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File: WAC 04 168 50987 Office: CALIFORNIA SERVICE CENTER Date: DEC 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)

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, 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 vice president of international sales and marketing 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 Arizona that is engaged in the design, manufacture, and sale of jewelry. The petitioner claims that it is the subsidiary of [REDACTED], located in Sandton, 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 for three more years.

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 filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the director erred by finding that the beneficiary would not be employed in a primarily managerial or executive capacity. In support of this contention, counsel submits a brief and additional evidence.

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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The primary issue in this 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, the petitioner submitted an attachment identified as "Attachment B" to the Form I-129 which listed the beneficiary's duties while in the United States. Specifically, the duties were identified as executive in nature and were listed as follows:

- Establish and Develop strategic direction and action plan according to Board of Directors initiatives;
- Support and coordinate with other corporate organizations in implementing group strategies and policies;
- Develop and implement marketing policies and strategies;
- Identify additional opportunities in jewelry distribution and sales;
- Develop market strategies for further expansion into Asia, Europe and Australia;
- Develop and implement advertising strategies to customers and market; and
- Exercise discretionary authority for personnel recruitment and termination, evaluation of work performance, and recommendation of other personnel action

The petitioner submitted a copy of the beneficiary's resume, which listed his duties while in the United States for the previous year. Specifically, under a heading identifying the nature of the business as "Jewelry Distribution and Production," the following responsibilities were listed:

- Oversee stock receiving in the Arizona office of [the petitioner];
- Oversee stock ordering and purchasing;
- Account management of large retail customers with chain stores in excess of 200 stores;
- Merchandising and systems control;
- Conclude various supply agreement with large U.S. manufacturers;
- Oversee importing and exporting aspects of shipping; and Negotiated supply agreements with international manufacturers;
- Consult with Board of Directors in establishing and implementing policies and strategies for [the foreign entity's] business;
- Develop new business and markets;

- Develop and implement business plan to increase sales of [the foreign entity's] products;
- Develop market strategies for expansion of [the foreign entity's] products throughout the United States and internationally;
- Participate in business and strategic negotiations;
- Develop and implement business allegiance strategies; and
- Exercise discretionary authority for personnel recruitment and termination, evaluation of work performance, recommendations and other personnel actions.

The director found this initial description of the beneficiary's duties insufficient and consequently issued a request for evidence on May 28, 2004. The request required the petitioner to submit an organizational chart for the U.S entity which showed the beneficiary's position in the organizational hierarchy as well as all employees under the beneficiary's supervision. In addition, the director requested a more detailed description of the beneficiary's duties as well as quarterly wage reports and a payroll summary verifying the employees of other persons.

In response, the petitioner submitted a list of three administrative staff members who specialized in customer service and alleged that the beneficiary oversaw their activities. In addition, a separate list of duties was submitted, which is reproduced below:

- Daily correspondence with admin team and sales team in Los Angeles
- Complete management of [the foreign entity] and [foreign entity] brand development in the USA
- Order placing
- Bank accounts and financial overview
- Liaising with suppliers in Hong Kong and Asia
- Management of all banking wire transfers
- Continued strategy planning with [REDACTED] to further develop the business
- Bi weekly travel to Los Angeles office to conduct meetings with employees and sales teams
- Corporate financing structures including [REDACTED] and [REDACTED]
- Assistance in range development and merchandise planning
- Traveling to [REDACTED] show Las Vegas, JA New York winter and summer shows
- Travel 3 x per annum to Hong Kong to plan buying and merchandising and to meet with suppliers

Additionally, a February 12, 2003 declaration from the petitioner's president further discussed the nature of the beneficiary's duties in general terms while discussing the responsibilities of the vice president. The declaration stated:

The Vice President will primarily be responsible for the following activities:

- Establish and develop strategic direction and action plan according to Board of Directors initiatives;
- Support and coordinate with other corporate organizations in implementing group strategies and policies;
- Develop and implement marketing policies and strategies[;]
- Identify additional opportunities in jewelry distribution and sales;
- Develop market strategies for further expansion into the United States, Asia, Europe and Australia;
- Develop and implement advertising strategies to customers and market;
- Exercise discretionary authority for personnel recruitment and termination, evaluation of work performance, and recommendation of other personnel action;
- Consult with Board of Directors in establishing and implementing policies and strategies for [the foreign entity's] business;
- Develop new business and markets;
- Develop and implement a business plan to increase sales of [the foreign entity's] products through [the petitioner];
- Develop market strategies for expansion of [the foreign entity's] products throughout the United States and internationally;
- Participate in business and strategic negotiations;
- Develop and implement business allegiance strategies; and
- Exercise discretionary authority for personnel recruitment and termination[,] evaluation of work performance, recommendations, and other personnel actions.

The AAO notes that these duties listed above are very similar to the duties initially identified with the petition.

On July 3, 2004, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization. The director further concluded that the beneficiary was performing the tasks necessary to provide the petitioner's goods and services and that it had not been demonstrated that the beneficiary was managing an essential function. Finally, the director concluded that the petitioner had not reached the point where it could employ the beneficiary in a primarily managerial or executive capacity, noting that at the time of the petition's filing it employed only three subordinate administrative staff members.

On appeal, the petitioner restates the beneficiary's qualifications and asserts that the short time in which the petitioner has been a functioning company should be considered when reviewing the actual duties performed by the beneficiary. Counsel alleges that the petitioner is still in the start up phase and that the beneficiary did not arrive in the U.S. entity until September 2003 to begin the necessary tasks. Counsel further asserts that the beneficiary now oversees a number of new staff members, including managers, and that the beneficiary is also managing a key function within the petitioner. Furthermore, the petitioner asserts that, although the

beneficiary does perform some of the day-to-day duties of the business, the percentage of time spent on these tasks in comparison to his managerial and executive duties is minimal.

Upon review, the petitioner's assertions are not persuasive. Whether the beneficiary is a manager 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. In this case, the petitioner asserts that the beneficiary is an executive by virtue of his position title, experience, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed executive duties. 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).

At the time of filing, the petitioner was an almost two-year old jewelry retailer that claimed to have a gross annual income of \$73,630. The firm employed the beneficiary as its vice-president and claimed to employ 3 administrative staff members responsible for performing customer service functions. The description of the beneficiary's duties, provided in the initial letter of support, is vague and seems to merely paraphrase the regulatory definitions. Specifically, the identification of duties such as "exercise discretionary authority for personnel recruitment," "develop new business and markets" and "develop market strategies" in the initial petition did little to clarify what the beneficiary does on an average workday. In fact, these duties are extremely similar to the executive duties set forth in Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). In response to the request for evidence, a more detailed description of duties was submitted, which indicated that the beneficiary traveled to trade shows, placed orders, and managed banking functions. Essentially, the claim that the beneficiary places orders and handles banking is inconsistent and contradictory to the petitioner's claim that the beneficiary handles only executive functions. In addition, the fact that the beneficiary travels bi-weekly to California and attends trade shows in both the winter and summer months without a sales staff or subordinate managers to run the business in his absence suggests that the beneficiary is single-handedly running the operations of the petitioner.

The actual duties themselves reveal the true nature of the employment. *Id.* In reviewing the beneficiary's stated duties, it appears that the majority of his time is devoted to the company's marketing and acquisitions. Furthermore, it appears that based on the petitioner's statements, the petitioner is still in a start-up phase. Since the beneficiary apparently oversees only three administrative staff members who focus on customer service, there does not appear to be sufficient staff to handle the sales functions, the marketing functions, the trade shows, or even the accounting and banking responsibilities. Consequently, it appears that all of these functions fall on the shoulders of the beneficiary. 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).

Furthermore, the subordinate staff members the beneficiary is claimed to oversee have not been verified, since despite the director's request, quarterly wage reports and payroll summaries for the employees were not submitted. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Although the petitioner discusses a joint venture agreement in which the petitioner is engaged and explains the presence of these employees through a related agreement,

this claim is insufficient to satisfy the requirements in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, the AAO notes that for the first time on appeal, counsel asserts that the beneficiary oversees a key function of the petitioner while simultaneously alleging his qualifications in a managerial and executive capacity. Specifically, counsel asserts that the marketing strategies and the marketing department of the petitioner are the keys to the petitioner's success, and thus the beneficiary's involvement in the petitioner's marketing is an essential function. This assertion is not persuasive. On appeal, a petitioner cannot offer a new position to the beneficiary or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as vice president and three administrative staff members. The petitioner indicates that the business is still developing, and once fully operational, it will hire additional employees. It is evident, therefore, that without the required staff, the beneficiary is required to perform the duties that would normally be delegated to subordinate employees in order to keep the business operational. Although the petitioner asserts that the beneficiary is truly acting in a managerial or executive capacity, the petitioner provides no independent evidence to corroborate these claims. As previously discussed, the petitioner does not meet its burden of proof in these proceedings without documentary evidence to support its statements, *Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel on appeal do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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. Although the petitioner on appeal alleges that numerous new employees will soon be retained and that the delay in becoming fully operational is attributed to the start-up phase of the petitioning entity, these assertions are not persuasive. The petitioner must establish eligibility at the time of filing. 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). In the instant

matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties would be primarily managerial or executive in nature. For this reason, the petition may not be approved.

Beyond the decision of the director, the petition also may not be approved because there is insufficient evidence that a qualifying relationship exists between the petitioner and the foreign entity. Specifically, the record indicates that [REDACTED] owns 74% of the foreign entity, [REDACTED]. The petitioner likewise claims that [REDACTED] owns 50% of the petitioner, and that the true affiliation of the companies lies with a holding company identified as [REDACTED]. However, it would appear that an affiliate relationship could exist between the parties by way of the ownership interests of [REDACTED] in both entities. The record indicates that [REDACTED] owns 100% of the petitioner, and not 50% as claimed by the petitioner. The Minutes of the Shareholder's meeting of the petitioner indicate that 5,000 shares have been authorized, and an accompanying ledger indicates that those 5,000 shares were issued to [REDACTED] on January 29, 2003. However, the petitioner claims that 5,000 shares were issued to [REDACTED] on October 1, 2003 in exchange for his services, which suggests that 10,000 shares are now outstanding. There is no evidence that the petitioner authorized the issuance of an additional 5,000 shares. Specifically, the petitioner's Form 1120, U.S. Corporation Tax Return, for the year 2003, filed in May 2004, indicates that [REDACTED] is the sole owner of the petitioner, while also indicating on Form 5472 that [REDACTED] is a direct foreign shareholder of the petitioner. Consequently, the petitioner's claims of ownership are inconsistent and confusing and fail to clarify the true relationship between the parties. 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). 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.