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20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



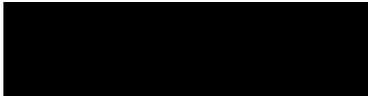
U.S. Citizenship
and Immigration
Services

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FILE: SRC 02 113 50822 Office: TEXAS SERVICE CENTER Date: **MAY 17 2004**

IN RE: Petitioner: 
Beneficiary:

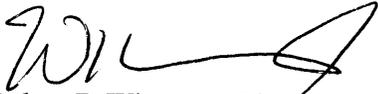
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 U.S. company engaged in selling jewelry at retail and at wholesale. The petitioner seeks to extend the temporary employment of the beneficiary as Executive/Director for an additional three years, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary is employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's decision "is flawed" in that it is based on the requirements of "managerial capacity," rather than the criteria of an executive, the capacity in which the beneficiary is employed. Counsel further contends that the beneficiary's job duties in the United States "were precisely what an executive of a small operation would do," and that the beneficiary should therefore be deemed to be functioning in an executive capacity.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) further provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The present issue is whether the beneficiary will be employed in a managerial or executive capacity in the United States organization.

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 the petition submitted by the petitioner on February 27, 2002, the petitioner provided the following duties of the beneficiary as Executive/Director of the U.S. organization:

Searched for location; opened in Laredo area; retained [attorney] to set up corp.; obtained licensure; opened bank [account]; entered into leasehold; bought merchandise; retained [accounts]; hired employees; operating for over one year [and] grossing last year over \$209,000.

Additionally, the petitioner noted that at the time of filing the petition, the company had three employees. The petitioner submitted its Employer's Quarterly Federal Tax returns for the quarters ending June 30, 2001, September 30, 2001, and December 31, 2001; each return indicated zero employees for the particular pay period. The petitioner also provided payroll records from the U.S. company, which identified two individuals employed in October 2001, including the beneficiary, three employees in November 2001, and five employees in December 2001. The payroll records did not identify the position held by each employee.

In a request for evidence, the director asked that the petitioner provide a description of the duties performed by the beneficiary during the past year, including the percentage of time the beneficiary spent on each particular job duty. In addition, the director requested evidence of the current staffing of the U.S. organization, identifying the position titles and duties of all employees, the number of subordinate managers, supervisors, or other employees who report directly to the beneficiary, and the date on which each employee was hired.

In response, the petitioner provided the following description of the beneficiary's responsibilities in the United States:

The beneficiary directs the entire operations and is responsible for purchase sales, renting space, banking and payment of bills for utilities, insurance and taxes, and setting goals and long-term investments. The beneficiary also is responsible for securing lease extension (see copy of lease extension to 2004). The [beneficiary] also hires the manager and instructs for the daily operations to [the manager] for the hiring and firing and setting salary rate within the budget set by the [beneficiary]. The [beneficiary] also confers with the [manager] on the purchase of goods from jobbers and [manufacturers]. The [beneficiary] travels to N.Y., L.A. Dallas and other cities and enters into contracts for purchase of goods (see sample invoices annexed). The [beneficiary] also instructs the [manager] to price items within the parameters and mark-ups established by the [beneficiary]. He also instructs the [manager] to conduct inventory and report on findings for use by the accountant for sundry taxes. The [beneficiary] also attends shows and promotions (see e.g., [beneficiary's] I.D. when attending Las Vegas show as a Buyer). The [beneficiary] is also responsible for banking and payment of taxes and payrolls, including conferences with accountants to meet filing deadlines.

The petitioner failed to designate a percentage of the beneficiary's time spent on each job duty, explaining that the allocation would be too difficult. The petitioner again contended that the day-to-day operations of the company are performed by the store manager, and that "the direction and control of the overall operations rests with the [beneficiary]."

An additional letter dated June 7, 2002, was submitted by the petitioner's accountant. The accountant claimed that as of that date, the petitioner employed ten employees. Of these ten employees, six were employed at the time of filing the petition. The positions included one manager, five sales clerks, and the beneficiary, as president. The accountant further explained that the manager reports directly to the beneficiary, and is in charge of supervising the sales clerks. The sales clerks are responsible for "attending to customers' needs and selling merchandise," and one sales clerk has the additional responsibility of providing the beneficiary with invoices and reports.

In a decision dated September 9, 2002; the director denied the petition concluding that the petitioner had not established that the beneficiary would be employed in the United States in a managerial or executive capacity. The director noted that there was a discrepancy in the number of employees claimed by the petitioner on the petition compared to those employees listed in the letter submitted by the petitioner's accountant. The director further stated that the evidence does not demonstrate that the beneficiary has been supervising professionals; nor does the record indicate that the beneficiary will be relieved from performing the day-to-day operations of the business. Therefore, the director concluded that "absent the support staff and/or duties which reflects [sic] managerial responsibilities," the petitioner was not persuasive in establishing that the beneficiary will be employed as a manager or executive.

On appeal, counsel contends that the director's analysis of the petition was flawed as he applied the requirements for "managerial capacity" rather than those related to "executive capacity." Counsel asserts that the beneficiary has been functioning as an executive only, and therefore, the director should not have considered whether the beneficiary has been supervising professional or managerial employees.

Counsel further contends that since establishing the U.S. company in October 2000, the beneficiary has performed duties "consistent with those of an executive." These responsibilities included securing a business location, retaining an attorney and an accountant, issuing stock, opening the necessary bank accounts, obtaining financing, insurance, licenses and permits, advertising, securing contracts for the sale of merchandise, and attending trade shows to promote business. Counsel claims that these duties demonstrate that the beneficiary has been functioning in accordance with the criteria necessary for "executive capacity."

Additionally, counsel denies that the beneficiary has been performing any day-to-day operations of the business. Rather, counsel contends that the beneficiary, like other executives, "may very likely take a hands-on approach to overseeing the direction of the business without necessarily forfeiting his executive capacity."

Lastly, counsel asserts that all facts pertinent to the present petition were made available in the prior petition, which was approved by Citizenship and Immigration Services (CIS) in 2001. Therefore, counsel contends that "the earlier [CIS] approval and the two American Consulate issuance of visas[,] where it is known that they have wide experience in evaluating L visa, were in fact correct," and the beneficiary should be classified as an executive.

On review, the record is not persuasive in demonstrating that the beneficiary would be employed in the United States in a managerial or executive capacity as defined at section 101(a)(44) of the Act.

When examining the managerial or executive 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.* In addition, pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(D), when requesting an extension of a visa petition involving a new office, the petitioner must submit a statement describing the staffing of the new operation, including the number of employees and type of position held by each. In the present matter, counsel asserted that the beneficiary would be employed in an executive capacity. Therefore, the AAO will adjudicate the petition based on "executive capacity" only.

The documentation submitted by the petitioner and counsel fails to demonstrate that the beneficiary's job responsibilities are executive in nature. Although required by the regulations, the petitioner did not submit any documentation describing the beneficiary's position when it filed its petition for an extension. Upon request by the director, the petitioner subsequently provided a list of employees, a brief description of their positions, and a description of the beneficiary's job duties. Specifically, the petitioner stated that the beneficiary is responsible for securing office space, paying bills for utilities, insurance and taxes, handling payroll and financial matters, including meeting with the accountant, contracting with outside parties for the purchase of goods, and conferring with the company's manager regarding inventory and personnel matters, such as hiring and firing subordinates and salaries. In addition, the beneficiary travels to various U.S. cities for trade shows and promotions.

The previously listed job duties demonstrate that the beneficiary is performing all of the functions of the U.S. business, rather than solely those that are executive. While counsel contends that the beneficiary's job duties are "consistent with those of an executive," the beneficiary is clearly performing duties considered to be non-managerial and non-executive in nature. According to the job descriptions provided, the beneficiary is responsible for all financial and administrative matters of the company. These include handling payroll, paying monthly utilities, insurance and taxes, and securing all documents necessary for the business' operation. Additionally, the beneficiary is performing the sales and marketing function of the company, as he is personally meeting with clients to obtain contracts for the company, and is shown in photographs communicating with customers and selling merchandise. Moreover, the beneficiary is given the title of "Buyer" on one of his tradeshow nametags, thereby implying that he is responsible for purchasing the products to be sold by the petitioner. Contrary to the regulations, which require that the beneficiary "directs the management of an organization or a major component or function of the organization," the beneficiary is instead performing many functions of the business, which cannot be classified as executive. 8 C.F.R. § 214.2(l)(3)(C)(1). 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).

Additionally, the documentation pertaining to the staffing of the organization fails to establish that the petitioner employs a staff sufficient to relieve the beneficiary from performing non-qualifying duties. As addressed by the director, the petitioner noted on the petition that it employed three individuals. However, documentation subsequently submitted indicated six individuals employed by the petitioner at the time of

filing.¹ The employees were identified as sales clerks, who are responsible for selling the merchandise, and a manager, who supervises the sales clerks. There is no indication that the petitioner employs any individuals to perform the outside sales, marketing, financial and administrative duties that are currently being performed by the beneficiary. Furthermore, the inconsistencies in the record pertaining to the people employed by the petitioning organization create doubt as to the actual number of employees. This is substantiated by the Employer's Quarterly Federal Tax returns for June through December 2001, in which the petitioner documented that it had zero employees. 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). Also, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho, supra*. The petitioner has not submitted any evidence to explain or resolve these inconsistencies.

As addressed by counsel on appeal, the AAO acknowledges that the current petition is for an extension of a L-1A petition that was previously approved by the director. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Although the appeal will be dismissed, the AAO notes that the director based his decision, in part, on an improper standard. The director should focus on applying the statute and regulations to the facts presented by the record of proceeding. Although Section 101(a)(44)(C) of the Act requires CIS to consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some rational basis for requiring the petitioner to establish the need for an executive. The fact that a petitioner is a small business will not preclude the beneficiary from qualifying for classification under section 101(a)(15)(L) of the Act.

¹ The AAO acknowledges the documentation submitted by the petitioner's accountant in which she identified ten employees of the petitioner. It was noted that four of these employees were hired following the filing of the petition. A nonimmigrant visa petition is adjudicated according to the facts at the time of filing the petition, and 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). Therefore, the four employees hired subsequent to the filing of the petition will not be considered in the present analysis.

For the foregoing reasons, the petitioner has not demonstrated that the beneficiary would be employed in the U.S. organization in a primarily executive capacity.

Beyond the decision of the director, it remains to be determined whether the foreign and U.S. companies are still qualifying organizations, as required in the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A). The petitioner asserted in its petition that the U.S. company is a subsidiary of the foreign company. The petitioner also stated that the foreign company was wholly-owned by the beneficiary's brother, and that the beneficiary and his brother each owned 50% of the U.S. company. The petitioner submitted two stock certificates for the U.S. company, which indicate that the beneficiary and the beneficiary's brother each own ten shares of the petitioning organization. However, Schedule E of the Year 2001 U.S. Corporation Income Tax Return identifies the beneficiary as the owner of 100% of the corporation's common stock. Additionally, Schedule K of the same tax return indicates that the corporation had only one shareholder at the end of the tax year. 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, supra*. As the petition will be dismissed on other grounds, this issue need not be further addressed.

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.