

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

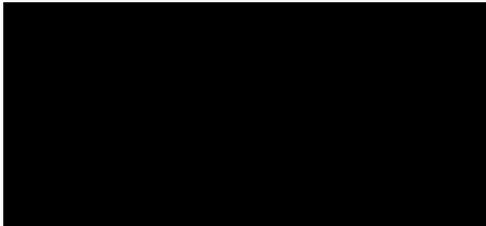
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529

PUBLIC COPY



U.S. Citizenship
and Immigration
Services

D7

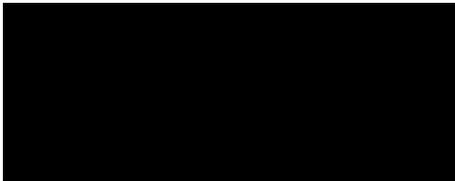


FILE: SRC 03 010 51654 Office: TEXAS SERVICE CENTER Date: **AUG 15 2005**

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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2001 and claims to be a distributor of perfumes and cosmetics. The petitioner claims that the U.S. entity is an affiliate of [REDACTED] located in Costa Rica. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its manager for a period of two years, at a yearly salary of \$30,000. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been or would continue to be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will continue to 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) of this section for the previous year;
- C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- E) Evidence of the financial status of the United States operation.

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.

The petitioner stated in the petition that the beneficiary has been responsible for overseeing customer service, reviewing market reports, and requesting merchandise from the factory. The petitioner further stated in the petition that the beneficiary would be responsible for managing personnel, overseeing customer service, planning a marketing strategy for products in Florida, requesting merchandise from the factory, overseeing customs paperwork, reviewing inventory control, and classifying merchandise.

In a letter dated October 9, 2002, the petitioner stated that the beneficiary’s position involved the management of the business enterprise and included:

- Managing United States office finance;
- Confers with organization officials to plan business objectives;
- Develop and implement policies and procedures for company operations;
- Train and hire and fire employees;
- Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions; and
- Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments and increase productivity.

The director determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary had been or would continue to be employed primarily in a managerial or executive capacity. The director stated that the petitioner had not demonstrated that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization. The director also stated that the petitioner had not established that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional or managerial employees who will relieve him from performing the services of the organization.

On appeal, counsel argues that the beneficiary manages the entire organization, not just a function, subdivision, or component of the U.S. entity. Counsel described the beneficiary's duties as:

- Corporate signature and representation;
- Keep an up to date product inventory, accounts receivable and the companies [sic] assets;
- Keep control of all legal aspects of the company, and follow up in regards to any situation that may arise on this subject. Be responsible of the legal aspects of hiring and releasing company employees; maintain liaison with the company's custom agent, pay international providers, and pay local suppliers, oversee regular payroll and overtime payments;
- Coordinating together with the marketing and sales manager, the strategies to increase sales. Keep an up to date monthly control of the sales representatives hired and the sales increases in order to determine the company's development;
- Prepare the annual budget of all of the company's operation;
- Keep an up to date products inventory in the main warehouse;
- Coordinate along with the service department and sales promotions; [and]
- Determine products to be featured for quarterly sales catalog, and those to be exported according to inventory balances; [sic]

In a letter dated November 22, 2002, the president and CEO of Zermat Internacional stated that a general manager reports directly to the board of directors and the executive committee; and will present monthly statements to the executive committee when required. The CEO described the beneficiary's job duties as:

Optimize the use of financial and human resource of [the U.S. entity] with the objective to achieve the maximum growth of the company in the northern American market and the fulfillment of our goals and objectives.

Planning, organizing, directing, supervising and controlling all the activities in the following areas:

- Finance and administration
- Marketing and sales
- Distributors and sales offices
- Keep an up to date product inventory, accounts receivable and the companies [sic] assets.
- Keep control to all legal aspects of the company, and follow up any situation that may arise on this subject. Be responsible of the legal aspect of hiring and releasing company employees maintain liaison with the company's custom agent, pay international providers, and pay local suppliers, effect regular payroll and overtime payments.
- Coordinating together with the marketing and sales manager, the strategies to increase sales. Keep an up to date monthly control of the sales representatives hired and the sales increases in order to determine the company's development.
- Prepare the annual budget of all the operation.
- Keep an up to date products inventory in the main warehouse[.]

- Coordinate along with the service department, sales promotions to dispose of an idle stock.
- Determine products to be featured for quarterly sales catalog, and those to be exported according to inventory.
- Keep an accurate control of the imported merchandise, maintain products sales statistics, monthly rotation, sales increase etc.
- The general manager is the only authorized bank, liaison, issue and sign checks, make deposits, check bank statements, check daily petty cash activity and report daily credit card transactions.
- Make sure the goals and objectives set forth by the parent company are met.

The petitioner submitted an organizational chart of the U.S. entity, which depicted a warehouse administrator, commercial director, customer service representative, and telemarketing representative all under the direction of the general manager.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. In evaluating whether the beneficiary is employed in a primarily managerial or executive capacity, the AAO will look first to the petitioner's description of the beneficiary's 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 asserts that the beneficiary performs managerial duties but fails to distinguish the extent to which she performs such duties. Further, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions, and 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). The petitioner contends that the beneficiary is employed by the U.S. entity in a managerial capacity in that she plans, organizes, directs, supervises, and controls all activities of the organization. However, a review of the record demonstrates that the beneficiary primarily performs marketing, sales, and distribution duties rather than managerial duties. Further, there is insufficient evidence to show that the U.S. entity is or will be able to support a managerial or executive position. 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 day-to-day functions of the organization.

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 stated that the beneficiary's duties included: "finance and administration, marketing and sales, distributors and sales offices, keep an up to date product inventory, and keep control to all legal aspects of the company."

The petitioner described the beneficiary as being involved in the negotiating process, customer service, sales, inventory control, and marketing of the petitioner's product. Since the beneficiary is directly involved in customer service, sales, and marketing of the petitioner's product 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).

In addition, 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 lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary has spent and will spend performing each duty. This failure of documentation is important because several of the beneficiary's daily tasks, such as coordinating with the sales and marketing departments and maintaining an up-to-date inventory 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 function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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. 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 there is no independent documentary evidence to demonstrate that the subordinate staff is composed of supervisory, professional, or managerial employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity in that respect. Furthermore, there has been insufficient evidence submitted to demonstrate that the U.S. entity actually employs anyone other than the beneficiary.

Upon a review of the record, it does not appear that the petitioner has reached the point that it can employ the beneficiary in a primarily managerial or executive position. It appears from the record that the beneficiary has been and will continue to be an agent or distributor of the petitioner's perfumes and cosmetics. The petitioner has failed to demonstrate that the beneficiary has been or will be employed in a primarily qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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.