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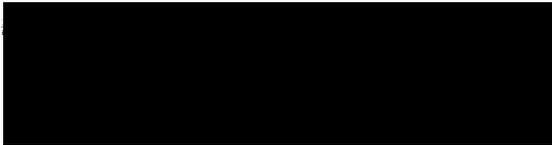


U.S. Citizenship
and Immigration
Services

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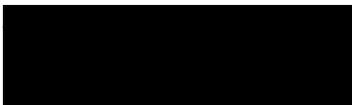
APR 07 2005



File: SRC 04 059 51281 Office: TEXAS 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, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida that claims to be engaged in the retail and wholesale distribution of infant and toddler products. The petitioner claims that it is the subsidiary of [REDACTED] located in Houghton Estate, South Africa. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner disputes the director's decision and asserts that the petitioner presented evidence to establish that the beneficiary is not involved in the day-to-day operations of the petitioner's business, but rather performs only managerial and executive functions. Counsel submits a brief and additional evidence in support of the appeal.

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 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 the initial petition submitted on December 22, 2003, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] has been General Manager of [the petitioner] where he directs and manages all aspects of the company's business in the US, including seeking out and hiring professionals to assist in the establishment of the company's business. He directs all aspects of the finance, sales/marketing, human resources, operations and administrative functions, as well as recruiting, hiring and training qualified staff.

In a letter dated December 17, 2003, the petitioner provided the following additional information regarding the beneficiary's role during the petitioner's first year of operations:

[The beneficiary] has been actively establishing the new U.S. company. He has secured a business location and opened a company bank account with Bank of America, and has hired a CPA to oversee all of the company's financial matters. In addition, he has hired an employee for the company.

[The beneficiary] continues to actively market and secure new business. At present, [the petitioner] is the distributor for [REDACTED] Italian company which sells infant-related items, such as strollers, cribs, car seats, etc, and sells to wholesalers in South Africa. [The petitioner's] other products include but are not limited to, the Artist Box, Gift Boxes, the Blackboard, and Ostrich eggs, which are distributed in the U.S. and South Africa.

The petitioner indicated on Form I-129 that it had two employees at the time of filing. The petitioner's Form 941, Employer's Quarterly Tax Return for the third quarter of 2003 indicated the beneficiary as the only

employee. The petitioner also submitted copies of two check receipts, both for \$500, purportedly paid to its "employee" on November 4 and December 7, 2003. The name of the check issuer is obscured, but the one of the checks clearly shows the beneficiary's residential address.

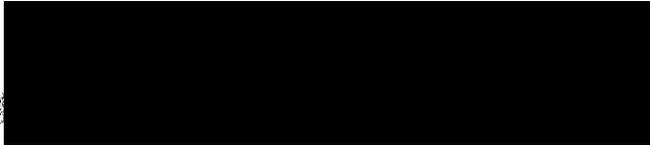
On January 2, 2004, the director requested additional evidence. Specifically, the director requested: (1) an explanation regarding the duties and educational backgrounds of the petitioner's other employees, if any; and (2) an explanation as to how the beneficiary will not engage in the day to day operations of the business, and whether he will be engaged in primarily managerial or executive duties.

In a response dated January 21, 2004, former counsel for the petitioner provided the following "definitive statement describing the US employment of the beneficiary":

The beneficiary's duties include, the overall management of the company, including overall cost control of the company's budget, supervision of staff, and management, client liason [sic] and overseeing the marketing effort with management, supervision of product importation and related matters. An equal amount of time is spent on all matters relating to the ongoing successful functioning of the company.

Counsel for the petitioner also provided the following description of the petitioner's staffing:

 Contacts regular and prospective customers to solicit orders. Recommends products to customers, based on customer's specific needs and interests. Answers questions about products, prices, durability and credit terms. Meets with customers to demonstrate and explain features of products, Prepares Lists of Prospective customers. Reviews sales records and current market information to determine value or sales potential of product. Estimates delivery Dates and arranges delivery schedules. Completes sales contracts or forms to record sales information. Instructs customers in use of products. Assists and advises retail dealers in use of sales promotion techniques. Investigates and resolves customer complaints.



On February 5, 2004, the director denied the petition, concluding that the petitioner had failed to establish that the beneficiary will be primarily performing in a managerial or executive capacity. The director noted that the petitioner did not establish that the beneficiary was managing other professionals or managers, and further noted that the record indicated that the beneficiary would have to engage in the day to day business activities of the company, based on the current structure.

On appeal, counsel for the petitioner asserts that sufficient evidence was submitted to establish that the beneficiary was "not dealing with sales, marketing, customer service, accounting, legal or computer functions" but rather held supervisory authority over employees who performed these functions while

performing other duties which are managerial or executive. Counsel submits copies of previously submitted documentation, along with new job descriptions for the beneficiary and the petitioner's "sales and marketing representative." Counsel claims that these job descriptions were included in former counsel's response to the director's request for evidence, but no copies of these documents can be found in the record of proceeding. The job description submitted for the beneficiary's subordinate is identical to that contained in former counsel's January 21, 2004 letter. The job description for the beneficiary includes the following duties:

- 1 Directs, plans and implements policies and objectives of company.
- 2 Directs activities of company to plan procedures, establish responsibilities and coordinate functions.
- 3 Analyzes marketing potential for new store locations, sales statistics, and expenditure to formulate policy.
- 4 Analyzes operations to evaluate performance of company and staff and to determine areas of cost reduction and program improvement.
- 5 Confers with advisors to establish policies and formulate plans
- 6 Reviews financial statements and sales and activity reports to ensure that company's objectives are achieved.
- 7 Assigns or delegates responsibilities.
- 8 Screens, selects, and hires new employees.
- 9 Negotiates and approves contracts with suppliers and distributors.
- 10 Direct foreign sales and service outlets of company.
- 11 Directs product research and development.
- 12 Direct conversion of products from USA to foreign standards.
- 13 Represent company at trade association meetings to promote products.

Counsel asserts "[w]hen taken as a whole, the initial petition and the petition for the extension show a consistent plan and pattern for the United States company . . . and as the plan has progressed from the time the petition was initially approved, nothing has changed that should have caused the extension to be denied."

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.* Here, the petitioner claims that the beneficiary qualifies for classification as both a manager and or executive. A 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 if it is representing the beneficiary is both an executive and a manager. At a minimum, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include directing "all aspects of the finance, sales/marketing, human resources, operations and administrative functions." However, the petitioner has not defined these functions or identified who

performs routine duties associated with these functions. As will be discussed below, the petitioner has provided minimal evidence that it employed its claimed “sales and marketing representative” at the time of filing, and no evidence that it employed additional employees or contract staff. The petitioner further states that the beneficiary “directs foreign sales and service outlets of company,” “directs product research and development,” “directs conversion of products from USA to foreign standards,” and “supervises product importation,” but the petitioner does not claim to have any employees engaged in product research and development, importing activities, or any foreign sales and service outlets. 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). 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).

Collectively, the lack of staff to perform the functions that the beneficiary purportedly “directs” raises questions regarding the validity of the job descriptions provided. Either the beneficiary himself is performing most of the functions or he does not actually manage these functions as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Although counsel has submitted a more detailed description of the beneficiary's duties on appeal, it states his duties in very broad terms, such as “directs, plans and implements policies and objectives,” “directs activities of company to plan procedures, establish responsibilities and coordinate functions,” and “establishes policies and formulates plans.” Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, at 1108.

In addition, the petitioner describes the beneficiary as negotiating contracts with suppliers and distributors, performing client liaison, and actively marketing the petitioner's product. Since the beneficiary actually negotiates contracts and markets the petitioner's products, he is performing tasks necessary to provide a service or product and these duties will not be considered managerial or executive in nature. 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).

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's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature,

and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). This failure of documentation is important because, as discussed above, several of the beneficiary's daily tasks, such as marketing and client liaison tasks, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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 duties and the staff of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

At the time of filing the petitioner, which claims to be engaged in the import, export and sale of infant and toddler products, employed the beneficiary the beneficiary as general manager. The petitioner has provided minimal evidence of two checks for \$500 paid to its claimed "sales and marketing representative," made approximately one month apart in November and December 2003. Absent further evidence of wages paid to this employee, the AAO will assume that she was hired in October or November 2003 and that she was working part-time for a monthly salary of \$500 at the time the petition was filed. Although counsel states the petitioner has contractual employees in the areas of accounting, computer and legal services, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business, which is import and export, sales and marketing of products. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Based on a review of the petitioner's staffing levels at the time of filing,

the beneficiary supervised, at most, one part-time subordinate who relieved him from performing some routine sales and customer service duties.

Therefore, it can be assumed, and has not been proven otherwise, that some of the company's sales and customer service duties and all of the other routine administrative and operational duties of the company, including market research, marketing, negotiations with suppliers and distributors, import and export functions, product research and development, must be performed by the beneficiary. 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(l)(3)(ii). Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. Again, 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 is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it is making progress towards the goals outlined in its business plan and intends to hire employees in the future. However, 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). As noted above, 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, 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(l)(3). For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it is eligible for an extension of the initial one-year "new office" validity period. As previously noted, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not satisfied two of the enumerated evidentiary requirements. The petitioner has not submitted evidence that the United States and foreign entities are still qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner claims that it is a wholly-owned subsidiary of the foreign entity. In support of this assertion, the petitioner submitted its articles of incorporation, indicating that the company is authorized to issue 100 shares of common stock with a par value of \$1.00. The petitioner also submitted a single stock certificate, number 5, indicating that 100 shares were issued to the foreign entity on March 2002. The petitioner's financial statement indicates that the petitioner's common stock is valued at \$1,000, which suggests that the petitioner had issued more than 100 shares of stock as of the date of filing in December 2003. 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 general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. The minimal evidence submitted by the petitioner is insufficient to establish that the United States entity maintains a qualifying relationship with the foreign entity. For this additional reason, the appeal will be dismissed.

In addition, the petitioner has not submitted evidence that the United States entity has been doing business for the previous year as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H) and as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The petitioner submitted a financial statement, a few undated invoices, one invoice dated October 31, 2003, and a letter from a customer confirming an order made in November 12, 2003. Although the petitioner claims to be a distributor for a major manufacturer of infant products, the petitioner has submitted no evidence of its relationship with the manufacturer. In the instant case, there is no evidence that the petitioner was engaged in the regular, systematic and continuous provision of goods or services from January through October of 2003. For this additional reason the petition may not be approved.

Finally, the record reflects that the U.S. entity did not secure a commercial lease until December 1, 2003, nearly eleven months after the approval of the original new office petition. The record further reflects that the office space licensed to the petitioner on this date is the same office used by the petitioner's previous immigration counsel, which raises questions regarding the validity of the agreement submitted. All company documents submitted dated prior to December 2003 bear the beneficiary's residential address. 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).

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).

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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.

ORDER: The appeal is dismissed.