

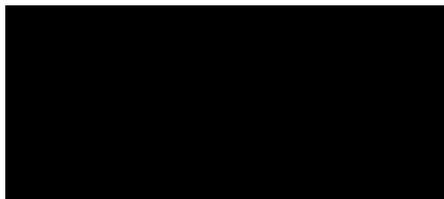
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U.S. Department of Homeland Security  
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U.S. Citizenship  
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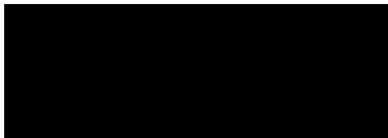
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FILE: EAC 02 163 52512 Office: VERMONT SERVICE CENTER Date: **AUG 01 2005**

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

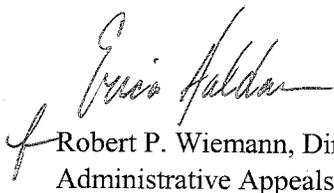
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

According to documentary evidence contained in the record, the petitioner was established in 2001 and is described as a jewelry business. The petitioner claims to be a subsidiary of Aurea SRL, located in Rome, Italy. It claims one employee with a gross annual income of \$132,266.00. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its marketing and managing director at a yearly salary of \$20,000.00. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties will be managerial or executive in nature.

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 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) states that a visa petition under section 101(a)(15)(L) 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);
- 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.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed by the U.S. entity primarily in a 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 response to the director's request for additional evidence to demonstrate the beneficiary's proposed job duties, the petitioner described them as:

- Meetings with potential clients – consultations with client in order to evaluate needs, personal image, etc. (20 hours/week);
- Travel time to client's residence/business (3 hours/week);
- Meeting with consultants, such as lawyers, accountant, etc. (1 hour/week);
- Meeting with diamond dealers (3 hours/week);
- Training of future manager/marketer (4 hours/week);
- Searching for a better location (½ hour/week);
- Preparing brochures and sales materials (3 hours/week);
- Creating strategy for name recognition in New York (½ hour/week);
- Analysis of the competition – Gathering data on competitors and performing price, sales, marketing and distribution analysis (2 hours/week);
- Creating an analysis that forecasts sales volume based on sell through [sic] and market trends for the New York City market (2 hours/week);
- Gather and analyze general customer preferences and buying habits (2 hours/week);
- Preparing market proposals (1 hour/week);
- Researching and analyzing distribution methods that are relevant and effective in a city such as New York (1 hour/week);
- Preparing business reports to be reviewed by other owners (1 hour/week);
- Supervising timely delivery of merchandise, negotiate payment terms, and oversee customer satisfaction (2 hours/week);
- Oversee budget and forecast future financial needs in order to expand operations thereby allowing for future hirings [sic] (2 hours/week);
- Analyzing jewelry trends worldwide and in New York (1hour/week);
- Creating and maintain database of clients and their preferences (1 hour/week);
- Creating active presentation on Power Point (1hour/week); and

- Introducing styles to department stores for future expanded marketing (½ hour/week).

The petitioner submitted an organizational chart demonstrating that the U.S. entity's hierarchy consists of the beneficiary as director of marketing and management and an assistant to director of marketing and management. The petitioner also submitted a copy of the assistant's resume, which described his duties as:

- Assisting in analyzing the New York market to help expand the customer base.
- Assisting in preparing training booklet for future employees.
- Participating with the director of marketing in meeting with customers to create a feedback chart of client tastes.

In denying the petition, the director determined that the evidence submitted was insufficient to demonstrate that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity. The director noted that the job duty descriptions given were vague and did not clearly describe the beneficiary's day-to-day activities. The director also noted that it did not appear that the U.S. entity, being formed in 2001, employing one individual, and reporting a net annual income of \$51,116.00 would realistically be in a position to utilize the beneficiary as a viable manager. The director concluded by stating that there had been no evidence submitted to show that the beneficiary would be managing subordinates who could relieve her from performing non-qualifying duties, or that the petitioner would be able to support a managerial or executive position.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary has been performing as marketer, manager, and trainer for the U.S. entity. Counsel also asserts that the assistant to the beneficiary is employed by the U.S. entity, had been working without compensation, and is being trained by the beneficiary to eventually take over her position.

Upon review, counsel's assertions are not persuasive. The evidence submitted does not establish that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity. In evaluating whether the beneficiary is employed in a primarily managerial capacity, the AAO will look first to the petitioner's description of the beneficiary's 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.* Further, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Counsel contends that the beneficiary and her assistant are employed by the U.S. entity. Counsel further contends that the beneficiary is in the process of training the assistant to eventually take over her position. A review of the assistant's job description fails to demonstrate that he will be supervised by the beneficiary; that he is employed in a managerial, professional, or supervisory position; or that he actually will perform the day-to-day non-qualifying duties of the U.S. entity. Consequently, there is insufficient evidence to show that the beneficiary will perform the high-level responsibilities as defined, or that she will primarily perform those duties rather than spending the majority of her time performing the day-to-day functions of the organization.

In addition, the petitioner described the beneficiary duties as: researching the market, marketing the petitioner's product, shipping the product, performing sales functions, and negotiating contracts, etc. Since

the beneficiary actually performs administrative duties as well as clerical work, she 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).

Although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. The assistant's duties are described as "assisting in analyzing the New York market to help expand the customer base," "assisting in preparing training booklet for future employees," and "participating with the director of marketing in meeting with customers to create a feedback chart of client tastes." This description is insufficient to show that the subordinate is employed in a supervisory, professional, or managerial capacity. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary is primarily performing non-qualifying duties, the beneficiary cannot be deemed to be primarily acting in a managerial or executive capacity.

Even though the petitioner claims that the beneficiary directs and manages the petitioner's sales, marketing, and customer service activities, it does not claim to have anyone on its staff to actually perform the sales, marketing, and customer service functions. The petitioner has noted that the beneficiary was in the process of training the subordinate at the time the petition was filed. The subordinate stated that he was an "assistant" to the beneficiary and that he anticipates being trained for the next two years to take over the beneficiary's position. Thus, either the beneficiary herself is performing the sales, marketing, and customer service functions or she does not actually manage the sales, marketing, and customer service 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). If the beneficiary is performing the sales, marketing, and customer service functions 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, supra*.

The record shows that the U.S. entity was established in 2001. It is inferred throughout the record that the petitioning entity is still in its developmental stage. However, the record shows that the entity has been operational for more than one year and therefore, it will be treated as an established entity pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C). As an established entity, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. Furthermore, 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 order to qualify for an extension of the L-1 visa after an organization becomes operational, the petitioner must establish the need for an executive or managerial employee. Although the petitioner claims that the events following the 9/11 attacks detrimentally affected its business, the company is still expected to conform to the statutory and regulatory requirements in petitioning for an extension of the beneficiary's stay as an intracompany transferee. The evidence fails to demonstrate that the petitioner has reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Based upon evidence

contained in the record, it is apparent that the beneficiary has been performing 0and will continue to primarily perform the day-to-day services of the organization rather than perform primarily in a managerial or executive capacity.

In summary, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

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.