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

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U.S. Citizenship and Immigration Services

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MAR 17 2004

FILE: LIN 01 274 52124 Office: NEBRASKA SERVICE CENTER Date:

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:

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 is an art and jewelry retailer. It seeks authorization to employ the beneficiary temporarily in the United States as its vice president and manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary has and would continue to act in an executive capacity.

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 1998 and that it is an affiliate of Buddhist Global Bazaar, located in India. The petitioner seeks to employ the beneficiary for three years at an annual salary of $37,600.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed 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 following description of the beneficiary's current job duties was provided:

[The beneficiary's] most recent foreign position with [the overseas entity] is management of inventory acquisition, (location of rare objects, and negotiating sales terms), as well as supervising shipping arrangements for merchandise to our warehouse in the U.S. and to individual clients for specific orders. The position also required language skills in English, Tibetan, and Hindi. . . .

The following description of the beneficiary's proposed duties was also provided:

> She will be responsible for managing internet mark[et]ing, customer relations, sales, inventory control, as well as scheduling and coordinating, and managing exhibits at several State Fairs, in the U.S. She will manage the local warehouse and supervise inventory control, as well as the showroom and retail operation in Ft. Worth. Her particular expertise in Tibetan/Buddhist philosophy will be helpful . . . . [The beneficiary] has computer skills, and will manage and oversee computer marketing and internet systems, as a major portion of sales come [sic] via internet systems.

On December 4, 2001, CIS issued a request for additional evidence. The petitioner was asked to provide a copy of its organizational chart, a more detailed description of the beneficiary's duties abroad and the proposed duties in the United States, including specific job duties, the types of employees the beneficiary has or intends to supervise, and the beneficiary's level of authority. The petitioner was also asked to specify the number of employees the beneficiary supervised, briefly providing their educational and professional qualifications.

The petitioner responded with a statement from its president who stated that the beneficiary's duties have included designing and coordinating the printing of a national catalogue for the mail order portion of the business, negotiating import purchases and shipping, as well as hiring, firing, and supervising personnel. In several other submissions the petitioner's president indicated that the beneficiary's job in the United States would entail managing a retail store and a mail order catalogue operation. In regard to managing the retail store the beneficiary would be required to handle all personnel matters, including supervision of clerical staff. In regard to the mail order operation, the beneficiary would be required to supervise college level and graduate level students in revising the printed catalogue. The petitioner also provided the following percentage breakdown of the beneficiary's duties:

> Oversight of internet development and supervision: 15%
>
> Management, hiring, supervision of retail stores: 40%
>
> Supervision of catalogue development and updates: 10%
>
> Planning, management, and supervision of exhibitions: 20%
>
> Policy, hiring, strategy, company planning: 10%
>
> Policy direction/communication with India office & suppliers: 5%

The petitioner indicated that the overseas entity employs two people, aside from the beneficiary. Although the petitioner indicated that one of the two employees is a clerk, the other individual's position title was not given and there is no job description for either employee. The petitioner indicated further that the U.S. entity has two store clerks, a bookkeeper, and an individual responsible for "computer-catalogue input." The petitioner did not indicate any of the educational levels or job descriptions for any of its U.S. employees.

The petitioner also submitted two letters from companies that have dealt with the beneficiary in her capacity as vice president of the overseas entity. Each letter indicated that the beneficiary looked for and negotiated purchase prices for inventory that she purchased.

After reviewing the evidence submitted, the director denied the petition noting that the evidence fails to establish that the beneficiary has been or would be employed in a managerial or executive capacity.

On appeal the petitioner asserts that the department where the beneficiary would work was created in November of 2001 thereby entitling the petitioner "new office" status. However, the petition that is the basis for the instant proceeding was received by CIS in October of 2001. If the entity that would employ the beneficiary had not yet been created at the time of the filing of the petition, it is unclear why the petition was filed in the first place. The alternative consideration is that the "new" department to which the petitioner refers in the instant case is part of an already existing entity. That being the case, the AAO must consider the date when that entity was created, not the date when that entity expanded to include a new department. Thus, even if the mail order portion of the petitioner's business was not created until November 2001, the partnership agreement in the record of proceedings indicates that a partnership was created in 1999 for the purpose of creating the petitioning entity. The record also contains a lease agreement, dated January 1999, indicating that warehouse space was rented to house the petitioner's operation more than two years prior to filing the petition. Based on the evidence of record, the petitioner cannot be accorded "new office" status.

The petitioner also asserts that the beneficiary has the required skills and discretionary authority necessary to expand the existing U.S. business. He also repeated the description of the beneficiary's duties given earlier and emphasized her significant role in creating a successful business operation, as well as the petitioner's need for the beneficiary's particular abilities. However, CIS does not dispute the claim that the beneficiary has played and will continue to play a key role in the petitioning entity's financial success. Rather, the request for additional evidence clarified that CIS's main concern was the beneficiary's duties and whether those duties were and will be primarily of a managerial or executive nature. Although the petitioner discusses the beneficiary's supervisory role and discretionary authority over all personnel matters, it has not submitted any evidence or provided the AAO with any information on appeal to overcome CIS's objections. Having discretionary authority and supervising personnel would not necessarily preclude the beneficiary from taking on non-qualifying duties. For instance, several of the submitted documents indicate that the beneficiary actually negotiates and purchases the items that are later to be sold by the petitioner. It is noted that 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). Although seeking out inventory and negotiating the purchase price are both crucial to the petitioner's success, these duties can be better attributed to a buyer rather than an individual acting in a managerial or executive capacity. Furthermore, it is unclear how much of the beneficiary's time is spent performing these tasks, as neither one was mentioned in the percentage breakdown of the beneficiary's duties.

Furthermore, even though the petitioner states that the beneficiary has subordinate personnel, there is no information about any of their duties or educational levels. The petitioner has provided only the job titles of the beneficiary's subordinates without any evidence that they are professional, managerial, or supervisory as required by 8 C.F.R. § 214.2 (l)(1)(ii)(B)(*2*).

Finally, the petitioner asserts that CIS placed too much emphasis on the petitioner's small size and failed to accord it the same consideration as it would a large corporation. Contrary to the petitioner's argument, the director's consideration of the size of the petitioning organization comports with current law. While size cannot be the sole consideration in determining eligibility for managerial or executive status, the director can

and should consider the petitioner's size and personnel structure for the purpose of establishing whether the petitioner has a sufficient staff to relieve the beneficiary from performing non-qualifying duties. In the instant case, the description of the beneficiary's duties suggests that the beneficiary performs non-qualifying tasks; therefore, regardless of the petitioner's size the beneficiary does not work primarily as a manager or executive.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner states that the beneficiary's duties are managerial and involve a great deal of discretionary authority. However, the description of duties that the petitioner provided is too general to convey a clear understanding of what the beneficiary would be doing, and has been doing up to now, on a daily basis. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. Nor has the petitioner demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that she will be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach 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 she 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.

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.