



U.S. Citizenship
and Immigration
Services

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File: WAC-03-079-53760 Office: CALIFORNIA SERVICE CENTER Date: **OCT 28 2004**

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

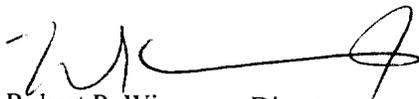
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



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

Identifying data deleted to
prevent disclosure of unarranted
invasion of personal privacy

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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 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 California that operates a retail clothing and jewelry store. The petitioner claims that it is the affiliate of Paritosh Prints, located in Delhi, 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: (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity, and (2) the petitioner has been doing business for the previous year.

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 beneficiary is working in a managerial and executive capacity, and that CIS failed to consider all of the provided evidence. Counsel further claims that evidence shows that the petitioner's sales have increased substantially, reflecting that the petitioner is engaged in regular, systematic, and continuous provision of goods. In support of these assertions, counsel submits a brief, additional evidence, and previously submitted documents.

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] continues to be employed as President of Marketing and managing a real gold jewelry and Indian clothing company, a position involving executive functions with [the petitioner]. In this position [the beneficiary] is responsible for developing strategies for purchasing and marketing jewelry and Indian clothing. . . . [The beneficiary] has intimate knowledge of both the technological and physical resources available to [the petitioner] and the Indian entity. As such, he is uniquely placed to formulate and implement policies. He will also provide the necessary direction to the service providers located in India. [The petitioner] has reached the stage of organizational development where it urgently need [sic] the services of [the beneficiary]. [The beneficiary] has extensive exposure and experience that is crucial to the multinational aspects of the company's business. Being a senior executive of the company, he will have great latitude in the execution of corporate strategy and establishing the goals and policies pertaining to business expansion and training as well as all responsibility for making all decisions in this area. [The beneficiary's] skills are still urgently needed by [the petitioner] in the United States to (a) direct the management and maintain and expand the company's relationships with existing and future clients, (b) realign the focus of [the petitioner] to stay in tune with the ever-changing marketplace, (c) to draw upon his intimate knowledge of the resources at the disposal of the Indian entity.

On March 3, 2003, the director requested additional evidence. In part, the director requested evidence to show that the beneficiary will be employed in a primarily managerial or executive capacity, including: (1) an organizational chart for the petitioner that describes its managerial hierarchy and staffing level, including the names, titles, job duties, educational backgrounds, and salaries for all employees under the beneficiary's

supervision; (2) California Forms DE-6, Quarterly Wage Report, for the previous three quarters, showing the names, social security numbers, and number of weeks worked for all employees; (3) Forms 941, Quarterly Wage Report, for the previous three quarters; (4) a payroll summary including Forms W-2 and W-3; and (5) a detailed description of the beneficiary's job duties on a daily basis.

In a response dated May 16, 2003, the petitioner submitted: (1) an organizational chart; (2) California Forms BOE-401-A, State, Local and District Sales and Use Tax Return, for the third and fourth quarters of 2002 and the first quarter of 2003; (3) Forms 941, Employer's Quarterly Federal Tax Return, for the third and fourth quarters of 2002 and the first quarter of 2003; (4) an internal wage summary for the third and fourth quarters of 2002 and the first quarter of 2003; (5) 2002 Forms W-2 for two employees; and (6) a paragraph further describing the beneficiary's job duties. In the description of the beneficiary's duties in the United States, the petitioner stated:

[The beneficiary] is responsible for managing the development and expansion of the business including overseeing marketing staff; liason [sic] with the business CPA; overseeing accounts payable and receivable; overseeing acquisition of goods, stocking and sales. Recently, [the beneficiary] has expanded the business to a larger location. His job duties also include managing the advertising campaign for the company. Under his management the company's profits are increasing.

On June 19, 2003, the director denied the petition. The director determined, in part, that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated that "[t]here is insufficient evidence to demonstrate that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees who will relieve him from performing non-qualifying duties. The evidence as submitted is not convincing in establishing that the beneficiary will not be primarily involved in performing day-to-day functions of the company. The petitioner has not shown that the beneficiary has been and will function at a senior level within an organizational hierarchy." The director further noted that the petitioner failed to submit requested evidence, and that such failure precluded a material line of inquiry.

On appeal, counsel for the petitioner asserts that "[the beneficiary] is working in a Managerial and Executive capacity", and that CIS failed to consider all of the provided evidence. In support of this assertion, counsel submits a brief, additional evidence, and previously submitted documents. In the brief, counsel cites seven AAO decisions. Counsel discusses the beneficiary's position as follows:

[The beneficiary] is responsible for the development and expansion of the business. He makes strategic and policy decisions of the business. He works with professionals i.e. CPAs and Attorneys. He oversees accounts receivables and accounts payables, takes inventories, fixes prices of products, reconciles cash and sales receipts, plans and prepares work schedules and assigns specific duties to employees. . . . As described above, the job description and duties of the Beneficiary are exactly the same as described in section (101)(a)44(A) of the Act and 8 US (1101)(a)(44)A.

Counsel further asserts that:

The 1990 Act liberalized the definition of the Executive and Manager. It allows the individual to direct and manage without supervisory responsibilities. Thus the Petitioner is a qualifying entity and the Beneficiary is performing all the managerial duties as day to day functions are performed by other employees.

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 petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant case, counsel asserts that the beneficiary is primarily engaged in both managerial duties and executive duties. Therefore, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act.

The job description for the beneficiary submitted by the petitioner is vague, providing little insight into the true nature of the tasks the beneficiary will perform. For example, the job description provides that the beneficiary "will have great latitude in the execution of corporate strategy and establishing the goals and policies pertaining to business expansion and training," he will "realign the focus of [the petitioner] to stay in tune with the ever-changing marketplace," he will "draw upon his intimate knowledge of the resources at the disposal of the Indian entity," and he "is uniquely placed to formulate and implement policies." These statements do not indicate what actual tasks the beneficiary will perform on a daily basis. 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). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job description does not allow the AAO to sufficiently determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). 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. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-

managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's tasks, such as "tak[ing] inventories . . . [and] reconcile[ing] cash and sales receipts," do not fall directly under traditional managerial duties as defined in the statute. Thus, the AAO cannot determine whether the beneficiary will primarily perform managerial or executive tasks as contemplated by sections 101(a)(44)(A) and (B) of the Act.

Counsel for the petitioner states that "[t]he 1990 Act liberalized the definition of the Executive and Manager." Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. Counsel submits no evidence in the form of congressional reports, case law, or other documentation to support his argument. Accordingly, counsel's unsupported assertions are not persuasive on this point.

The organizational chart for the petitioner indicates that the beneficiary manages two marketing and sales representatives. 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. 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).

Though requested by the director, the petitioner did not provide the level of education required to perform the duties of its marketing and sales representatives. Thus, the petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

Counsel alleges that the beneficiary "works with professionals i.e. CPAs and Attorneys." Yet the petitioner has submitted no evidence to show that it has hired the services of an accountant. The sole evidence that the petitioner has hired an attorney is the fact that the present petition has been filed by an attorney. Yet, the petitioner has not established that the beneficiary supervises its immigration counsel such that the beneficiary

supervises a professional. See § 101(a)(44)(A)(ii) of the Act. 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). Without documentary evidence to support the claim, the assertions of 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).

In a section of the brief discussing the beneficiary's employment capacity, counsel cites seven AAO decisions. Yet, counsel has not provided copies of these decisions or sufficient information such that the AAO can identify the referenced matters. Nor has counsel furnished evidence to establish that the facts of the instant petition are analogous to those in the cited decisions. 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. at 190. Furthermore, it appears that the AAO decisions cited are unpublished. 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.

Counsel claims that, as the beneficiary did not actually enter the United States under his previous L-1A approval until July 28, 2002, "2003 is actually the first year of operation." Counsel's assertion is ill-founded. On the Form I-129, the petitioner stated that it was established in 2001. The record contains a California Form BOE-401-A, State, Local and District Sales and Use Tax Return, for the first quarter of 2001, reflecting that the petitioner was operating during that period. Further, the beneficiary was approved for a one-year period of stay in L-1A classification to open a new office from January 13, 2002 to January 12, 2003. 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 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. As discussed above, the petitioner has not shown that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Based on the foregoing, 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). For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has been doing business for the previous year as required by the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B).

The regulation at 8 C.F.R. § 214.2 (l)(1)(ii)(H) defines "doing business" 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."

In the initial petition, the petitioner indicated that it was established in 2001 "to develop and expand the sale of 24K gold jewelry and Indian clothing." The petitioner provided documents, including: (1) a commercial

lease for the period from November 1, 2002 to October 31, 2003; and (2) copies of California Forms BOE-401-A for the first, second, and third quarters of 2001, and the first, second, and third quarters for 2002.

In the March 3, 2003 request for additional evidence, the director requested documentation to show that the petitioner is doing business in the United States. The director referenced "receipts of transactions" and "signed contracts" as examples of the evidence sought. The director further requested copies of the petitioner's state and federal tax returns for the last two tax years. Regarding federal tax returns, the director specifically requested signed and certified copies of Forms 1120, 2220, 4562, 5472, and 1065 with all schedules.

In response, the petitioner submitted: (1) copies of California Forms BOE-401-A for the fourth quarter for 2002 and the first quarter of 2003; (2) copies of Forms 941, Employer's Quarterly Federal Tax Return, for the third and fourth quarters of 2002 and the first quarter of 2003; and (3) previously submitted evidence. The petitioner provided no additional information to describe its business activities over the one-year period prior to filing the petition.

In the director's denial dated June 19, 2003, he determined, in part, that the petitioner did not establish that it has been doing business in the United States. Specifically, the director stated that the petitioner failed to provide requested evidence, and thus "[t]here is no way to determine the petitioner's volume of business." The director further stated that "[t]he petitioner's failure to submit all requested additional evidence precludes a material line of inquiry, which shall be the grounds for denying the petition."

On appeal, counsel claims that the record supports that the petitioner has been doing business. Counsel summarizes the petitioner's quarterly profits from July 2002 to June 2003 as evidence of the petitioner's sales activity. Counsel submits a copy of the petitioner's California Forms BOE-401-A for the second quarter of 2003, as well as previously submitted evidence. Counsel finally asserts that all requested evidence was submitted, and CIS failed to consider all of the evidence.

Counsel's assertions are not persuasive. As correctly noted by the director, the petitioner failed to provide all of the documentation requested in the request for evidence. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

As discussed above, the director requested that the petitioner submit documentation to show that it is doing business in the United States such as receipts of transactions and signed contracts. The director further requested copies of the petitioner's state and federal tax returns for the last two tax years, noting that federal tax returns should include signed and certified copies of Forms 1120, 2220, 4562, 5472, and 1065 with all schedules. The petitioner failed to provide any of its federal or state tax returns. While the petitioner submitted copies of federal and state filings that reflect its quarterly profits, the petitioner failed to provide evidence of any transactions that generated these profits, such to show that the petitioner is engaged in the

regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2 (l)(1)(ii)(H). Again, 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). The petitioner's failure to submit sufficient documentation of its business activity has precluded the material line of inquiry of whether it is doing business as defined in 8 C.F.R. § 214.2 (l)(1)(ii)(H). For this additional reason, the appeal will be dismissed. *See* 8 C.F.R. § 103.2(b)(14).

Beyond the decision of the director, the record reflects that the U.S. entity did not secure a commercial lease until November 1, 2002, more than ten 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). This evidence also undermines the petitioner's claim that it has been doing business for the previous year, from January 2002 to the date of filing, as required by the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B). The appeal must be dismissed for this additional reason.

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.