

07

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



U.S. Citizenship  
and Immigration  
Services

[Redacted]

FILE: EAC 02 081 50134 Office: VERMONT SERVICE CENTER

Date: DEC 13 2004

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

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

ON BEHALF OF PETITIONER:

[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

**PUBLIC COPY**

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as a nonimmigrant intracompany transferee pursuant to section 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 New York that is operating as a manufacturer of fragrances. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Tamilnadu, India. The petitioner now seeks to employ the beneficiary as its director for one year.

The director denied the petition determining that the petitioner had failed to demonstrate: (1) that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity; and (2) that the beneficiary had been employed abroad in a qualifying capacity for at least one year within the three years preceding the filing of the petition. The director also noted that the petitioner had failed to submit required translations of all financial documentation into U.S. dollars, which the director concluded prevented a finding that the petitioning organization incurred substantial sales or that it had sufficient income to remunerate any subordinate employees.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel states that the beneficiary's proposed position of director of the United States entity "is a key managerial position in our organization." Counsel outlines four job duties that would be performed by the beneficiary, which counsel claims are "purely executive." Counsel submits a brief in support of the appeal.

Counsel does not address on appeal the director's finding that the beneficiary was not employed abroad in a qualifying capacity. 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). As counsel does not provide documentary evidence pertaining to this issue on appeal, the director's finding with regards to the beneficiary's employment capacity abroad will be affirmed.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of 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.

Pursuant to the regulation at 8 C.F.R. § 214.2(1)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (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 the instant matter is whether the beneficiary would be employed by the United States 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 filed the nonimmigrant petition on December 31, 2001 noting the beneficiary's proposed employment as director of the United States entity. In an attached letter from the petitioner, dated December 27, 2001, the petitioner stated that the beneficiary's business and managerial skills are essential to the success of the United States entity. In a company profile statement and in projections sheet submitted by the petitioner with the petition, the petitioner explained that the beneficiary is a trained perfumer who, as director of the petitioning organization, "[would] liaise [sic] with customers, ascertain their needs and suggest suitable products of the company."

In a request for evidence, issued on February 11, 2002, the director asked that the petitioner submit evidence demonstrating the beneficiary's proposed employment in the United States in a primarily managerial or executive capacity, including: (1) a description of the positions to be held by all proposed employees, including the beneficiary's position as director; (2) a breakdown of the number of hours each employee will dedicate to his or her particular job duties; (3) a description of the services and products to be rendered by the petitioning organization; (4) copies of the petitioner's bank statements from September 2000 through December 2001; and (5) a letter from an official at the petitioner's financial institution confirming the petitioner's account balance on December 31, 2001.

Counsel responded in a letter dated May 8, 2002 and attached a letter from the managing director of the foreign entity, in which he explained the petitioner's proposed business and the beneficiary's employment capacity in the United States:

The U.S. company will be engaged in the import and distribution of both our traditional line of [sic] as well as [sic] and specifically formulated aromas and scents for body oils, incense sticks, fragrances, perfumes, soaps, candles, aromatherapy oils and other cosmetic items. [The beneficiary] will be identifying supply channels in the U.S. market for potential export to India and distribution channels for wholesale distribution. We will not be involved in direct retail but rather the custom manufacture of our products and the provision of precursor material to the cosmetic industry.

[The beneficiary] because of his past managerial work with the company in India was specifically chosen for this assignment. His past decisions have included vendor selection, ideas for product line planning, expansion, long range forecasting and review of support staff including promotion and termination. In the U.S. he will be initially identifying areas for opportunities and prospective wholesale customers to enable the company to establish a strong hold in the competitive U.S. market. During his tenure and under his guidance, we hope to steadily increase sales and office staff.

In a decision dated June 25, 2002, the director determined that the petitioner did not demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that the record did not provide a comprehensive description of the beneficiary's job duties in order to determine whether the beneficiary would have managerial control over a department, subdivision or component of the United States entity. The director also noted that the evidence was insufficient to conclude that the beneficiary would be employed at a senior level within the petitioning organization, or that the petitioner employed a subordinate staff that would relieve the beneficiary from performing non-qualifying tasks of the business. The director further noted that the petitioner failed to submit translated financial documentation identifying sales or establishing the ability to pay subordinate employees. Accordingly, the director denied the petition.

In an appeal filed on July 29, 2002, counsel states that the beneficiary is qualified to perform in the proposed "key managerial position" in the United States as a result of his education and work experience. Counsel states that the beneficiary would possess "considerable discretionary authority" with regard to coordinating, directing and implementing the organization's operations and policies, and would specifically perform the following "purely executive duties":

1. Oversee the operations in the U.S. and coordinate the same with our parent company in India.
2. Develop and implement [a] plan for long-term growth, set corporate policies, goals and objectives.
3. Analyze, develop, and implement marketing plans and strategies.
4. Procure additional banking relationships for the Company, using various contacts.

Counsel claims that these duties are clearly of an executive nature and are "customarily associated with the position of Director-perfumes."

On review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans, organizational structure, and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

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.*

Here, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim to employ a beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. In his May 8, 2002 letter submitted in response to the director's request for evidence, counsel stated that the beneficiary is eligible for the requested position of "Manager" of the petitioning organization, while the foreign entity's managing director stated in a February 5, 2002 statement that the beneficiary would be employed as the petitioner's chief executive officer. Additionally, on appeal, counsel references the beneficiary's "key managerial position," yet outlines "purely executive duties." A petitioner is obligated to establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. The petitioner has failed to satisfy this requirement.

Also, as correctly noted by the director, the record does not contain a comprehensive description of the managerial or executive tasks to be performed by the beneficiary. Although requested by the director, counsel failed to detail the beneficiary's specific job duties or account for the amount of time the beneficiary would spend on each. Rather, counsel submitted a limited job description written by the foreign entity's managing director, in which he explained that the beneficiary would identify prospective customers and sales opportunities. On appeal, counsel submits a brief list of four tasks for which the beneficiary would be responsible. The actual duties themselves reveal the true nature of the employment. *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). 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. *Id.* The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Moreover, the petitioner failed to comply with the evidentiary requirements pertaining to the opening of a new United States office, which require that the petitioner demonstrate that within one year of approval of the petition the petitioning organization would support the beneficiary in a primarily managerial or executive capacity. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) requires that the petitioner submit information describing the scope of the petitioning entity, its organizational structure, its financial goals, and its financial status in support of its claim that the beneficiary would be employed as a manager or executive within one year of filing the petition. While specifically requested by the director, neither the petitioner nor counsel provided a description of the petitioner's proposed staffing levels, or submitted a business plan for the petitioning organization clearly identifying its business and financial goals. Therefore, the record is insufficient in demonstrating that within one year of approval of the petition the petitioner would support the beneficiary in a primarily managerial or executive capacity. Again, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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).

Furthermore, as addressed by the director, the majority of financial documentation submitted is not translated into U.S. dollars. This information is relevant in order to determine the foreign entity's ability to remunerate the beneficiary and commence doing business in the United States. 8 C.F.R. § 214.2(l)(3)(v)(C)(3). Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claim that the United States organization would employ the beneficiary in a primarily managerial or executive capacity. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Based on the foregoing discussion, the petitioner has failed to establish that the beneficiary would be employed by the United States entity in a primarily qualifying capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether a qualifying relationship exists between the beneficiary's foreign employer and the petitioning organization as required in the Act at § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

While the petitioner stated on the nonimmigrant petition that it is the subsidiary of the foreign entity, the record contains conflicting evidence. The petitioner submitted two stock certificates each identified as stock certificate number one and dated November 24, 2000. The first stock certificate reads "10,000 shares of US Dollars 5/- each" in the petitioning organization have been issued to the beneficiary's foreign employer, thereby indicating that the foreign entity owns 2,000 shares of stock. The second certificate indicates that 200 shares of the petitioner's stock have been issued to the beneficiary's foreign employer for \$250.00 each. The petitioner has not offered an explanation for the discrepancy. 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). For this additional reason, 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.