



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: SRC 02 240 52126 Office: TEXAS SERVICE CENTER Date: 4/10/14

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president 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 Oklahoma that is operating as a retail store. The petitioner claims that it is an affiliate of the beneficiary's foreign employer, located in Kinwat, India. The petitioner now seeks to extend the beneficiary's stay for one year.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the petitioning organization in a primarily managerial or executive capacity while serving as the sole employee of the organization.

On appeal, counsel states that Citizenship and Immigration Services (CIS) erroneously concluded that the beneficiary was not primarily employed in an executive capacity as a result of the number of employees employed during the petitioner's start-up phase. Counsel contends that CIS ignored the "current interpretation of the regulations" and the arguments and evidence submitted in support of the extension of the beneficiary's classification as a nonimmigrant intracompany transferee. Counsel submits a brief and three unpublished AAO decisions in support of the appeal.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The issue in the instant proceeding is whether the beneficiary would be employed by the petitioning organization 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
- (iii) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner noted on the nonimmigrant petition, filed August 6, 2002, that as president, the beneficiary would have "total responsibility for all aspects of management of the new company." The director subsequently issued a request for evidence on October 11, 2002, noting that the beneficiary is the only individual listed on the nonimmigrant petition as an employee of the U.S. organization. The director requested that the petitioner submit the following evidence: (1) a description of the beneficiary's job duties during the past year; (2) an explanation of who performs the daily tasks of the business; and (3) copies of Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, for the past two quarters.

Counsel for the petitioner responded on December 12, 2002, and stated that the beneficiary's job duties during the past year included:

Managing and directing the company, instituting policies, goals and marketing strategies; reviewing potential growth areas; managing the daily operations; keeping accounts current; approving purchases and inventory; reviewing sales and profits; making staffing decisions; keeping current with all state licensure and tax requirements.

In support of the beneficiary's employment in an executive capacity, counsel outlined the regulatory requirements for "executive capacity" and stated the following: (1) the beneficiary directs the management of the organization by deciding whether to hire staff, by developing marketing strategies, by overseeing the company's financial goals, budget, and expansion, by negotiating contracts, and through his responsibility for the profitability of the company; (2) the beneficiary establishes the business' goals and policies and determines the direction of the business; (3) the beneficiary exercises wide latitude in discretionary decision-making; and (4) the beneficiary answers to no higher individual in the company.

Counsel also stated that if CIS considers staffing levels of the petitioning organization, CIS must take into account the petitioner's purpose and stage of development. Counsel stated that the petitioning organization is a new business that, although employs only the beneficiary, "will be hiring more employees as the business grows and increases its profit margin." Counsel also noted two unpublished AAO decisions as evidence that the beneficiary, as the petitioner's sole employee, may be considered to be employed in a primarily executive capacity. The quarterly tax returns for the quarters ending June and September 2002 confirmed that the petitioner employed no additional employees during these periods.

In a decision dated January 15, 2003, the director stated that "[while] the beneficiary may be acting in an executive capacity [CIS] is not persuaded that the beneficiary is acting *primarily* in an executive capacity." (Emphasis in original). The director further stated that absent additional employees to perform the business' daily tasks of ordering and stocking merchandise and waiting on customers, the beneficiary would likely be performing

these routine job duties. The director noted that the petitioner's assertion that the beneficiary would be employed in a primarily executive capacity is not supported by the record. The director consequently denied the petition.

On appeal, counsel contends that CIS ignored the arguments, evidence, and current interpretation of the regulations submitted in support of the beneficiary's employment in a primarily executive capacity. Counsel states that as a new business, the petitioning organization is not expected to have numerous employees during its first year. Counsel further states that the petitioner's goals for its second year were addressed in its response to the director's request for evidence, in which the petitioner indicated its intent to hire new employees. Counsel notes that the petitioner has since hired an additional full-time employee "to maintain the daily activities of running a convenience store," and submits a payroll record from January 31, 2003 as evidence of employment. Counsel again identifies the regulatory requirements for "executive capacity" and provides a similar description as to how the beneficiary meets the criteria of an executive. Counsel also provides three unpublished AAO decisions as evidence that the beneficiary, as a sole employee of an organization, may be considered to be employed in a primarily managerial or executive capacity.

On review, the record does not support counsel's assertion that the beneficiary would be employed by the petitioning organization in a primarily executive capacity. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States 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. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

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.*

The petitioner failed to submit a detailed description of the beneficiary's job duties that would demonstrate employment in a primarily executive capacity. The petitioner's vague job descriptions, such as "managing and directing the company," "instituting policies, goals, and marketing strategies," reviewing potential growth, and making staffing decision, do not identify the specific job responsibilities of the beneficiary in his position as president of the corporation. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Additionally, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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. at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Moreover, several of the beneficiary's job duties support a finding that the beneficiary would be performing non-qualifying daily activities of the business, rather than directing those responsible for the activities. Specifically, the beneficiary would be responsible for approving purchases and inventory. The petitioner, however, has not accounted for the employment of any subordinate employees who would handle the actual purchasing of inventory for the business. More importantly, the petitioner employs no other individuals who would perform the day-to-day operations of the business, such as run the store's cash register, stock the shelves, clean the store, and manage the finances. As the only employee, it is evident that the beneficiary

must be responsible for the non-qualifying job duties of the U.S. operation. 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).

Counsel's claim on appeal that the petitioner has since hired an employee to handle the daily functions of the business has no merit. It is a well-established rule that the petitioner must demonstrate 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). At the time of filing the present petition, the petitioning organization employed only the beneficiary. The AAO will not consider the present employment of another employee. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998) (stating that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements).

The AAO will also disregard counsel's suggestion on appeal that the petitioning organization has previously "had various numbers of contract employees since the inception of the business, including stock persons." There is no evidence in the record supporting counsel's assertion. Counsel has not provided any contracts confirming a business relationship with other workers, nor does the petitioner's corporate tax return reflect any compensation paid to contract workers. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As correctly noted by counsel on appeal, a company's size alone, without taking into account the reasonable needs of the organization, 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In the instant matter, the petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it is inconceivable that the reasonable needs of the petitioning organization might plausibly be met by the services of the beneficiary alone. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily executive capacity, pursuant to section 101(a)(44)(B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Finally, counsel refers to three unpublished decisions concerning beneficiaries who were deemed to be employed in a primarily managerial or executive capacity despite being the petitioner's sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the submitted cases. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N

Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

For the foregoing reasons, the AAO cannot conclude that the beneficiary would be employed in the petitioning organization in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record indicates that the beneficiary is the sole proprietor of the foreign entity. If this fact is established, it remains to be determined 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. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States. For this additional reason, the appeal will be denied.

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.