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**U.S. Citizenship
and Immigration
Services**



FILE: WAC 02 062 52580 Office: CALIFORNIA SERVICE CENTER Date: **MAR 24 2004**

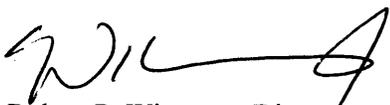
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Silko Fashions, Inc., endeavors to classify the beneficiary as a manager or executive 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 claims to be an affiliate of Hing Yip Silk Co. Ltd. located in China and engaged in the import and sale of silk garments. It seeks to extend the petition's validity and the beneficiary's stay for two years as the U.S. entity's president at a salary of \$60,000 per year. The petitioner was incorporated in the State of California on July 26, 1994 and claims to have five employees.

On April 9, 2002, the director denied the petition because the beneficiary will not serve in a primarily executive or managerial capacity.

The petitioner subsequently appealed. However, the director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review.

On appeal, the petitioner's counsel refutes the director's findings.

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.

If the petitioner is filing a visa petition to extend the beneficiary's stay for L-1 classification, the regulation at 8 C.F.R. § 214.2(l)(14)(i) requires that:

The petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.

The regulation at 8 C.F.R. § 103.5(a)(8) provides that:

Treating an appeal as a motion. The official who denied an application or petition may treat the appeal from that decision as a motion for the purposes of granting the motion.

The issue in this appeal is whether the beneficiary primarily performs managerial or executive duties for the U.S. entity. 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.

In addition, 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.

On December 11, 2001, the petitioner submitted Form I-129 to extend the beneficiary’s stay. The petitioner submitted documentation with the form and described the beneficiary’s job duties as:

[D]irects market research, which is a major component of the organization. [The beneficiary] assesses the fashion trends and makes unilateral decisions regarding the creation of styles, purchases of fabric and determination of sizes. [The beneficiary] determines which fabrics will market well, negotiates prices and purchases materials. She also designs the fashion and directs the factory in China to create patterns based on her designs. [The beneficiary] exercises discretion when determining which fabrics to purchase and which styles and sizes to manufacture

and shipping of [the petitioner's] garments. . . [The beneficiary] exercises authority in hiring, firing, and other personnel decisions and sets long term and short term financial goals and policies. She determines the monthly gross sales goals, taking into consideration overhead, salaries, market conditions and other internal and external factors. She approves budgets and major expenditures. She supervises the vice president/general manager, who in turn supervises the lower ranking employees.

On January 3, 2002, the director requested further information including a detailed organizational chart for the U.S. entity listing the job titles, detailed job descriptions, educational levels, salaries, and immigration status for the employees the beneficiary supervises.

On March 21, 2002, in response to the director's request, the petitioner submitted a chart of the list of workers the beneficiary's supervision that included a description of the employees' duties, job titles, educational levels, salaries, and immigration status.

On April 9, 2002, in his notice of decision, the director determined that the petitioner had submitted insufficient evidence to establish that the beneficiary's duties were primarily that of an executive or manager pursuant to 8 C.F.R. § 214.2(1)(14)(ii). The director found that the number of upper-management employees for this company did not appear to support the functions of the business. The director also found that although the petitioner had sufficient upper management, the petitioner lacked middle management and workers to support the functions of the upper management.

On appeal, counsel cites an unpublished decision and alleges that the denial of the director was incorrect because the fact that the petitioner is a small company should not enter into the calculation of whether the president of Silko Fashions performs managerial or executive functions. In addition, counsel quotes the Occupational Outlook Handbook indicating that "the nature of high level executives' responsibilities depends upon the size of the organization, in large organizations, their duties are highly specialized while in smaller organizations, the executive is often responsible for purchasing, hiring, training, quality control and day-to-day supervisory duties." *Occupational Outlook Handbook*, 2000-2001 Edition, U.S. Department of Labor, Bureau of Labor Statistics, page 50. In addition, counsel's brief describes the beneficiary's duties. Counsel states that two new employees have been hired and the petitioner has expanded its business to advertise with three new clients.

Although counsel presents a previous unpublished AAO decision and a quote from the Occupational Outlook Handbook, counsel's assertions are not persuasive because counsel has misinterpreted the director's decision. The director's findings do not indicate that his denial was based on the fact that the petitioning entity is a small company. Rather, the director found that the number of upper-management employees did not appear to support the functions of the business. The director's decision appears to indicate that he based his decision upon the beneficiary's primary duties within the organizational hierarchy and concluded that the beneficiary's duties were not primarily that of an executive or manager pursuant to 8 C.F.R. § 214.2(1)(14)(ii).

In 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(1)(3)(ii). Moreover, 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.

On appeal, the petitioner asserted that the beneficiary "will focus entirely on executive and managerial functions" and that the beneficiary "performs managerial and executive functions which are unique to a fashion design boutique." The petitioner never effectively clarified whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. Regardless, the petitioner must establish that the beneficiary is acting primarily in an executive capacity or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of either of the four elements of the two diverse statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive-manager" and rely on partial sections of the two statutory definitions.

On review, the beneficiary's duties are described as "managing the company as a whole" and "ultimately responsible for the design, merchandising, and pricing of all products." However, these duties are general and appear to indicate that the preponderance of the beneficiary's duties will be directly performing the non-managerial day-to-day operations of the business. It must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities are managerial or executive in nature. The petitioner did not, however, describe how the beneficiary is ultimately responsible for the design, merchandising, or pricing of all products. 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).

In addition, the petitioner failed to submit the percentage of time the beneficiary actually performs the claimed managerial or executive duties. The failure of documentation is important because several of the beneficiary's daily tasks, such as "assesses the fashion trends and makes unilateral decisions regarding the creation of styles, purchases of fabric and determination of sizes," do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Moreover, the petitioner describes the beneficiary's U.S. duties as directing the marketing, determining which fabrics will market well, and negotiating prices and purchases materials. Since the beneficiary actually determines which fabrics will market well and negotiates the pricing, she is performing tasks necessary to provide a service or product. 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).

Further, counsel asserted that the beneficiary “supervises the vice president/general manager, who in turn supervises the lower ranking employees.” Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Here, the petitioner, at the request of the director, submitted a description of the subordinate employees’ job duties. However, the general description of the vice president/general manager’s duties appear to indicate that the vice president/general manager is not acting in a managerial or supervisory nature as her duties include training and day-to-day support of the staff, talking with buyers directly regarding damaged merchandise, and consulting with the president regarding discounts or price negotiations. She is also responsible for bookkeeping tasks such as banking, accounting, issuing checks, inputting financial information into the books, and keeping track of customer payments.

In addition, section 101(a)(32) of the Act states that the term “profession” includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teachers of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term “profession” includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. Although the petitioner indicated in the list of workers under the beneficiary’s supervision that the vice president/general manager has a B.S. in hotel management, the vice president/general manager’s duties are not typical of those ordinarily requiring a baccalaureate’s degree. Therefore, the description of the beneficiary’s job duties lead the AAO to conclude that the beneficiary is performing as a first-line supervisor of non-professional employees, rather than as a manager or executive. As stated in the Act, “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)(A)(iv) of the Act.

The AAO notes that at the request of the director, the petitioner submitted a detailed description of the subordinate employees’ job description in a chart described as a list of workers under the beneficiary’s supervision. On the chart, the petitioner indicated the vice president/general manager’s salary as \$66,000 per year. However, the petitioner indicated on Form I-129 that the beneficiary earns \$60,000 per year. This appears to indicate that a president of the petitioning entity with significant responsibilities as described by the petitioner earns a lesser amount of money than a subordinate employee. In addition, the petitioner indicated on Form I-129 that the current number of employees is five. However, in the response to the director’s request for additional evidence, the petitioner described the list of workers under the beneficiary’s supervision as including eleven employees, two of which were vacant. As a result, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, on appeal, counsel, in her brief dated May 9, 2002, asserts that the petitioner is submitting new evidence. Counsel states that the petitioner has expanded its business to advertise with three new clients in three clothing catalogues and that in April and May 2002, the petitioner has hired two additional employees that the beneficiary will supervise. The two additional

employees include a sales manager and a design associate. The petitioner submitted job offer letters, job descriptions, and resumes of the two new employees. The petitioner claims that the beneficiary has delegated many of her prior duties to the two new employees and is “now able to perform exclusively executive and managerial functions.” Specifically, the beneficiary “has delegated the duties of developing her ideas for fashion design and market research to the design associate and carrying out marketing activities, participation in fashion shows, and preparation of service agreements to the sales manager.” The petitioner has submitted a revised organizational chart indicating that the beneficiary will directly supervise the general manager, the design associate, and the sales manager. However, although the petitioner submitted evidence to substantiate its claim of its new clients and additional employees, 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).

After careful consideration, the AAO must conclude that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is dismissed.