



U.S. Citizenship
and Immigration
Services

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FILE: LIN 01 239 56156 Office: NEBRASKA SERVICE CENTER Date:

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

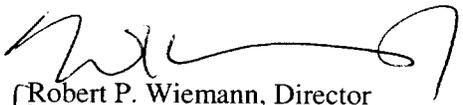
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Nebraska 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 filed this nonimmigrant petition seeking to extend the employment of its managing director as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Michigan that is engaged in the sale of jewelry and offers goldsmith services. The petitioner claims that it is the branch of the beneficiary's foreign employer, located in Malmo, Sweden. The petitioner now seeks to extend the beneficiary's stay for three years.

The director denied the petition concluding that the beneficiary is performing daily non-qualifying functions of the U.S. business, and is therefore not employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel submits a statement from the petitioner, in which the petitioner claims that Citizenship and Immigration Services (CIS) erred in concluding that the beneficiary was not employed in the United States in a qualifying capacity, and states that the beneficiary "perform[s] many duties that clearly fall within the definition of managerial and executive [capacity]."

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) 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.

The issue in the present proceeding is whether the beneficiary is employed by the U.S. entity 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner stated on the nonimmigrant petition, filed on August 9, 2001, that the beneficiary's responsibilities as the petitioner's managing director would include directing and supervising the operation. The director subsequently issued a request for evidence on September 17, 2001. The director asked that the petitioner provide a statement from an authorized official of the petitioning organization describing the beneficiary's duties during the previous year and the duties the beneficiary will perform under the extended petition. The director also requested that the petitioner describe its staffing, including the number of individuals employed and the positions held by each, and submit verification of employment, such as Form 941, Employer's Quarterly Federal Tax Return, W-2 statements, and unemployment reports.

The petitioner responded in a letter through counsel dated November 19, 2001. Counsel provided the following description of the beneficiary's job duties:

[The beneficiary's] duties consist of creating and insuring the implementing [sic] of business policies of his chain of retail goldsmiths/jewelry stores. In that capacity he is responsible for establishing the business policies of the establishments and providing supervision and oversight for each store's operations. He supervises purchasing of gemstones, diamonds and gold for all of the stores and establishes pricing for finished goods. He has performed this set of duties for the stores since 1994 and is expected to do so into the future.

With regards to the petitioner's staffing, counsel stated:

[The beneficiary] has indicated that one of the reasons that he located his businesses in the Detroit Metropolitan area was that he had relatives here. [The beneficiary] has noted that it [sic] customary in Iraqi culture for relatives to assist one another in launching new ventures. [The beneficiary] has therefore staffed his operations in the United States both with relatives who have worked without remuneration on his behalf and with independent contractors who perform custom goldsmithing work for the company. [The beneficiary] can therefore document payments to the independent contractor but cannot present evidence of wages that have not been paid.

Counsel submitted photographs of the stores' interior and exterior, a check register, which the petitioner claims reflects three payments to an independent contractor, lease agreements, invoices, and an unaudited financial statement of the petitioning organization.

In a decision dated September 13, 2002, the director outlined the beneficiary's job duties and stated that the description is "too vague and general." The director also stated that because the petitioner has not established the employment of other employees who would relieve the beneficiary from performing the daily operations of the business, the beneficiary is likely performing the business' non-qualifying clerical duties, and maintaining the store and bookkeeping records. The director noted that the photographs submitted by the petitioner depict the beneficiary doing craftwork and assisting customers, duties that are not considered to be executive or managerial. The director concluded that the beneficiary was not employed by the U.S. entity in a qualifying capacity, and accordingly, denied the petition.

On appeal, counsel submits a statement from the petitioner in which the petitioner asserts that the beneficiary's job duties "clearly fall within the definition of managerial and executive [capacity]." The petitioner states that the beneficiary has the sole responsibility of creating the company's policies, including determining which gemstones or gold to purchase, pricing goods for retail sale, hiring and firing employees, and entering into contracts on behalf of the U.S. entity.

The petitioner also claims that CIS incorrectly based its denial of the petition on the photographs in the record, which show the beneficiary in the jewelry store. The petitioner states that CIS "has confused the pride of an owner in his facilities and its goods with the day to day operations of the enterprise." The petitioner contends that the beneficiary is not performing daily operations of the petitioning business "merely because he chooses to be included in photographs that display the physical plant of the company that he owns."

Finally, the petitioner contends that CIS failed to recognize that a beneficiary may be employed as a manager or executive despite the small size of the organization. The petitioner states that neither the Act nor the regulations impose a requirement on the amount of employees. The petitioner explains that "[t]here are employees and uncompensated family help that can and do perform mundane chores associated with the everyday operation of a business."

On review, the record does not support a finding that the beneficiary has been employed by 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.*

Although the petitioner described the beneficiary's position as including managerial and executive responsibilities, the petitioner's assertions that the beneficiary is primarily performing in a qualifying capacity are not credible. The record lacks sufficient evidence, mainly documentation of other employees, to substantiate the petitioner's claim that the beneficiary is "establishing the [petitioner's] business policies," and supervising purchases, rather than actually performing the daily operations of the business. The petitioner has not accounted for the employment of any individuals who would support the beneficiary in a managerial or executive position and execute any business policies established by the beneficiary. The petitioner's claims of contracting work to independent contractors and allowing family members to perform operations of the business without compensation do not demonstrate that the beneficiary is relieved from performing the petitioner's non-qualifying job duties. The petitioner has not provided any documentation, such as contractual agreements, of a relationship with independent contractors, nor has the petitioner submitted any employee records verifying the employment of an additional employee, as claimed on the nonimmigrant petition. The check register submitted by the petitioner as evidence of three payments made to a claimed independent contractor is not sufficient. Moreover, the petitioner's financial statements do not identify salaries paid to other employees or payments made for cost of labor to independent contractors. 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).

Moreover, as correctly noted by the director, the photographs submitted by the petitioner support a finding that the beneficiary is performing the non-managerial and non-executive functions of the business. The petitioner states on appeal that the pictures simply portray the beneficiary's pride for his store. The AAO acknowledges that in the majority of the photographs the beneficiary is shown merely standing in the jewelry store. However, the petitioner has failed to explain the two photographs that show the beneficiary assisting a customer and working at a desk either designing or fixing jewelry. The beneficiary's explanation on appeal that the beneficiary is "proudly showing off [the petitioner's] wares and its goldsmithing facilities" does not address the clear depiction of the beneficiary performing the petitioner's services. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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*, 14 I&N Dec. at 193. It is therefore reasonable to conclude that the petitioner does not employ a subordinate staff that would relieve the beneficiary from performing the non-managerial and non-executive operations of the business. 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 petitioner incorrectly claims on appeal that the director based his decision on the size of the enterprise and the number of staff. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the director properly considered the reasonable needs of the

petitioning organization, which include the retail sale of jewelry to the public and providing goldsmith services. The petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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*, 14 I&N Dec. at 193.

Based on the foregoing discussion, the AAO cannot conclude that the beneficiary has been employed by the U.S. entity in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Although not raised by the director, the AAO will address the issue of qualifying relationship. The record as presently constituted does not support the petitioner's claim that the U.S. entity is a branch of the foreign organization. In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J).

Probative evidence of a branch office would include 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 of 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.

If the petitioner submits evidence to show that it is incorporated 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). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer. In the present matter, the record includes U.S. income tax returns for the U.S. company as an S corporation. The petitioner cannot, therefore, be deemed a branch of the foreign entity.

The record does not contain sufficient evidence to establish an affiliate relationship. The petitioner failed to submit documentation substantiating the petitioner's claim that the beneficiary is the sole shareholder of the petitioning organization. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of

ownership and control. The AAO cannot conclude that a qualifying relationship exists between the foreign and U.S. entities. For this additional reason, the appeal will be dismissed.

The petitioner indicates that the beneficiary is the sole owner of both companies. This raises the issue of whether the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. The petitioner has not submitted persuasive evidence to show that the beneficiary's services are to be used temporarily and that he will be transferred to an assignment abroad upon completion of his services in the United States.

The fact that the beneficiary, as the sole owner of the foreign entity, is residing in the United States raises the question of whether the foreign organization is still doing business as a qualifying organization as required in 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). The petitioner has not identified who would operate the foreign entity during the beneficiary's assignment overseas. It is therefore reasonable to conclude that the foreign entity is not presently doing business while the beneficiary is employed in the United States. For these additional reasons, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.