primarily managerial or executive in nature and whether the U.S. entity can support such a position.

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 letter of support dated February 16, 2000, the petitioner stated that the beneficiary would be involved in all aspects of continuing to develop and manage the operations of the business, including hiring and supervising employees. The petitioner further stated that the beneficiary's duties would consist of:

- Hire employees to handle the increasing volume of wholesale business as a result of participation in major trade shows;
- Continue to develop new strategies for greater market share and profit;
- Hire and supervise manager of wholesale operations to negotiate long-term supply contracts with wholesalers as well as act as product sourcing agents in their behalf;
- Plan, develop and design [the U.S. entity's] expansion to the use of the internet to conduct business;
- Develop and execute strategic initiative for the business that may include such undertakings in the future as franchising, parenting and other means that would contribute to the expansion of the retail presence of [the U.S. entity's] stores;
- Analyzing the market, setting strategic planning goals, setting sales quotas and expenses, developing advertising and promoting products in the United States.

The director determined that the petitioner had not submitted sufficient evidence to determine the beneficiary's eligibility, and requested that the petitioner submit additional evidence pertaining to the beneficiary's responsibilities, position description, and duties.

In response to the director's request for additional evidence, the petitioner submitted an organizational chart depicting the U.S. entity's hierarchical structure, and the following summary of employee titles and responsibilities:

Wholesale Sales Manager – Identify wholesale gift buyers, nurture and negotiate volume deals.

Product Designer – Contract designer for the U.S. entity.

Retail Supervisor – Schedules employee shifts, customer service, and sales.

Customer Service Clerks – Assists customers in their purchases.

The petitioner also submitted a copy of the U.S. entity's Form DE 6, Quarterly Wage Report, for the first quarter of 2000.

The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be primarily employed in a managerial or executive capacity.

On appeal, the petitioner describes the beneficiary as having full executive decision-making authority over the U.S. entity. The petitioner also asserts that the beneficiary directs the management of the company and exercises full authority over setting goals and implementing policies. The petitioner further asserts that the beneficiary, as general manager, determines:

- a. How to arrange for financing either from a pre-production aspect or post-delivery factoring in his capacity and position as general manager and co-owner to enter into credit agreements;
- b. Pricing, costing and discounting matters as it relates to international product sourcing and importation issues (loadability, material sources, etc.); . . .
- c. Which trade shows to participate in based on the financial resources available and business viability of each venue;
- d. All financial controls which [the beneficiary] alone has full authority over; . . .
- e. Which sales reps to work with based on track-record;
- f. Which product development direction to pursue with designers as it relates to material availability; and
- g. Which strategic alliances to pursue to further expand the company's revenue base.

The petitioner contends that the shipping of company orders has been outsourced to a third-party warehouse.

On appeal, counsel contends that the beneficiary makes all the executive decisions for the company; directs the management of the U.S. entity's entire operations; establishes the goals and policies of the organization; consults with the president of the foreign entity on major decisions; and receives no supervision from other executives. Counsel also asserts that the beneficiary is a manager in that he manages the U.S. entity in its entirety, supervises the work of professionals, and has authority to hire and fire employees. Counsel asserts that the beneficiary exercises discretion over the day-to-day operations of the business in that he sets up trade shows, introduces new product lines, books orders from customers, negotiates payment and delivery terms, handles public relations with major customers, and prepares necessary order sheets.

In addition, counsel contends that the beneficiary employs a product designer on a contractual basis, who is responsible for designing new products for the U.S. entity and for facilitating custom orders.

Counsel further asserts "the size of the company and nature of business are not determinative as to the duties of the beneficiary." Counsel notes that evidence of the beneficiary's duties and responsibilities should play a major role in determining eligibility for intracompany transferee status. Counsel asserts that the petitioner does not have to establish that the beneficiary will be performing all managerial or executive duties, but it must be established that he will be substantially performing managerial or executive duties. Counsel concludes by noting that the U.S. entity commenced doing business in May 1999 and that case law suggests that one and a half years is not excessive for a start-up company to still be in a start-up mode.

Counsel's assertions are not persuasive. On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The U.S. entity was established in December 1998 as a wholesale and retail business. The initial L-1A visa was granted in March 1999. The petitioner is not a new office pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(F) for purposes of evaluating the beneficiary's proposed duties.

Counsel contends that the U.S. entity has been doing business since May 1999 and that the U.S. entity is still in its start-up stages. Contrary to this contention, 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. The fact that the petitioner is in a preliminary stage of organizational development does not relieve it from meeting statutory requirements. 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); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant case, the petitioner has failed to present sufficient evidence to establish that it could employ the beneficiary in a predominantly managerial or executive position as of the date of filing of this petition.

Counsel asserts that the director's decision was contrary to the evidence submitted and to relevant legal authority. Counsel further contends that one-person office petitions, similar in description to the current petition, have been granted by the AAO, and cites to unpublished decisions in support of her contentions. While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Further, an unpublished decision carries no precedential weight. *See Chan v. Reno*, 113 F.2d 1068, 1073 (9th Cir. 1997) (citing 8 C.F.R. § 3.1(g)). As the Ninth Circuit says, "[U]npublished precedent is a dubious basis for demonstrating the type of inconsistency which would warrant rejection of deference." *Id.* (citing *De Osorio v. INS*, 10 F.3d 1034, 1042 (4th Cir. 1993)).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization or evidence of the beneficiary's job duties, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In evaluating whether the beneficiary is employed in a primarily managerial or executive capacity, the AAO will look first to the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The 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.* The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In the instant matter, there is insufficient evidence to show that the beneficiary primarily performs qualifying managerial or executive duties.

The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he would be establishing goals and policies, that he would be exercising a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals. Counsel contends on appeal that the beneficiary makes all executive decisions for the company, directs the management of the entire operation, establishes goals and policies, consults with the president of the foreign entity, and receives no supervision from other executives within the company. There has been no independent documentary evidence submitted to substantiate counsel's claims. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. *See* Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as "directing the entire operation of the organization, establishing goals and policies of the organization, and exercising sole discretionary decision making." Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner has not provided a comprehensive description of the beneficiary's purported job duties. The description given of the beneficiary's job duties is too broad to establish that the preponderance of his duties will be managerial or executive in nature. The following duties are without any context in which to reach a determination as to whether they would be qualifying as managerial: manages the U.S. entity, supervises the work of professionals, hires and fires employees, sets up trade shows, and introduces new product lines. Further, there is insufficient detail regarding the actual duties of the assignment to overcome the objectives of the director. There is no indication from the record how much of the beneficiary's time will be devoted to performing each task. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. V. Sava, supra, at 1108.*

The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing non-qualifying duties. The evidence shows that there is a wholesale sales manager, retail supervisor, and customer service clerks who are employed by the U.S. entity. The petitioner contends that it employs a product designer on a contractual basis. The petitioner provided a brief description of the employee's responsibilities. However, the record does not reflect that the employees are professional, maintain supervisory positions, work on a full-

time basis, or that they take direction from the beneficiary in performing their duties. The petitioner states that it utilizes the services of outside contractors on an as needed basis.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not necessarily mean that the employee works in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that a baccalaureate degree is actually necessary, for example, to perform the sales and administrative work of the sales manager, retail supervisor, or customer service clerks, who are among the beneficiary's subordinates.

In review of the record, it appears that the beneficiary will be primarily performing the services of the U.S. entity. 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). The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the organization; setting up trade shows, introducing new product lines, booking orders and negotiating payment and delivery terms, and preparing order sheets. The petitioner has not demonstrated that the beneficiary 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.