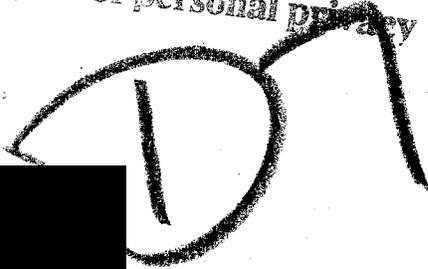




U.S. Citizenship
and Immigration
Services

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invasion of personal privacy



FILE: EAC 02 253 51527 Office: VERMONT SERVICE CENTER Date: JUL 12 2004

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

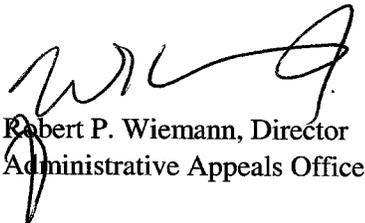
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, 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 seeks to eventually operate as an importer, distributor, and wholesaler of textile and food products. It seeks authorization to employ the beneficiary temporarily in the United States as its president and director of operations. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. On appeal, counsel disputes the director's findings and submits a brief in support of his assertions.

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 regulations at 8 C.F.R. § 214.2(l)(3) state 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.

The U.S. petitioner states that it was established in 2000 in the state of Massachusetts and claims that it is a subsidiary of [REDACTED], located in Bangladesh. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$28,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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 support of the petition, the petitioner provided the following description of the beneficiary's job duties:

The position of Director of Operations has a pivotal role in setting the tone and trend of North American operations. This position would be authorized and held accountable for implementation of all strategic decisions. This position would also be responsible for smooth execution of corporate priorities. The significant job demands in the initial period would be creating infrastructure and establishing [a] team that can get the operations underway. The Director of Operations would be actively involved in pre and post launch marketing functions. He will be expected to establish business links with all suppliers and maximize

profitability by cutting costs and eliminating waste. In addition, the jobholder would also be responsible for exploring new markets and general management function.

The jobholder needs to closely monitor input in to various initiatives. He should have the ability to look at things from different perspectives and be willing to change her opinions whenever additional information warrants that. Coordination with the parent company would be an important part of [the] job.

On August 8, 2002, CIS issued a request for additional evidence. The petitioner was asked to provide a copy of its organizational chart indicating where the beneficiary's position will fall within the chart. The petitioner was also asked to submit a comprehensive description of the beneficiary's proposed duties, as well as a breakdown of the number of hours devoted to each of the beneficiary's listed duties.

The petitioner's response included the following description of the beneficiary's job duties:

[The beneficiary's] responsibility is to provide good management and supervision of the Vice President and for the various Department Managers. His experience in financial planning and office management will enhance the company's status and will provide a platform for the launching of our business.

[His] responsibility will be to oversee all operations for the company. He will hire, train, supervise and dismiss personnel who will perform the same functions with respect to subordinate personnel. [The beneficiary] will be responsible for the behavior, attendance, and appearance of the company's employees. He will meet with supervisors to check status on all merchandise and with vendors to discuss merchandise cost and discounts. He will be responsible for the company's employees to be courteous, considerate, responsible and to meet customers' satisfaction. [The beneficiary] will review the company's documents, including tax reporting, and database entries for the company. He will prepare and implement a marketing plan. His vast experience will assist this company for a bright future.

The petitioner's organizational chart shows at least nine positions in the company hierarchy. However, only three of those positions are actually filled, and of those three positions, one is that of the beneficiary. Thus, contrary to the petition, which indicates that the petitioner currently employs five people, the petitioner's organizational chart suggests that it only employed two people when it responded to the request for additional evidence, since the beneficiary was not yet in the United States when the petition was filed. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not explained or even acknowledged this inconsistency between its initial claim and the subsequent documentation. Furthermore, the petitioner failed to provide the request hourly breakdown of the beneficiary's duties. It is noted that 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).

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a managerial capacity, given the petitioner's current staffing composition and its current income.

On appeal, counsel states that the petitioner has maintained that the beneficiary will assume the role of both a manager and executive, and asserts that the director erred in failing to consider the beneficiary in the capacity of an executive. While the record indicates that the petitioner has claimed that the beneficiary would be employed in "a position requiring application of managerial and executive skills," 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). 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 either capacity, or both capacities as the case may be. In the instant case, the petitioner merely made the initial claim and gave the beneficiary an executive title, but did not provide a detailed job description to show that the beneficiary's duties fit under the statutory requirements of both manager and executive. Rather than providing a specific description of the beneficiary's duties on appeal, counsel generally paraphrased the statutory definitions of executive and managerial capacity. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). For instance, the petitioner depicted the beneficiary as "direct[ing] the overall operation of the organization," "establish[ing] the goals and policies of the organization," and "exercise[ing] wide latitude in discretionary decision making." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. 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.). Although the director did not include a discussion of the beneficiary's eligibility for classification as an executive, the fact remains that the petitioner failed to provide a description of duties to clarify how the beneficiary's duties fall under the definition of both manager and executive, regardless of what the proposed position title may suggest. 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, the record lacks a specific hourly breakdown of the beneficiary's duties. The petitioner merely indicated that the beneficiary will be directly involved in training all of the company personnel, preparing and implementing a marketing plan, as well as meeting with vendors to negotiate the cost of the products to be sold by the petitioner. While the petitioner did not indicate the length of time the beneficiary would allocate to each duty, the list of duties suggests that the beneficiary is actually performing tasks necessary to provide a service or product. Therefore, the proposed employment will not be considered managerial or executive in nature. 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).

On review, the record does not establish that a majority of the beneficiary's duties will be either managerial or executive. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he will otherwise be relieved from performing non-qualifying duties. To the contrary, according to the description of the beneficiary's proposed duties, the petitioner's plan is to have the beneficiary perform duties that are those of a sales representative and marketing specialist, neither of which can be classified as managerial or executive. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that

the beneficiary primarily manages an essential function of the organization or that he operates at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner's supporting letter indicated that it is wholly owned by the foreign entity and claimed that the beneficiary's annual salary would be \$26,000. However, in the petition itself, the petitioner indicated that the foreign entity owns 60% of the petitioner's stock and stated that the beneficiary's salary would be \$28,000. Although the \$2,000 discrepancy in the beneficiary's proposed salary is not material and therefore not dispositive of the petitioner's claim, the issue of the petitioner's ownership is germane in determining its overall eligibility for the benefit sought. In the case at hand the petitioner has submitted a number of conflicting documents regarding the petitioner's ownership and control. In the petition, the petitioner indicated that the foreign entity owns 60% of its shares and that Royal Green Corporation owns another 20% of its shares. This claim is supported by the petitioner's stock certificates, which indicate that 2000 shares are owned by Royal Green Corporation, while another 6000 shares are owned by the foreign entity. However, the petitioner did not explain who owns the remaining 20% of its shares; nor did it explain what relation Royal Green Corporation has to the petitioning entity, given the extreme similarity in their names. Further, in a document titled "Minutes of Organizational Meeting of the Board of Director's," the beneficiary and the petitioner's current vice president are named as the petitioner's two shareholders, the former holding 95 shares and the latter holding 5 shares. Not only does this document contradict the ownership breakdown provided in Section 2 of the petition's supplement, but none of these claims support the petitioner's statement that it is a wholly owned subsidiary. As previously stated, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho, supra*. The petitioner has not, however, submitted any documentation to resolve these considerable inconsistencies. As such, the record lacks evidence of a qualifying relationship between the petitioner and a foreign entity. 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). Therefore, for the additional reasons stated in this paragraph, the petition cannot 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.