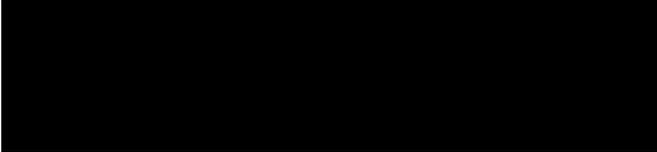


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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



MAR 12 2004

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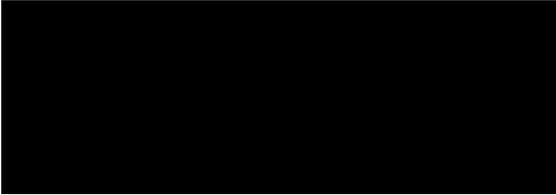
IN RE: Petitioner:
Beneficiary:



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:

PUBLIC COPY



*Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy*

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 is a jewelry store established in 1997, and engaged in the retail sale of jewelry and gemstones. The petitioner seeks to employ the beneficiary for three years as an executive director. The beneficiary currently holds a valid L-1A visa for employment in a related U.S. organization, and therefore, the petitioner filed a petition to change the beneficiary's previously approved employment. The director denied the petition concluding that the petitioner had failed to provide sufficient evidence that the beneficiary's proposed duties will be of a primarily managerial or executive nature.

On appeal, the petitioner's counsel made the following assertions: (1) that the duties of the beneficiary are both executive and managerial and carry the highest level of authority in the corporation; (2) that the beneficiary plans, directs, organizes, and controls all of the company's major functions; and, (3) that the director erred in fact and in law in holding that the duties of the beneficiary were not executive and managerial in nature. Counsel submits a brief in support of his assertions.

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) further 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 this proceeding is whether the beneficiary will be employed in the United States 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) 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 a letter accompanying the petition, the petitioner provided the following job duties to be performed by the beneficiary as the executive director:

- Establish policies and procedures for marketing, sales, inventory requisition, contract procurement and contract negotiation;
- Investment of funds at commercial terms as and when necessary;
- Direct the hiring, firing, supervision and placement of employees;
- Develop, implement and revise as necessary company policies, procedures and business plans;
- Oversee and evaluate the implementation of company policies, procedures and plans and provide ongoing assessment as to the extent to which same are achieved;

- Formulate strategies to further develop, structure and organize the enterprise, directing and overseeing the implementation of such strategies;
- Plan, develop and implement plans for business expansion, investigating the feasibility of adding additional locations, increasing the amount and nature of inventory purchased and investigating and negotiating purchase agreements with new distributors and manufacturers;
- Research and develop plans to increase sales, including the introduction of new promotional, advertising and marketing schemes;
- Function as liaison between [the petitioning organization] and the parent company abroad;
- Evaluate, assess and revise current financial operations, budget, procedures, policies, accounts and other aspects of the enterprise on an on-going basis with a view toward achieving corporate goals; and
- Direct, oversee and be solely responsible for the day-to-day operation, activities and development of the [petitioning organization].

The petitioner further explained that over 75% of the beneficiary's time would be spent "directing the enterprise and engaging in executive functions," while the remaining 25% of time, the beneficiary will be performing in a managerial capacity. The petitioner also stated that the beneficiary would have sole authority to engage in business activities without prior approval from any other entity, director or minority shareholder.

In a request for evidence, the director asked that the petitioner submit documentation to establish that the beneficiary will be employed in an executive or managerial position by the U.S. company, including: the beneficiary's position title, a list of job duties, the percentage of time spent on each job function, the number of subordinate managers, supervisors or other employees who will report directly to the beneficiary, a brief description of the subordinates' job titles and duties, and the names of employees who will perform the administrative work of the organization. The director also requested that evidence of the staffing level in the U.S. organization be submitted, as well as the dates that each employee began working for the company.

In the response to the director's request for additional evidence, the petitioner submitted a letter outlining the same job duties of the beneficiary as previously provided in the petition, and included that the beneficiary will "define, assess and oversee the performance of general management staff," "formulate and implement corporate policies and protocols," and preside over annual shareholder meetings, defining such resolutions that will advance the shareholders' interests and attain corporate goals. The petitioner also submitted a current organizational chart that reflected the petitioning company was consisted of the following subordinate employees: production manager, manager of finance and accounting, sales manager, assistant sales manager, sales assistant, sales representative, repairs assistant, computer database administrator, two – four hourly and part-time assistant sales representatives, and one – three secretarial and administrative employees. A job description for each was also provided.

In addition, the petitioner provided tax records for the years 1998 through 2001. These documents included W-2 Forms, the Employer's Annual Federal Unemployment Tax Return, the Employer's Quarterly Federal Tax Return, and the Employer's Quarterly Report. The quarterly report for the quarter in which the petition was filed listed names of employees corresponding to the names of individuals in the positions of sales manager, and finance and accounting manager. Two additional employees are listed on the quarterly report, but it is unclear from the record in which position each is employed.

In her decision, the director determined that the beneficiary's proposed duties as executive director would not be primarily executive or managerial. The director noted that at the time of filing the petition, the beneficiary employed the four employees identified above. Therefore, the director concluded that the beneficiary's actual time devoted to day-to-day functions would exceed that which is spent performing the "purely managerial or executive duties for the company." Consequently, the director denied the petition.

On appeal, petitioner's counsel submits a brief in support of the beneficiary's position as a manager and executive. Counsel submits a list of the beneficiary's job functions, which includes those job duties already outlined above. Counsel also asserts that the eight individuals presently employed by the petitioner perform the day-to-day operations of the company, while the beneficiary "is responsible for setting the policies by which it is run and managed."

In his brief, counsel cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D. Ga. 1988), in support of his assertion that the beneficiary is acting in a managerial and executive capacity. Counsel claims that the petitioner in the above-cited case was the president and chief executive office of a small retail jewelry store with few employees, and had the same duties and responsibilities as the beneficiary in the present case. The court determined that Citizenship and Immigration Services (CIS) was too restrictive on small companies petitioning for executives and managers, and concluded that the beneficiary was a manager or executive. Counsel asserted that the AAO's finding in the present case should be determined by the Court's ruling in *Mars Jewelers, Inc.*

In addition, counsel asserts that the director "ignored the continuing growth of the petitioner's business . . . and has refused to consider expansion of the business which occurred subsequent to the submission of the L-1A extension application." Counsel states that a start-up business must merely establish normal growth and development of the business, which the petitioner has proven. Counsel further asserts that "[i]n the past, the AAO has always considered new documentation and evidence submitted after the filing of a petition, if it establishes that the business is indeed growing." Therefore, because the petitioner, as a start-up company, has shown it is making progress in establishing and expanding its operations, counsel contends the petition should be approved.

On review, the various inconsistencies throughout the record preclude a finding that the beneficiary is functioning in a primarily managerial or executive capacity. At the time of filing the petition, the petitioner employed four individuals. Two of these employees are identified as the finance and accounting manager and the sales manager. However, the record contains inconsistent evidence regarding the two remaining employees' positions. One employee is not identified on the petitioner's organizational chart. The other employee is identified as both the production manager and the assistant sales manager. Yet, the surrounding evidence, including the description of the qualifications and sales experience for each position, supports a finding that these positions are actually held by two different people. It is impossible to discern from the record the position held by the fourth named employee. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Considering these discrepancies, the AAO can only infer that two employees are performing the finance, accounting and sales functions of the organization. There is insufficient evidence as to who will perform the remaining day-to-day functions of the company, including selling to the customers, monitoring inventory,

repairing jewelry, and performing secretarial and administrative tasks. It can be determined from the job descriptions provided by the petitioner that the beneficiary would perform *some* managerial or executive duties in his role as executive director, such as hiring and firing employees and developing and revising the company's business plan. However, the record does not establish that the beneficiary's job duties as executive director will be *primarily* managerial or executive, as required in the regulations. See 8 C.F.R. § 214.2(l)(1)(ii)(B) & (C).

In addition, the petitioner and counsel mistakenly assert that the current organizational chart of the petitioning organization, which identifies an additional eight employees, establishes that the beneficiary will not be performing non-qualifying duties. As noted by the director in her decision, the current staffing of the company is irrelevant to the analysis of managerial or executive capacity. 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). The petitioner has failed to establish that the four individuals employed by the beneficiary at the time of filing the petition would relieve the beneficiary from performing non-managerial or non-executive duties.

Counsel also cites *Mars Jewelers, Inc. v. INS*, *supra*, as "controlling precedent" that the beneficiary be considered a manager or executive. Yet, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the Mars Jewelers case, except to state that the duties and responsibilities of the beneficiaries are the same. Simply 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, counsel fails to note that in concluding the beneficiary in the Mars Jewelers case was a manager or executive, the Court applied the 1983 INS regulations, which were in effect at the time the petitioner filed its petition. Under the 1983 regulations, a beneficiary does not have to be engaged *primarily* in managerial or executive duties. See 8 C.F.R. § 214.2(l)(1)(ii)(A) & (B) (1984). In contrast, the current regulations specifically require that the beneficiary's assignment be in a *primarily* managerial or executive capacity. See 8 C.F.R. § 214.2(l)(1)(ii)(A) & (B).

Finally, counsel asserts several times throughout his brief that a start-up business must merely demonstrate that it is making "normal progress in the growth and development of the business" in order to be approved for an L-1A visa. Counsel further asserts that as a start-up business, the petitioning organization has proven its continuing growth, and therefore its ability to support a managerial or executive position.

Counsel's claim that the AAO should apply a less restrictive analysis to this petition because the petitioner is a start-up company is misplaced. The term "start-up company" implies that an organization has been in business for a short period of time, such as a new office. The phrase "new office" is defined in the regulations as an organization which has been doing business in the United States for less than one year. The petitioning organization was incorporated in the United States on November 17, 1997, and had been doing business for the four years prior to the filing of the petition. The AAO recognizes that a new office will require time to establish a managerial or executive position. However, within one year of the approval of a petition for an individual employed in a new office, the U.S. operation must be able to support such a position. See 8 C.F.R. § 214.2(l)(3)(v)(C). Contrary to counsel's argument, the petitioner is not simply a start-up company, and therefore, must demonstrate that it can support employment of the beneficiary in a primarily managerial or executive position.

For the foregoing reasons, the AAO cannot conclude that the beneficiary will be employed in the U.S. organization in a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner indicates that the beneficiary is the sole owner of the foreign company. The petitioner, however, has not submitted any evidence to establish that the foreign sole proprietorship continues to do business, as required at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). A sole proprietorship is a business in which one person owns all of the assets and operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Edition). As the beneficiary claims to be the owner and sole proprietor of the foreign business, the presence of the beneficiary in the United States raises the question of whether the foreign business continues to do business abroad. The lack of current evidence leads the AAO to conclude that the foreign sole proprietorship is no longer doing business.

Additionally, it remains to be determined whether the beneficiary's services in the United States 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.

Furthermore, the record establishes that the beneficiary was previously employed by the petitioning organization. As noted earlier, the beneficiary has been working in a related U.S. company since December 8, 1998. He currently holds a valid L-1A visa for his temporary employment at this organization. However, the petitioning company submitted an Employer's Quarterly Tax Return ending on December 31, 1999, which identifies the beneficiary as an employee in its organization during the months of October through December 1999. It remains to be determined whether the regulations, which require an amended petition to be filed to reflect changes in approved employment, changes in the capacity of employment, or any information which would affect the beneficiary's eligibility were complied with. 8 C.F.R. § 214.2(l)(7)(i)(C). The beneficiary's employment at an organization for which it was not approved would necessitate the filing of an amended petition.

As the appeal will be dismissed on other grounds, these additional issues need not be further addressed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests 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.