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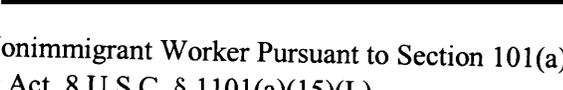
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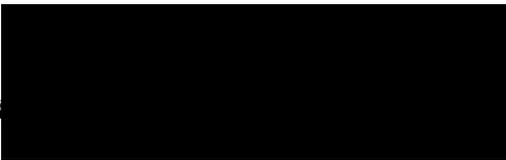
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FILE: WAC 03 122 51673 Office: CALIFORNIA SERVICE CENTER Date: **APR 01 2005**

IN RE: Petitioner: 
Beneficiary: 

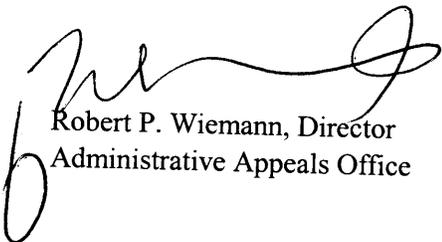
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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 chief executive officer-president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that is operating as a sewing contractor. It claims that it is a branch of the beneficiary's foreign employer, located in Calcutta, India. The petitioner seeks to employ the beneficiary for an additional three years.

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

On appeal, counsel contends that although the beneficiary need only qualify as both a manager and an executive, "the petition should be granted under both the managerial and executive capacity categories." Counsel submits a brief in support of the claim that the beneficiary would be employed in both qualifying capacities.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(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 (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(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 issue in the instant matter is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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

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

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

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

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

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

The petitioner filed the nonimmigrant petition on March 7, 2003, noting that as chief executive officer-president, the beneficiary would be responsible for the day-to-day operations of the company, including hiring personnel for production and sales, introducing the petitioning organization to manufacturers in order to create a corporate presence in the United States, and overseeing the company's floor manager, who is responsible for supervising the labor force. In an attached letter from the foreign entity, dated March 5, 2003, the director of the organization stated that the beneficiary is the ideal candidate for the proposed position because of his long association and experience with the foreign organization. The director explained that the beneficiary would be responsible for expanding the petitioner's customer base, increasing sales volume, hiring employees, and overseeing the import-export operations. While the petitioner submitted employee payroll records with the petition, the records are dated March 2002, one year prior to the filing of the instant petition, when the company employed fifteen workers. It is unclear whether any of the employee records pertain to the seven workers presently employed by the petitioner.

The director issued a request for evidence on April 14, 2003 requesting that the petitioner submit the following: (1) an organizational chart describing the managerial and personnel levels of the U.S. company, and clearly identifying the beneficiary's position in relation to all other employees of the company; (2) a brief description of the job duties performed by the beneficiary's subordinate employees, and each worker's name, job title, educational level and wages; (3) a list of the petitioner's employees from the date of establishment until the present, including names, job titles, social security numbers, and dated of employment; and, (4) a detailed description of the job duties to be performed by the beneficiary including evidence that the beneficiary satisfies the qualifications for the position.

Counsel responded in a letter dated July 15, 2003, and submitted an organizational chart identifying the beneficiary as the president. The beneficiary's subordinate employees were identified as the floor manager/sewer and four lower-level sewers. The petitioner stated on the chart that as the president, the beneficiary is responsible for the "day-to-day operation" of the company, "expand[ing] the company's market," "supervise[ing] employees," and "mak[ing] inroads with American manufacturers." The petitioner noted that the floor manager reports directly to the beneficiary and is responsible for the production of garments and for supervising the sewers. The petitioner further noted that the beneficiary reports only to the board of directors in India.

In an attached statement, the petitioner explained that the beneficiary spends 50 percent of his time performing sales activities, such as maintaining current customers and obtaining new accounts, 25 percent of his time performing the administration and financial aspects of the business, and the remaining 25 percent of time on daily activities and supervising the company's production. The petitioner stated that the beneficiary is

an ideal candidate for the position of chief executive officer-president because of his business background and advanced knowledge of the English language.

In a decision dated August 21, 2003, the director determined that the petitioner did not demonstrate that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director outlined the proposed job duties for the beneficiary, and stated that "[t]here is no indication that the beneficiary will exercise significant authority over generalized policy or that the beneficiary's duties will be primarily managerial or executive in nature." Consequently, the director denied the petition.

In an appeal filed on September 19, 2003, counsel claims that the petition should be approved as the beneficiary qualifies as both as manager and an executive. Counsel outlines the four regulatory requirements for both managerial capacity and executive capacity and states:

The record demonstrates the beneficiary's job duties involve the exclusive management of sales, an essential function of the foreign organization among other duties associated with the position of the President and CEO. He makes decisions about the extent of sales expansion in the U.S. and production commitments. He serves as a liaison with customers. He reports directly to the Board of Directors of the Parent Company in India. He enjoys unfettered [sic] discretionary authority for the U.S. operations. The company has a floor manager who reports directly to the Beneficiary. The position of the Floor Manager involves production in its entirety, including hiring and firing of sewers and other production staff and supervising them. The position of a Floor Manager is a professional position requiring a bachelors degree or number of years of professional experience. [The beneficiary] has the authority to hire and fire the Floor Manager. The Beneficiary exercises exclusive authority over generalized policy of U.S. operations and the Beneficiary's duties are primarily managerial and executive in nature. The financial investment in the U.S. subsidiary will suffer irreparably unless the L-1 is extended.

* * *

The first element [of executive capacity] is satisfied based on Petitioner's statement regarding the beneficiary's proposed job duties, namely that the Beneficiary will serve as the President and CEO of the U.S. Subsidiary with duties commensurate with the title. Beneficiary will supervise Petitioner's day to day [sic] business affairs, and Beneficiary has the authority to hire, fire and promote the staff. The U.S. entity is a major component of the organization and the Beneficiary directs the management of this major component.

The second element to demonstrate "executive capacity" is that the Beneficiary establishes the goals and policies of the organization. The record verifies that the Beneficiary establishes the goals and policies of [the petitioning organization], which is the U.S. entity in terms of sales and matching production. Thus, it is apparent that the Beneficiary does in fact establish the goals and policies of the organization.

Third, the record demonstrates that the Beneficiary has wide latitude in discretionary decision making. In fact his word is the last word for the U.S. operations. The Beneficiary has authority to be involved in all personnel matters, and his job duties involve the supervision of

the Floor Manager of the U.S. entity. The position of the Floor Manager is itself a professional position. As evidenced by the record, it is clear that the Beneficiary meets the third requirement to demonstrate executive capacity.

Fourth, the Beneficiary reports directly to the Board of Directors of the Parent Company in India. He is the Head of the organization in the U.S. He receives virtually no supervision in the U.S. He, therefore satisfies this criteria. . . .

Counsel requests that the instant petition be "adjudicate[d] . . . based on the totality of the business operations and the gross revenues of the company achieved in the short span of time while [the] Beneficiary has acted in an executive capacity." Counsel states that the petitioner has demonstrated a "track record of sales" totaling approximately \$190,000.

On review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. 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. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. There is no provision in Citizenship and Immigration Services (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.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

The petitioner has provided a vague and nonspecific description of the beneficiary's job duties that fails to demonstrate what the beneficiary would do on a daily basis under the extended petition. For example, the petitioner states that the beneficiary would be responsible for increasing sales volume, overseeing the company's import and export operations, and making "inroads" with manufacturers. The petitioner does not, however, define the specific tasks associated with each responsibility. 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). Moreover, counsel's descriptions on appeal of the beneficiary's managerial and executive job duties are merely a recitation of the definitions of managerial and executive capacity. 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. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The record also fails to demonstrate that the beneficiary would spend the majority of his time performing in a qualifying capacity. Counsel noted in his response to the director's request for evidence that the beneficiary would spend 50 percent of his time performing sales activities for the company, including contacting and obtaining customers, and 25 percent of his time performing the administrative and financial operations of the business. Clearly, the majority, or 75 percent, of the beneficiary's time would therefore be devoted to performing non-qualifying functions of the petitioner's business. The AAO notes that 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 record does not support the petitioner's claim that the beneficiary would be primarily managing the business and supervising the activities of the floor manager. The petitioner has failed to prove that the beneficiary *primarily* performs high-level managerial and executive responsibilities and does not spend a majority of his or her time on day-to-day functions. See *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL [REDACTED] (9th Cir. July 30, 1991).

Counsel recognizes on appeal that the beneficiary need only qualify as either a manager or an executive, but claims that the beneficiary would be employed in both a managerial and executive capacity. If a petitioner is claiming to employ the beneficiary as both a manager and an executive, the petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Based on the foregoing discussion, the petitioner has failed to satisfy this requirement. The petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the record does not support the petitioner's claim that it is a branch of the beneficiary's foreign employer. The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. See *Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); see also *Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982) (stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick*, 13 I&N Dec. at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Here, the petitioner provided a copy of its articles of

incorporation reflecting its establishment as a separate company in the United States. Therefore, the petitioning organization cannot be deemed a branch of the beneficiary's foreign employer.

If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer. The petitioner submits three stock certificates reflecting the distribution of stock ownership in the petitioning organization, and specifically the foreign entity's ownership of 90 percent of the stock issued by the United States company. However, the petitioner's 2002 corporate income tax return is inconsistent with the suggested ownership. The petitioner failed to indicate on Schedule K of the tax return that an individual or foreign corporation owns the petitioner's stock. Moreover, Schedule L also fails to identify any value of common stock issued by the organization. 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). As a result of these discrepancies, the AAO cannot conclude that the petitioner has demonstrated the existence of a qualifying relationship between the two organizations. For this additional reason, the appeal will be dismissed.

An additional issue not addressed by the director is the fact that the record reflects that the U.S. entity did not secure a commercial lease until December 13, 2002, nearly nine 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). For this additional reason, the petition may not be approved.

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.