U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

File: EAC 02 080 54206 Office: VERMONT SERVICE CENTER Date: OCT 1 1 2004

IN RE: Petitioner: [redacted]
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)

IN 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

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DISCUSSION: The Director, Vermont 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 filed this nonimmigrant petition seeking to extend the employment of its vice president as an L-1A nonimmigrant intracompany transferee 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 is a limited liability company organized in the State of New Jersey, and is engaged in the import and sale of garments and textiles. The petitioner claims that it is the subsidiary of Kingsley Exports, located in Mysore, India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the "director's contention is unwarranted, unsupported by the Act and regulations, and speculative at best." In support of this assertion, the petitioner submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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) 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) also 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 primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 initial petition, counsel for the petitioner alleged that the beneficiary has been employed by the U.S. entity in a primarily executive capacity. Specifically, counsel stated:

> [The beneficiary] holds the position of vice president. This is a key managerial position in our organization. He has been vested with considerable discretionary authority in regard to coordinating, directing, and implementing the overall operations and policies of our company. Specifically, he will continue to perform the following purely executive duties:
>
> (1) Oversee the operations in the U.S. and coordinate the same with our parent company in India.
> (2) Manage administrative operations, including marketing, personnel, and general administrative affairs.
> (3) Develop and implement plans for long-term growth, set corporate policies, goals, and objectives.
> (4) Oversee and manage financial operations.
> (5) Analyze, develop, and implement marketing plans and strategies.

On February 11, 2002, the director requested additional evidence establishing that the beneficiary was employed in a capacity that was primarily managerial or executive in nature. Additionally, the director requested specific documentation for the record, including:

(1) An organizational chart showing the structure of the U.S. entity;
(2) A complete description of the beneficiary's duties;
(3) A description of the duties and educational backgrounds of the other employees of the U.S. entity;
(4) An explanation regarding how the beneficiary would abstain from performing the day-to-day operations of the business; and
(5) A breakdown in hours of the time spent by the beneficiary in performing each duty named in the description provided.

In a response dated March 4, 2002, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. Counsel's response, which provided a detailed overview of the beneficiary's duties, also included a breakdown of the percentages of time the beneficiary spent working on each task. In addition to addressing the beneficiary's duties, counsel provided a description of the titles and duties of the beneficiary's co-workers and an explanation of their educational backgrounds, an organizational chart for the U.S. entity, and a copy of the U.S. entity's quarterly Federal Tax Return for the fourth quarter of 2001.

On July 10, 2002, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would refrain from performing everyday tasks, thereby preventing a finding that he would be employed in a capacity that is solely managerial or executive. Specifically, the director noted that the job description provided was vague, and that the subordinate employees allegedly supervised by the petitioner were not deemed to be professionals.

On appeal, counsel for the petitioner asserts that the director's decision was unwarranted and unsupported, and alleges that the director disregarded the persuasive documentation previously submitted. Counsel contends that the director's finding that the beneficiary was not acting primarily as a manager or executive was based on the fact that the company employs only a small number of employees, and alleges that this line of reasoning "is at odds with elemental business realities, and exceeds both the plain meaning and legislative intent of the Act."

Upon 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). The petitioner's description of the job duties 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Prior to adjudication of the petition, counsel contended that the beneficiary has been employed in a capacity that was primarily executive in nature. In support of these contentions, counsel submitted a detailed response to the director's request for evidence, which established that the beneficiary holds

a Bachelor of Arts degree. In his letter dated March 4, 2002, counsel further described the beneficiary's duties as follows:

> The beneficiary has been and will continue to be employed in the important position of vice president. He has been responsible for directing and managing the overall sales and marketing operations of the company, including developing and implementing marketing, sales and promotion policies, strategies, programs and goals. He has been responsible for handling all personnel decision including hiring and termination. Further, he has been engaged in developing, formulating, establishing, and implementing plans for long term sales and marketing growth. ***He has not been directly engaged in producing or selling a product or services or otherwise performing operational duties and has not been acting as a first line supervisor.*** (Emphasis in original).

Counsel further provided a breakdown of the time the beneficiary spent performing all of his duties, and additionally submitted an overview of the educational backgrounds and positions of the beneficiary's subordinates. Finally, counsel for the petitioner alleges that *in the alternative*, the beneficiary could also be viewed as a function manager based on the nature of his duties and responsibilities.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary was not employed in a primarily managerial or executive capacity. In both the initial petition and in response to the request for evidence, counsel for the petitioner merely paraphrases the statutory language found in the definition of executive capacity when describing the beneficiary's duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). 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,* 724 F. Supp. at 1108.

In addition, the actual duties themselves reveal the true nature of the beneficiary's employment. *Id.* In this case, counsel alleges that the beneficiary "has not been directly engaged in producing or selling a product or services or otherwise performing operational duties and has not been acting as a first line supervisor." Counsel places significant emphasis on this statement in his letter of March 4, 2002, undoubtedly in an attempt to persuade Citizenship and Immigration Services (CIS) to make a favorable conclusion in favor of the petitioner. This statement, however, is contradicted by the evidence of record.

First, the record contains numerous copies of email messages exchanged between the beneficiary and other potential clients or business associates from November and December of 2001. These email messages, directed personally to the beneficiary, request services that are not executive in

nature. Specifically, the emails include requests for prices, requests for sample formulations, and requests for verification that mail deliveries have been received. Clearly, an executive, or vice president, is normally not expected to handle such menial tasks. However, the evidence of record confirms that the beneficiary was personally required to deal with day-to-day operations of the organization, thereby casting doubt on counsel's allegations that the beneficiary never engaged in non-executive tasks.

Secondly, and most importantly, counsel for the petitioner stated that the U.S. entity, although incorporated in October of 2000, did not commence business operations until August of 2001. However, the beneficiary was granted an initial one-year stay in the United States to open a new office in January of 2001. The record contains no evidence of the beneficiary's activities from the granting of the petition, in January of 2001, through the commencement of business operations in August of 2001. There is no evidence that the U.S. entity employed subordinate employees during this time, thereby raising a serious question with regard to the claim that the beneficiary has been employed in a primarily executive capacity for the year prior to the filing of the extension request. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. *See* Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Finally, in response to the director's request for evidence, counsel allèges, for the first time, that that the beneficiary may even qualify as a function manager if CIS determines that he is not primarily an executive. 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. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. Additionally, the petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities after the initial filing of the petition. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Until the request for evidence was issued, counsel for the petitioner maintained that the beneficiary was primarily an executive, as evidenced by his title of vice-president. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Consequently, the AAO agrees with the director's finding that the petitioner failed to establish that the beneficiary was employed in a primarily executive capacity.

On appeal, counsel introduces a new position with regard to the director's findings. Counsel's primary contention is that the director applied an erroneous standard in determining the nature of the beneficiary's position. Specifically, counsel alleges that the director relied solely on the small

number of staff employed by the U.S. entity as a means for determining that the beneficiary's position was not primarily managerial or executive.[1] The AAO disagrees.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, contrary to counsel's allegations, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

As discussed previously, the AAO notes several discrepancies in the record, which thereby warrant this analysis. First, the petitioner alleged throughout these proceedings that although the beneficiary's visa was granted in January of 2001, business did not commence until August of 2001. There is no evidence that the beneficiary was acting primarily as an executive during the period from January 2001 to August 2001. In fact, there is no evidence that the beneficiary did *any* work during this period. Furthermore, there is no evidence that any other employees were working for the petitioner and/or supervised by the beneficiary during this period. The petitioner also failed to document the dates that the subordinate employees commenced their employment with the petitioner, thereby raising an additional question of whether the beneficiary was conducting the day-to-day operations of the organization before the new employees arrived. Additionally, the only evidence provided to show that the U.S. entity actually employed persons other than the beneficiary is the quarterly tax return for the quarter ending December 31, 2001. However, this document merely establishes that salaries were paid, but fails to confirm the number of employees that were employed by the U.S. entity during this period. Without independent evidence to corroborate the claims of counsel, it is impossible to conclude that the beneficiary was primarily an executive during this one-year period, since it is impossible to verify that subordinate employees were in fact employed by the U.S. entity. Without documentary evidence to support the claim, the assertions of

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[1]The AAO acknowledges that counsel cites three earlier decisions rendered by the Commissioner, namely, *Matter of Vaillancourt*, 13 I&N Dec. 654 (Reg. Comm. 1970), *Matter of Bocris*, 13 I&N Dec. 601 (Reg. Comm. 1970), and *Matter of Pozzoli*, 14 I&N Dec. 569 (Reg. Comm. 1974) in support of its previous contention that the beneficiary is in fact primarily an executive. Counsel fails to equate the holdings and facts of these particular cases with the facts at hand, and therefore the AAO finds them unpersuasive for purposes of this decision. Specifically, counsel for the petitioner merely states that the petitioner prevailed in each case, and fails to discuss the reasons that these particular cases should be influential upon the AAO for purposes of this decision. In addition, counsel fails to acknowledge that these cases were decided well before the current revision to the Act, thereby overlooking the potential that these decisions have no weight in light of the current status of the Act. Accordingly, the AAO finds these citations unpersuasive.

counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 for the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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).

Finally, counsel for the petitioner indicates that since the filing of the petition, the U.S. entity has hired additional employees and plans to hire more subordinates as part of its business expansion, and relies on this business plan as a basis to justify the employment of the beneficiary in an executive capacity. However, as stated above, 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). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the AAO notes several significant deficiencies in the record of proceeding that were not addressed by the director. First, the record does not contain sufficient evidence that establishes a qualifying relationship between the U.S. petitioner and the foreign entity. The record contains a copy of a single membership certificate, which shows that Kinsgley Imports holds a 51% interest in the U.S. entity. The petitioner failed, however, to submit the remaining stock certificates or any additional corroborating evidence to substantiate this claim. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements

relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. Additionally, the record contains no evidence that the alleged parent company is still doing business abroad and still maintains a qualifying relationship with the U.S. entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). For this additional reason, the petition will be denied.

Secondly, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted a number of invoices and shipping documents suggesting that it has been selling its goods on a regular basis. However, the earliest invoice documenting the sale of the petitioner's goods dates back to August 2001. However, the petition was approved in January of that year. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business from January through August of 2001. For this additional reason the petition may not be approved.

Beyond the decision of the director, the record reflects that the U.S. entity did not secure a commercial lease until August 2001, nearly seven months after the approval of the original new office petition. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. In the present matter, either the petitioner did not comply with this requirement , misrepresented that they had complied, or the director committed gross error in approving the petition without evidence of the petitioner's physical premises. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. See 8 C.F.R. § 214.2(l)(9)(iii).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.