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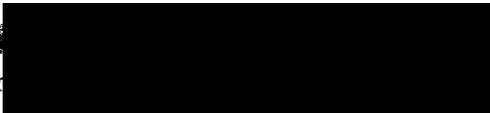
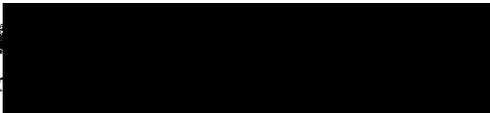


**U.S. Citizenship
and Immigration
Services**

D 7



FILE: WAC 02 136 50492 Office: CALIFORNIA 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, California 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 operating in the United States as a diamond wholesaler. It seeks to temporarily employ the beneficiary as president. As the beneficiary is presently in the United States as a nonimmigrant visitor for business, the petitioner filed a petition to change the beneficiary's classification to a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary would not be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) made a mistake of law and fact in denying the present petition, as the petitioner provided sufficient evidence of the beneficiary's duties as president. Counsel also contends that CIS incorrectly focused on the size of the company when determining whether the beneficiary would be employed as a manager or executive. Counsel submits a brief in support of the appeal.

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.

The petitioner indicated on the petition that, as president, the beneficiary would manage and supervise the U.S. office, including coordinating activities of the organization and reviewing financial reports. In an attached letter, the director of the beneficiary's foreign employer stated that the beneficiary's responsibilities in the United States would include: planning and developing the company and objectives; establishing corporate policies; reviewing the sales of the company; hiring employees; and developing marketing strategies. The petitioner also submitted two quarterly wage reports for the periods ending June and September 2001, identifying the employment of two and three employees during each period, respectively.

In a request for evidence, the director asked that the petitioner submit: (1) a U.S. organizational chart reflecting the names and job titles of all employees, and clearly identifying the beneficiary's position and the employees subordinate to the beneficiary, including their job titles and duties; (2) a more detailed description of the

beneficiary's job duties in the United States, indicating the percentage of time spent on each job responsibility; (3) copies of the California Employment Development Department (EDD) Form DE-6, quarterly wage reports for the period ending December 2001; and, (4) copies of the U.S. entity's payroll summary, and Forms W-2 and W-3 for all workers employed during 2001.

In response, the petitioner submitted an organizational chart, which identified six employees of the U.S. company including the beneficiary as the president and five subordinates: vice president, financial officer, sales person, secretary, and clerk. The petitioner also supplied an undated quarterly wage report, which identified five employees of the organization, not including the beneficiary. Additionally, the petitioner outlined the beneficiary's job duties as:

- Responsible for the effective coordination of the office activities in a manner which maximum [sic] sales, earning, customer satisfaction and development of personnel.
- Initiates and develops objectives and policies, review financial statements to increase profits and supervise day to day business affairs of [the] organization.
- Authority to engage in all personnel matters, including recruiting, terminating, and promoting of professional staff.
- Makes key decisions for marketing strategies.
- Review the annual report of the company.

In an appended letter, the petitioner also stated that while the beneficiary need only qualify as either a manager or an executive, "the petitioner's description of the job duties performed by the beneficiary qualifies under the criteria for both managerial and executive capacity," and therefore, the petition should be granted.

In his decision, the director stated that the petitioner's description of the beneficiary's job duties, which was "broad" and "general," does not establish that the beneficiary will be primarily directing the management of the organization. Rather, the director concluded that the beneficiary would be performing "many aspects of the day-to-day operations of the business." The director also noted that the wages reflected on the quarterly wage report indicate that the five employees of the U.S. entity are likely part-time workers; therefore, "the beneficiary's duties will be directly providing the services of the business, including sales." Finally, the director concluded that the beneficiary would not be managing a subordinate staff of professional, managerial, or supervisory personnel, "except in name only." The director subsequently denied the petition.

In a brief on appeal, counsel asserts: (1) that the petitioner provided sufficient detailed evidence that the beneficiary would be employed as president of the petitioning organization; and, (2) that the director incorrectly considered the size of the U.S. company in determining whether the beneficiary would qualify as a manager or executive. Counsel contends that the evidence demonstrates that the beneficiary "directs an organization of five employees" and is responsible for:

the effective coordination of [the] offices [sic] activities to maximize sales, earnings, customer satisfaction, and personnel development; initiate and develop objectives and policies, review financial statements to increase profits, and supervise day-to-day business affairs of [the] organization; engage in all personnel matter, including: recruiting, terminating, and promoting staff; and make key decisions for marketing strategies.

Counsel also asserts that “[t]he very nature” of the beneficiary’s position as president makes it “impossible to give exact percentages” for the beneficiary’s various job duties; therefore, “[CIS] should not conclude that the beneficiary will be performing many aspects of the day-to-day operations of the business.”

In addition, counsel claims that the director’s finding that the beneficiary’s subordinates are part-time or minimum wage employees “is irrelevant as to whether the beneficiary will be performing in an executive or managerial capacity.” Counsel refers to an unpublished AAO decision, and states that a sole employee of an organization may be classified as an executive “provided his or her primary function is to plan, organize, direct and control an organization’s major functions through other employees.” Counsel further contends that neither definition of managerial or executive capacity addresses the size or staffing level of an organization.

Finally, counsel states that the director’s determination that the beneficiary would not be managing a subordinate staff of professional, managerial, or supervisory personnel, “is not a requirement for an L-1A visa.” Counsel states that when establishing managerial capacity, the beneficiary must either supervise other professional or managerial employees, or manage an essential function. Counsel asserts that because “the beneficiary has ultimate authority over the operation of the entire organization,” the beneficiary satisfies this requirement of “manag[ing] an essential function.”

On review, counsel’s assertions are not persuasive. 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). If a petitioner is representing the beneficiary is both a manager and an executive, a petitioner must specifically establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner has not submitted detailed evidence to substantiate its assertion that the beneficiary would be employed in the United States as both a manager and executive. The petitioner stated that the beneficiary would develop the company’s objectives and policies, supervise day-to-day business affairs, make key marketing decisions, review the annual report, and coordinate office activities. When asked for additional description, including an assignment of time devoted to each specific job responsibility, the petitioner neglected to submit details. On appeal, counsel asserts that “there is no law or regulation that requires an L-1A applicant to break down his or her duties in such a mechanical manner.” However, absent additional description, such as defining the daily office activities that the beneficiary will coordinate, or explaining the specific business affairs the beneficiary will supervise, the AAO cannot conclude that the beneficiary would perform the high-level responsibilities of a manager or executive. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). Also, while not recognized by counsel, the regulation at § 214.2(l)(3)(viii) requires the petitioner to submit with its petition any evidence that the director may deem necessary. 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).

Additionally, the petitioner and counsel present conflicting evidence as to whether the beneficiary is managing the claimed subordinates or whether the beneficiary is employed as a functional manager. While the petitioner presented evidence of a vice-president, financial officer, sales person, secretary, and clerk employed by the U.S. entity, counsel subsequently asserts on appeal that the beneficiary “manages an essential function” of the organization. Counsel does not recognize the distinction that the term “function

manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). 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).

Counsel also asserts that the director incorrectly considered the size of the U.S. organization when examining the employment of the beneficiary, and determining that the beneficiary's subordinates were employed part-time. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, counsel stated only that part-time employment of the subordinate employees "is irrelevant as to whether the beneficiary will be performing in a managerial or executive capacity." Counsel has not explained how the reasonable needs of the organization justify the part-time employment of workers, and assumedly, the beneficiary's performance of daily activities of the corporation. 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). Also, 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).

Counsel further refers to an unpublished decision involving a sole employee of an organization. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. As the beneficiary is not the sole employee of the U.S. organization it is unclear how the facts of the instant petition are analogous to those in the unpublished decision. Counsel has not furnished additional evidence and has not explained the relevance of the unpublished decision. 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, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based on the evidence presented, the petitioner has not demonstrated that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

An issue not addressed by the director is whether the beneficiary, as a nonimmigrant for business, maintained the proper status while in the United States. The regulation at 8 C.F.R. § 214.1(e) states that a nonimmigrant in the United States in a class other than those defined in sections 101(a)(15)(B) and (C) who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act. *Id.* In the present matter, in a letter responding to the director's request for evidence, counsel implies that the beneficiary is presently working for the U.S. entity as its president. Counsel stated that the beneficiary is in the U.S. to oversee and direct the petitioning organization and "has

assumed his current position as President.” Counsel provides that since the beneficiary assumed his previous position, the company experienced a total sales revenue of \$485,661, and that the “sales figures are based on the beneficiary’s management of Petitioner’s company and his exercising his discretion of its day-to-day operations.” If the beneficiary is presently working in a capacity not authorized under his current nonimmigrant classification, the beneficiary’s employment may constitute a failure to maintain status. Again, the appeal will be dismissed for this additional reason.

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.