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Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE: SRC 02 275 50825 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:



Beneficiary:

SEP 17 2008

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:

PUBLIC COPY



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 clearly unwarranted
disclosure of personal privacy

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as a business engaged in pet care, pet grooming, and sales of pet supplies and related goods. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and CEO. The director determined that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and submits a brief and evidence in opposition thereto.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

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 (1)(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 with 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 serves 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) states that a visa petition under section 101(a)(15)(L) of the Act 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 (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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 managerial or executive capacity; and
- E) Evidence of the financial status of the United States operation.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2000 and claims to be a business engaged in pet care, pet grooming, and sales of pet supplies and related goods. The petitioner claims that the U.S. entity is a subsidiary of [REDACTED] located in Hong Kong. The petitioner declares two employees and \$23,050.00 in gross annual sales. The petitioner seeks to extend the beneficiary's stay in the United States for two years at an annual salary of \$25,000.

The issue presented in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily—

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as

other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily—

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the petition, the petitioner stated that the beneficiary has been and will continue to be responsible for the following:

1. Seeking out products in Hong Kong and abroad to increase the product line for businesses;
2. Increase sales and profit;
3. Look for and advise of new ways and ideas to increase profitability;
4. Expand with capital investment into multiple retail market areas; and
5. Manage pet grooming salon, including overseeing of employees and other managerial duties.

In a letter of support, dated September 5, 2002, the petitioner described the beneficiary's duties as follows:

[The beneficiary] will have a key role in the expansion plans. As President and Chief Executive Officer/Manager of Operations she will plan, manage, and operate all future expansion operations as well as continue with her current management of A Happy Pet Grooming Salon.

In support of a support memorandum submitted by the petitioner and dated March 23, 2001, the petitioner submitted as evidence a proposed organizational chart depicting the U.S. entity's hierarchy and photographs of the organization's interior and exterior structures. The proposed chart illustrated the beneficiary as Chief Executive Officer, with an operations and training manager, office manager, customer service manager, sales manager, marketing manager, office staff, service staff, sales staff, and marketing staff under his direction.

The director determined that the petitioner had failed to establish that the beneficiary would be primarily performing executive duties for the U.S. entity. The director also stated that the petitioner had not demonstrated that the beneficiary would be managing or directing the management of a department, subdivision, function, or component of the U.S. entity. The director further stated that there was no evidence submitted to establish that the beneficiary would be involved in the supervision of the work of other supervisory, managerial, or professional employees. The director noted that the U.S. entity had not expanded to a point where the services of a full-time executive would be required.

On appeal, counsel disagrees with the director's decision and asserts that the petitioner has provided sufficient evidence to establish that the beneficiary will be employed in the United States in an executive capacity. Counsel continues by stating that the U.S. entity has grown over the past year and that the beneficiary's services are still needed in order to carry out the company's expansion plans. Counsel asserts that it is anticipated that the expansion plans will be completed in December of 2005. Counsel contends that the beneficiary will continue to play a key role in the expansion plans, as she will "plan, manage, and operate all future expansion operations as well as continue with her current management of [the U.S. entity]." Counsel further contends that the beneficiary's current responsibilities are identified in the company's Articles of Incorporation. Article II, section two of the U.S. entity's Articles of Incorporation reads as follows:

The President shall be the chief executive officer of the Corporation and shall be the Chairman of the Board of Directors The President shall have general and active management of the business and affairs of the Corporation, subject to the direction of the Board of Directors, and shall preside at all meetings of the shareholder[s] unless the Board of Directors shall determine otherwise.

Counsel asserts that the beneficiary, as president and CEO of the U.S. entity, will be responsible for making all executive and operational decisions, hiring and firing all levels of employees, making key financial and investment decisions, and making all internal decisions regarding advertising and marketing. Counsel further asserts that the company size and profit should not dictate whether or not an organization requires a chief executive officer. Counsel further states "any company, no matter its size or revenue stream needs an [sic] chief officer to decide such things as future expansion, revenue allocation, marketing and advertisement expenditures, and a multitude of other decisions that fall well within the definition of an employee with *executive capacity* (emphasis in original)." On appeal, the petitioner submits a revised copy of the U.S. entity's organizational chart and resubmits a copy of the beneficiary's resume

Upon review, counsel's assertions are not persuasive. There is insufficient evidence contained in the record to establish that the beneficiary will be employed in a primarily managerial or executive capacity. In evaluating the claimed managerial or executive duties of a beneficiary, the AAO will look first to the petitioner's description of the beneficiary's job duties. 8 C.F.R. § 214.2(I)(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 in nature. 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, the petitioner describes the beneficiary as a “manager of operations.” On the other hand, counsel describes the beneficiary’s position as “executive.” It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The information provided by the petitioner describes the beneficiary’s duties only in broad and general terms. The following duties are without any context in which to reach a determination as to whether they are qualifying: responsible for planning, managing, and operating all future expansion operations; seeking out products in Hong Kong and abroad; increasing sales and profit; seeking and advising on new ways to increase profitability; and managing the pet grooming salon. Thus, there is insufficient detail regarding the actual duties of the assignment to overcome the issues raised by the director. On appeal, counsel asserts that the beneficiary will be responsible for making all executive and operational decisions, hiring and firing all levels of employees, making key financial and investment decisions, and making all internal decisions regarding advertising and marketing. Without clarification or documentation to substantiate the petitioners or counsel’s claims, the beneficiary’s job duties listed cannot be construed as being managerial or executive in nature. 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).

Furthermore, the evidence submitted is insufficient to show that the majority of the beneficiary’s duties will be executive in nature. Although the beneficiary’s title is that of president and chief executive officer, the petitioner has provided no comprehensive description of the beneficiary’s duties that would demonstrate that she is primarily directing the management of the organization or a major component or function of the organization, that she is establishing goals and policies, that she is exercising a wide latitude in discretionary decision-making, or that she receives only general supervision or direction from higher level individuals. While counsel asserts on appeal that the beneficiary’s job duties are identified in the U.S. entity’s Articles of Incorporation, the definition given in the Articles of Incorporation is broad and general and fails to detail the day-to-day activities of the beneficiary. Rather than primarily performing executive duties, photographs submitted by the petitioner appear to depict the beneficiary grooming a dog. There has been no evidence submitted to demonstrate how much of the beneficiary’s time is spent providing executive versus non-qualifying services to the U.S. entity such that the AAO can assess whether the beneficiary is primarily engaged in managerial or executive 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).

The record does not demonstrate that the U.S. entity contains the organizational complexity to support the proposed managerial or executive staff position. 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.* The petitioner states on appeal that the U.S. entity employs two employees. The company organization chart shows that a Chuk Ching is an operations and training manager. However, there has been no evidence submitted to establish whether this second employee works on a full-time or part-time basis. There is no evidence to establish what duties the second employee performs and how they relate to the duties to be performed by beneficiary. Specifically, there is no evidence to show that the second employee relieves the beneficiary from performing day-to-day tasks of the petitioner.

Counsel references the petitioner's future plans for expansion, including multiple retail stores, an ice cream salon, and a clothing design start-up. However, a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in an executive or managerial capacity.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.