



U.S. Citizenship
and Immigration
Services

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File: SRC 02 236 52739 Office: TEXAS SERVICE CENTER Date: **OCT 26 2004**

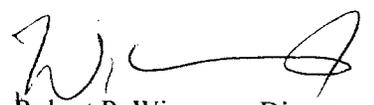
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

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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protect privacy

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 filed this nonimmigrant petition seeking to extend the employment of its 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 corporation organized in the State of Florida that is engaged in the import and sale of watches. The petitioner claims that it is the subsidiary of Quartz Watchmaker & Jeweler, located in Johannesburg, South Africa. 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 erred in interpreting the relevant statutory definitions and case law in determining that the beneficiary was not employed in a primarily managerial or executive capacity. In support of this assertion, counsel submits a detailed brief.

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 first 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, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] will continue to assume the position of President. This is a key managerial position in our organization. He will be 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 South Africa.
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 October 24, 2002, the director requested additional evidence establishing that the beneficiary was acting in a primarily managerial or executive capacity. Specifically, the director requested a statement describing the staffing of the U.S. operation, the number of employees, the position and job titles of each employee, their work schedules, and the specific date that each employee began working for the U.S. entity. The director requested documentary evidence in the form of quarterly tax returns to corroborate any statements provided. Additionally, the director requested information and documentation pertaining to any additional workers hired by the U.S. entity on a contractual basis. Finally, the director requested evidence that the U.S. entity had been doing business, and specifically requested invoices and receipts from June 2002 and July 2002.

On January 2, 2003, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. Counsel's response, which provided an overview of the staffing of the U.S. entity, did not provide the work schedules of the employees, nor did it provide any information regarding contract workers. In support of the claim that the beneficiary qualified as a manager or executive, counsel introduced an alternative assertion that the beneficiary could also be considered a function manager. Counsel additionally provided the U.S. entity's quarterly tax return for the period ending June 2002. Counsel also submitted invoices and receipts for the months of June and July of 2002.

On April 22, 2003, 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 record lacked sufficient evidence that the beneficiary had sufficient employees to perform the essential functions of the U.S. entity. In addition, the director concluded that the beneficiary was not operating as a function manager, since there was no documentation in the record establishing that the U.S. entity had contract workers to perform the day-to-day operations of the U.S. entity.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous, and alleges that the director misinterpreted and misapplied the applicable law and regulations. Counsel contends that the director's finding was erroneously based on the small size of the entity alone, and failed to consider the reasonable needs of the petitioner.

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 managerial or executive in nature. In support of these contentions, counsel submitted a detailed response to the director's request for evidence, which established the staffing of the U.S. entity. Specifically, counsel stated that the U.S. entity employed, in addition to the beneficiary, a manager and a clerk in June of 2002. Counsel's response indicated that the clerk was responsible for general clerical work, whereas the manager was responsible for directing the import and sales of the petitioner's products as well as supervising the clerk.

Counsel further alleged that in the alternative, the beneficiary was acting as a function manager. Specifically, counsel alleged that the beneficiary has been responsible for directing and managing the overall administrative and financial operations of the company, including the development of marketing, sales, and promotional policies.

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 definitions of managerial and 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); *Ayvr 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 this case, counsel for the petitioner states that the beneficiary is qualified as a manager or executive, since he oversees and supervises two subordinate employees, namely, a manager and a clerk. Although the beneficiary is not required to supervise personnel, if it is claimed that his 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.

While the petitioner claims that the beneficiary supervises a manager, the petitioner did not submit a detailed job description for this individual, despite the director's request for evidence. It is also noted that although the petitioner claims that the manager "directs the import and sales of the petitioner's product," the petitioner's organizational structure does not include anyone to conduct the actual sales of the business. Thus, either the manager himself is performing the sales function or he does not actually manage the sales function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Accordingly, the AAO cannot determine whether this individual is actually performing managerial duties or whether this person simply possesses a managerial title.

Although the director did not base her decision on the level of education possessed by the beneficiary's subordinates, the AAO must examine this factor in reviewing the record of proceeding. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is

defined above. In the instant case, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the clerical functions of the clerk or the day-to-day direction of the import and sale of the petitioner's goods as performed by the manager. Consequently, it cannot be determined that the beneficiary is supervising professional employees.

On appeal, counsel alleges that the director's findings were erroneous, and states that the director erred by not considering the reasonable needs of the petitioner. 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, 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.*

Although the director based her decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. 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.

At the time of filing, the petitioner was a three-year-old import company. Although the company was three years old, the petitioner declined to disclose its gross annual income, and merely stated that it was a "new company" in response to this question on its form I-129. The firm employed the beneficiary as president, plus a manager and a clerk as of June of 2002. The length of their employment, although requested by the director, was not provided. The AAO notes one of the two subordinate employees also has a managerial or executive title. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's

¹The 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. [Note: Except for minor points, these cases are still good law.] Accordingly, the AAO finds these citations unpersuasive.

representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president, a manager, and a clerk. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

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).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Finally, counsel for the petitioner indirectly acknowledges that the U.S. entity has not yet reached the point where it can employ the beneficiary in a primarily managerial or executive capacity. Although the beneficiary was granted an initial one-year stay in the U.S. to open a new office, and the petition in this matter was filed as a request for extension of the initial new office petition, counsel requests that CIS treat this extension request as a "newly established entity" since the U.S. entity has only recently commenced its business operations. This admission contradicts the claim that the U.S. entity has employed and will continue to employ the beneficiary in a primarily managerial or executive capacity.

The regulation at 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). 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.

It should also be noted that in response to the director's request for evidence, counsel alleged, for the first time, 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 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).

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).

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 this case, the AAO notes a deficiency in the record of proceeding that was 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 Sales and Use Tax Certificate of Registration from the State of Florida with an effective date of November 20, 2001, and one share certificate dated July 10, 2000, showing the owner to be the foreign entity. The petitioner failed, however, to submit additional corroborating evidence to substantiate the claim that a qualifying relationship exists between the two entities. 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.*, 19 I&N Dec. 362 (BIA 1986). 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.

Finally, 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 June 2002. However, the petition was approved in August of 2001. 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 August 2001 through May of 2002. For this additional reason the petition may not be approved.

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.