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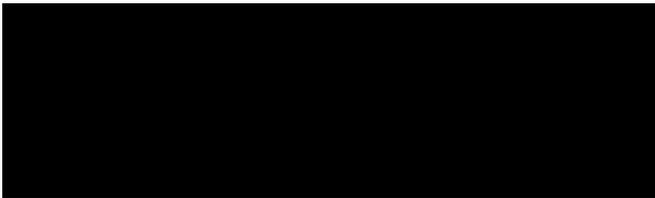
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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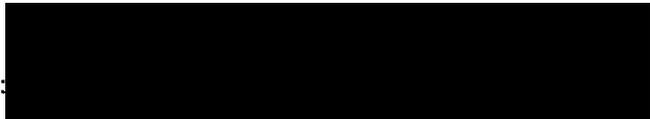
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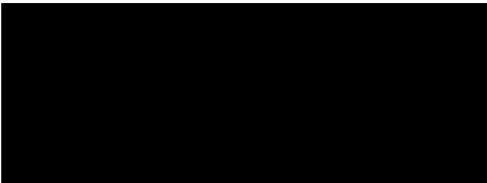
FILE: SRC 02 274 52301 Office: TEXAS SERVICE CENTER Date: **AUG 15 2005**

IN RE: Petitioner:
Beneficiary:



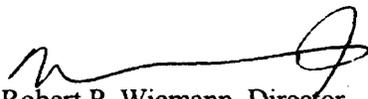
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

www.uscis.gov

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 2000 and claims to be in the import, export, and wholesale jewelry business. The petitioner claims that the U.S. entity is a branch of [REDACTED], located in Mexico. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president, at a yearly salary of \$31,200.00. The director determined that the petitioner failed to submit sufficient evidence to establish that the beneficiary has been or would be employed primarily in an executive or managerial capacity.

On appeal, counsel disagrees with the director's determination and asserts that the evidence establishes that the beneficiary's duties have been and will continue to be primarily executive or managerial 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) further 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) 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.

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.

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In a letter dated September 13, 2002, the petitioner stated that the beneficiary would be responsible for overseeing the vice-president and managers of the business. The petitioner also stated that the beneficiary would be responsible for determining the scope of the U.S. business operation and its specific goals, implementing company policies, determining the company’s annual budget, and future developments of the organization. The petitioner submitted a copy of its organizational chart that showed the beneficiary as president, with a vice-president, manager, and two salespersons as his subordinates.

The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be performing job duties primarily in an executive capacity. The director stated that the petitioner had not demonstrated that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who would relieve him from performing the services of the business. The director also stated that the beneficiary would not be primary engaged in executive duties where it had not been demonstrated that the services of a full-time president was required. The director noted that a majority of the beneficiary’s time would be spent performing the non-executive, day-to-day operational duties of the organization.

On appeal, counsel argues that the director failed to examine the reasonable needs of the company in assessing the petitioner’s eligibility for benefits and services. Counsel also argues that the petitioner is a small business owner and that previous INS decisions were made in favor of the small business owner. On appeal, the petitioner submitted a sworn affidavit, copies of company invoices, and a list of jewelry suppliers as evidence. In the affidavit the beneficiary states in part:

To survive in today's economic, [sic] I have to do many works [sic] outside the "executive capacity." INS should not compare my daily work with the work of CEO of big company [sic]. My business is a small Mexican business. It is a wonder that my business survives and continues to general [a] profit every year I direct the management of my business. For example, I determine the budgets and [am] responsible for financial planning of my small business. I directly negotiated all the contract [sic] of large amount purchase and sales. I decide all the hiring of managers . . . I personally hire all the managers in both Mexico and USA . . . Everyday the managers from Mexico call me and report to me the business operation [sic]. I give managers orders in regard [sic] large payment and large purchase. The manager must have my permission before they negotiate with the banks or other creditors . . . I am the person [who] establishes the goals and policies of my business, component or function . . . I exercise wide latitude in discretionary decision-making in the daily operation of both the Mexico and American business. For example, I make decision in large wholesale purchase (detail to follow). I make decision in the financial strategies in regard of loan and payment [sic]. I do not receive supervision or direction from any one [sic] in my daily operation of my business.

The record reveals that the U.S. entity was incorporated in 2000 and that it has been doing business for more than one year prior to the filing of this petition. Therefore, it is not to be considered a new office pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(F) for purposes of evaluating the beneficiary's proposed position. The petitioner infers that the U.S. entity is still in its developmental stages. However, 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended 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 case, the petitioner has failed to present sufficient evidence to establish that it has reached the point where it can employ the beneficiary in a predominantly executive position. Counsel asserts that similar extension of new office petitions have been granted by the AAO, and cites to unpublished decisions in support of his contentions. However, while 8 C.F.R. § 103.3 (c) provides that Citizenship and Immigration Services (CIS) precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Further, an unpublished decision carries no precedential weight. *See Chan v. Reno*, 113 F.2d1068, 1073 (9th Cir. 1997) (citing 8 C.F.R. § 3.1(g)). As the Ninth Circuit says, "[U]npublished precedent is a dubious basis for demonstrating the type of inconsistency which would warrant rejection of deference." *Id.* (citing *De Osorio v. INS*, 10 F.3d 1034, 1042 (4th Cir. 1993)).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* Together, these facts can be used as indicators to help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. The latter more accurately describes the beneficiary's role. The record demonstrates that the petitioner is in the importing, exporting, and wholesale of jewelry business. Although the petitioner claims to employ five individuals, the beneficiary has stated "to survive in today's economic

[sic], I have to do many works outside the executive capacity.” Further, there has been no independent documentary evidence submitted to establish that there are any individuals currently employed by the U.S. entity to perform the functions of the organization or to relieve the beneficiary from performing such duties. When examining the capabilities of an established organization, future projections are not sufficient to establish that the petitioner is developed to the point where it can support an employee in a primarily managerial or executive position. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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).

The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he will be directing the management of the organization or a major component or function of the organization, that he will be establishing goals and policies, that he will be exercising a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals. There has been no evidence submitted to show the percentage of time the beneficiary will spend performing executive versus non-executive duties.

The petitioner claims that the beneficiary will direct the overall management of the organization. However, rather than managing a major department, subdivision, function, or component of the organization, it appears that the beneficiary will actually be performing the services of the business. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has failed to submit sufficient evidence to demonstrate that the beneficiary will direct the overall management of the organization. For this reason, the petition may not be approved.

Beyond the decision of the director, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship continues to exist between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). In this matter, the petitioner submitted an untranslated copy of a purported business registration for the foreign entity. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. The petitioner also submitted a copy of a U.S. entity stock certificate, dated October 23, 2000, which shows that 1,000 shares of stock were issued to [REDACTED]. This evidence alone is insufficient to establish the existence of a qualifying relationship between the U.S. entity and a foreign entity. Furthermore, the petitioner has not persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. For these additional reasons, the petition may not be approved.

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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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.