



U.S. Citizenship
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Services

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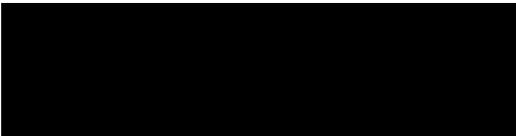


FILE: WAC 03 092 50461 Office: CALIFORNIA SERVICE CENTER Date: OCT 15 2006

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

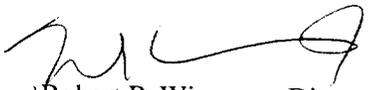
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, 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 filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Hawaii that is operating as a retailer of fashion jewelry. The petitioner claims that it is the affiliate of the beneficiary's foreign employer, located in Tokyo, Japan. The petitioner now seeks to employ the beneficiary as its sales and marketing manager for three years.

The director denied the petition concluding that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel claims that Citizenship and Immigration Services (CIS) misinterpreted the petitioner's quarterly wage reports and overemphasized the information in each report. In support of the appeal, counsel submits a brief and additional documentation relating to the petitioner's staffing.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of 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(I)(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 (I)(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 AAO will consider the issue of whether the beneficiary would 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), 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 a January 27, 2003 letter submitted with the nonimmigrant petition, the petitioner stated that as the petitioner's sales and marketing manager, the beneficiary would be responsible for two managerial functions: (1) successfully operating the petitioner's store in Waikiki; and (2) developing and marketing the petitioner's second store, which was recently opened. The petitioner explained that the beneficiary would perform the following job duties: (1) identify areas in which to promote the petitioning organization; (2) train the management and sales personnel to run the petitioning organization; (3) hire and fire personnel; (4) act as a liaison between the petitioning organization and its Japanese affiliate with regard to marketing and sales; and (5) prepare extensive marketing plans. The petitioner also explained the importance of having an experienced

manager in this position, stating that the beneficiary could establish recognition for the petitioner's product line in Hawaii.

In a request for evidence dated February 7, 2003, the director asked that the petitioner submit the following evidence establishing the beneficiary's proposed employment in a qualifying capacity: (1) the petitioner's organizational chart describing the managerial hierarchy and staffing levels and identifying all employees under the beneficiary's supervision by name and job title; (2) a brief description of the job duties performed by the beneficiary's subordinates, identifying their salary and wages; (3) a detailed description of the beneficiary's job duties including the percentage of time the beneficiary would spend on each; (4) the petitioner's state quarterly wage reports for the last four quarters; and (5) copies of the petitioner's weekly payroll records and Forms W-2 and W-3 evidencing wages paid to employees in 2002.

The petitioner responded on May 2, 2003. In a letter dated April 29, 2003, the petitioner's director stated that the beneficiary would be responsible for each store's management and retail activities, such as buying and ordering merchandise and controlling sales. The petitioner explained that "in his principal capacity for developing the function of sales strategy development and coordination at new retail stores," the beneficiary is also authorized to engage in business as a representative of the petitioner and the foreign entity. The petitioner submitted an organizational chart of the U.S. company's staffing levels, identifying the beneficiary as the sales and marketing manager of the petitioner's two stores. Each store was identified as employing a temporary full-time manager and at least three full-time sales clerks and one part-time sales clerk, all under the beneficiary's supervision. The beneficiary's position as sales and marketing manager was noted as being subordinate to the company's three directors, the president, vice-president, and secretary. The petitioner also provided on the organizational chart the following allocation of the time that the beneficiary would spend on each specific job duty:

1. Employee sales training (25%)
2. Inventory management including purchasing (20%)
3. Employee merchandise familiarization training (5%)
4. Merchandise sales – in-store floor sales (15%)
5. Local market penetration planning (25%)
 - a. Cross promotions
 - b. Printed, radio, TV advertising
 - c. Concentration on local awareness of [the petitioning organization]

The petitioner submitted Form 941, Employer's Federal Quarterly Tax Return, for each quarter in 2002. Form 941 for the quarter ending December 2002, which is the time period most relevant to the present issue, reflected that the petitioner employed twenty employees during this period. The petitioner also submitted copies of Form W-2, Wage and Tax Statement, for its twenty-four employees during the year 2002.

In a decision dated May 8, 2003, the director determined that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director noted an unexplained discrepancy in the number of individuals the petitioner claimed to employ,

stating that the nonimmigrant petition listed nine employees, while the petitioner's organizational chart reflected eleven employees. The director also noted that only four of the petitioner's employees reported on its Forms W-2 worked in a full-time position during 2002.

The director concluded that the beneficiary would be performing many of the day-to-day operations of the business including buying and ordering merchandise, training sales employees, promoting the company, and personally locating and starting new stores for the petitioner. The director stated that with approximately four full-time employees between two stores, it does not seem that the petitioner employs a sufficient professional, supervisory, or managerial staff to assist the beneficiary in performing these non-qualifying job duties. The director also stated that the petitioner did not demonstrate that the beneficiary would be managing the organization, or managing a department, subdivision, function, or component of the company. Accordingly, the director denied the petition.

On appeal, counsel claims that CIS misinterpreted the documentation submitted in reference to the petitioner's employees, specifically the petitioner's quarterly wage reports and W-2 Forms. Counsel states that the director "seemed to emphasize the discrepancy in the 'number of workers' claimed by petitioner," particularly those who were employed on a full-time basis, and incorrectly concluded that the staff was insufficient to assist the beneficiary with his non-qualifying job duties. Counsel states that the director's request for a state wage report identifying each employee's name, social security number, and the number of weeks worked is unclear, as counsel knew of no form that would include all of the requested information. Counsel explains that an attempt was therefore made to submit comprehensive employee records in response to the director's request for evidence. Counsel submits additional documentation on appeal, including the petitioner's 2002 earning report, 2002 Federal Yearly Report, and Hawaii State Unemployment Insurance Quarterly Wage Reports for the year 2002 and the quarter ending March 2003. Counsel explains that the discrepancy in the number of employees, as noted by the director in his decision, is a result of the petitioner's fluctuating staff, which is one of the problems the beneficiary would seek to resolve. Lastly, counsel claims that the part-time employment of some employees should not be viewed as prejudicial.

On review, the petitioner has failed to establish that the beneficiary would be employed by United States entity in a primarily managerial or executive capacity. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. 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). 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 the instant matter, the petitioner's job description indicates that the beneficiary would be performing job duties that are not primarily managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. As noted by the director, the beneficiary would be responsible for such non-qualifying job duties as managing and purchasing inventory, selling merchandise, and performing marketing analyses for potential store locations. While the beneficiary is not required to perform solely managerial or executive job duties in order to be considered a manager or an executive, the petitioner indicates that nearly 60% of the beneficiary's time would be spent performing these daily operations of the business. It is apparent, therefore, from the petitioner's representations that the beneficiary would not be employed in a primarily managerial or executive capacity. As the petitioner has failed to establish this critical element, the AAO cannot conclude that the beneficiary's employment would be in a qualifying capacity.

Additionally, the director correctly noted that the petitioner does not employ a staff sufficient to relieve the beneficiary from performing the above-named non-qualifying job duties. The AAO acknowledges counsel's claim on appeal that the petitioner's staff fluctuates according to tourism and the economy. Regardless of the number of full and part-time sales clerks, the petitioner has not demonstrated that the beneficiary's subordinate store managers would support the beneficiary in a primarily managerial or executive capacity. The petitioner neglected to provide the requested description of the tasks performed by the beneficiary's subordinates. It is therefore impossible to ascertain whether the two store managers would be responsible for performing any of the business' daily operations. Moreover, it is unclear from the managers' temporary employment status whether in their absence, the beneficiary would have to assume the responsibility of additional non-managerial and non-executive job duties. 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). 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).

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The AAO will dismiss the appeal.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed abroad in a primarily managerial or executive capacity. Although the petitioner states in its January 27, 2003 letter that the beneficiary has been employed by the foreign entity as the sales supervisor of two separate stores, the petitioner also describes the beneficiary as being responsible for each store's marketing strategy. Based on the petitioner's description, it is not clear whether the beneficiary is performing the marketing function of the foreign entity, or managing or directing subordinate employees who would relieve the beneficiary from performing this non-qualifying job duty. Moreover, the petitioner has not indicated the amount of time the beneficiary spends on the marketing of the foreign business. Therefore, it is unclear whether the majority of the beneficiary's time is spent performing in a non-managerial or non-executive capacity. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. 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. at 604. Absent additional documentation, the AAO cannot conclude that the petitioner demonstrated that the beneficiary was employed abroad in a qualifying capacity. For this additional reason, the appeal will be dismissed.

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.