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APR 01 2005



File: WAC-03-186-53238 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



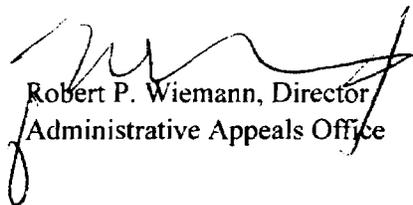
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration  
and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



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

**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 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 as an importer and wholesaler of diamonds and jewelry. The petitioner claims that it is the branch of [REDACTED], located in Mumbai, India. The beneficiary is in B-1 status as a visitor for business, and the petitioner seeks to change his status to L-1A and extend his period of 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 director further noted that a search of public records failed to confirm that the petitioner's Employer's Identification Number or name have been registered, calling into question the petitioner's existence or viability as a company.

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 petitioner has submitted sufficient evidence to show that the beneficiary will be employed in a primarily executive capacity. Counsel further confirms that the petitioner's Employer's Identification Number has been registered and the company exists. 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(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 primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

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

In a May 23, 2003 letter appended to the initial petition, the petitioner described the beneficiary's qualifications and role as follows:

[The beneficiary] is a partner in the [foreign entity] and will be President of the [petitioner]. He owns 50% of the shares of both companies. [The beneficiary] has proven to be a successful businessperson as demonstrated by the continuing growth and vitality of [the foreign entity's] operations in the past years . . . . [I]t was easily determined by everyone associated with [the foreign entity] to transfer [the beneficiary] to the [petitioner] in the capacity as President in order to assure that the [petitioner] enjoys its continued successful growth of its operations as well as in its client base.

On June 20, 2003, the director requested additional evidence. In part, the director stated that "the evidence of record fails to fully describe the beneficiary's duties . . . in detail . . . in the United States."

In a response dated September 4, 2003, in part the petitioner submitted a document further describing its operations, including a description of the beneficiary's duties as follows:

[The beneficiary] is the president and CEO of [the petitioner]. He has been partner of the [foreign entity] since it came into existence. He is in complete charge of all the wing, purchasing, sales, credit analyzing, payment, and collection. He manages the business on a day to day basis and shall supervise [sic] the chain of employees who may be hired to perform varied tasks[.]

[The beneficiary] has the power to place the order for goods assess customer credit standing and decide the extend [sic] of credit to lend. He is also empowered to enter in to all contracts on behalf of the company vis-à-vis lease agreement hiring employees lodging collection proceeding [sic] for delinquent accounts and any other matters that are in the interest of the company.

On September 17, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director noted that the petitioner's California Form DE-6 Quarterly Wage and Withholding Report for the second quarter of 2003 shows that the petitioner employed two employees during that period, but the petitioner failed to describe the duties of those employees or provide an organizational chart to show its management structure.

On appeal, counsel for the petitioner asserts that the petitioner has submitted sufficient evidence to show that the beneficiary will be employed in a primarily executive capacity as per *Matter of Caron International, Inc.*, 18 I&N 791 (Comm. 1988). The petitioner submits a more detailed description of the beneficiary's duties. Counsel asserts that "[c]learly the duties as described are duties that only a person in an executive capacity with the Petitioner can perform . . . ." The petitioner further submits its California Form DE-6 for the third quarter of 2003. Counsel contends that, as this document reflects that the petitioner has expanded from two to five employees, "the latest Form DE-6 demonstrates the great need for the Beneficiary's executive services . .

..” The petitioner submitted an organizational chart describing its current staffing. Counsel states that “it would be almost impossible to oversee the Petitioner’s five current employees as well as their future employee growth without the crucial executive services of the L-1 beneficiary.” The petitioner’s statement describing the beneficiary’s duties provides the following:

[The beneficiary] is Chief Executive of the corporation, conducting managerial and executive functions at our Los Angeles office. The duties of [the beneficiary] are as follows:

- Directing the functions of the Company and delegating responsibilities to various officials of the company as well as laying down broad policies and targets to be achieved by the business during the year. [The beneficiary] has a wide range of power in exercising control and command over the various departments of the business. He is answerable only to [the foreign entity] located in Opera House, Mumbai, India.
- Conducting monthly staff meetings of all Officers in the Los Angeles office to obtain status from his subordinates. During these meetings, he formulates and changes policies and lays down goals for his Staff Officers to follow. In addition, at these meetings, any extraordinary matters that require immediate attention and decision is [sic] brought to his notice and it is he who makes the final decisions.
- Hiring employees: [The beneficiary] has the discretion to hire additional employees that he deems necessary and is also able [to] open up a new department or wing within the organization if he chooses to expand. He is also the ultimate authority to decide upon credit limits for most customers.
- Planning future growth: . . . [The beneficiary] is planning an expansion of the company’s services in [the] United States in the field of jewelry manufacturing. In order to expand the [petitioner] into this field, [the beneficiary] will be interviewing numerous jewelry designers, setters and polishers in the United States, who have experience in their own respective fields.
- [The beneficiary] is meeting regularly with the Marketing Manager . . . to develop marketing strategies of the company for loose diamonds in the United States.

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(1)(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.

In the instant case, the petitioner 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 initial job description submitted by the petitioner was brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the statement that the beneficiary is "in complete charge of all the wing, purchasing, sales, credit analyzing, payment, and collection" does not indicate what tasks the beneficiary will perform on a daily basis. The petitioner has not specified whether the beneficiary will perform the non-qualifying tasks of purchasing goods, conducting sales, analyzing credit, and performing collections himself, or whether he will direct others to do so. 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.*

On appeal, the petitioner provided a new job description for the beneficiary. However, this job description appears to be based on the petitioner's alleged staffing level as of the date of the appeal, including five employees. On the date of filing the initial petition, the petitioner employed two salesmen. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Thus, the fact that the petitioner hired new employees after the date of filing is not probative of the petitioner's eligibility as of the filing date. The beneficiary's duties relating to newly hired employees are not given any weight in this proceeding. The majority of duties in the new job description that do not directly relate to managing the new staff members are not described with sufficient detail to show the actual tasks the beneficiary will perform. For example, the statements that the beneficiary will "[lay] down broad policies and targets to be achieved by the business during the year," and that "[the beneficiary] has a wide range of power in exercising control and command over the various departments of the business" do not indicate what the beneficiary will do on a daily basis. Again, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1103.

The provided job descriptions do not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

The petitioner indicated that the beneficiary will supervise subordinate employees and the petitioner's Form DE-6 indicated that the petitioner had two employees at the time of filing. 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. As noted by the director, the petitioner did not provide an organizational chart, the employees' job titles or a description of their job duties with the initial petition or in response to the request for evidence. 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).

On appeal the petitioner submits an organizational chart identifying the subordinate employees as "salesmen." has the title of salesman. The petitioner indicates that their duties include "[s]elling [the] company's product in [C]alifornia." As these employees do not have subordinates of their own, it is clear that they are not supervisory employees. See § 101(a)(44)(A)(ii) of the Act. Further, the petitioner has not described a department or function over which these employees exercise managerial authority, thus it has not been established that they are managers. *Id.*

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 a subordinate employee. The petitioner has not provided the academic credentials of its salesmen, and it has not established that a baccalaureate degree is required in order to successfully perform their duties. Thus, the petitioner has not established that the salesman is a professional.

Accordingly, the record does not support that the beneficiary manages subordinates that are supervisory, professional, or managerial as contemplated by section 101(a)(44)(A)(ii) of the Act.

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). 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.

The petitioner operates as an importer and wholesaler of diamonds and jewelry. Thus, it is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive tasks such as purchasing diamonds and jewelry, marketing products, conducting sales transactions, analyzing credit, performing collections, answering questions about merchandise from customers, tracking the

petitioner's inventory, managing a checking account and paying bills, answering telephones, and receiving deliveries. As noted above, the petitioner employs two salesmen, charged with the responsibility of "[s]elling [the] company's product." As many of the above-named non-qualifying tasks do not fall under the duties of the salesmen, the record suggests that the beneficiary will perform these duties. Thus, the reasonable needs of the petitioner reflect that the beneficiary must spend a significant amount of time performing the tasks necessary to provide the petitioner's services. 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). The petitioner has failed to establish that these non-managerial and non-executive tasks do not constitute the majority of the beneficiary's time. See 8 C.F.R. § 214.2(1)(3)(ii).

Counsel refers to *Matter of Caron International, Inc.*, 18 I&N 791 (Comm. 1988) to support the assertion that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the referenced matter. 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. 190 (Reg. Comm. 1972).

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(1)(3). For this reason, the appeal will be dismissed.

In his denial, the director questioned whether the petitioner is "viable," and stated that "a search of public records fails to reveal that their [sic] exist [sic] an Internal Revenue Service identification number [matching the petitioner's] or [a business entity under the petitioner's name]." On appeal, the petitioner submitted documents to rebut this finding, including: (1) a copy of a letter from the Internal Revenue Service, dated February 5, 2001, notifying the petitioner that an Employer Identification Number had been created for it; and (2) a copy of a letter from the Internal Revenue Service, dated October 6, 2003, verifying the petitioner's Employer Identification Number. Counsel states that "[the] Petitioner has clearly rebutted your respective Service Center's erroneous finding that [the] Petitioner could not be found through a search of public records - clearly the Internal Revenue Service recognizes the Employer Identification Number (EIN) of [REDACTED] as belonging to the Petitioner." The AAO agrees that the petitioner has established that it has registered with the Internal Revenue Service and it exists as a bona fide entity. The director's finding on this issue will be withdrawn.

In the denial, the director further noted that "[n]o evidence was submitted to show that the petitioner would hire additional staff (such as advertisement, job announcement, etc.)" As stated above, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Whether the petitioner intends to hire additional employees in the future is not probative of its eligibility as of the date of filing the petition. Thus, the fact that the petitioner did not include evidence of efforts to hire additional staff has no material bearing on this visa petition. The director's comment on this issue will be withdrawn.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed abroad in a primarily managerial or executive capacity as required by the regulation at 8 C.F.R. § 214.2(I)(3)(iv). The description of the beneficiary's duties abroad contains significant non-managerial and non-executive tasks, such as purchasing diamonds, selling diamonds, and analyzing the credit worthiness of customers. The petitioner has not indicated the percentage of time that the beneficiary invested in these tasks, such that the AAO can determine whether he was primarily engaged with managerial or executive duties. Further, the petitioner did not establish that the beneficiary's two subordinates abroad were supervisory, professional, or managerial as contemplated by section 101(a)(44)(A)(ii) of the Act. Though one of these subordinates had the title "Manager," his duties suggest that he performed primarily clerical tasks such as "maintaining stock, . . . taking care of day-to-day appointments, [and] preparing invoices, drafts and export documents of the export sales." Thus, the petitioner has not established that the beneficiary's duties abroad were primarily managerial or executive in nature. *See* 8 C.F.R. § 214.2(I)(3)(iv). For this additional reason, the appeal will be dismissed.

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. The petitioner has not met this burden.

**ORDER:** The appeal is dismissed.