

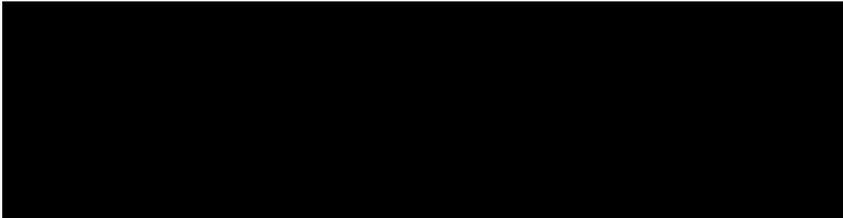
Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

D 7

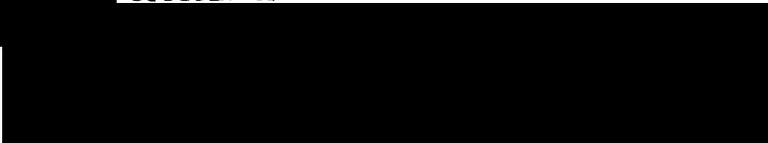


FILE:

OFFICE: CALIFORNIA SERVICE CENTER Date: FEB 07 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

**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 president 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 California and claims to be engaged in the business of selling hair products and related services. The petitioner indicates that it is an affiliate of [REDACTED] located in Israel. The beneficiary was initially granted a one-year period of stay (from March 2002 to March 2003) to open a new office in the United States. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that the petitioner failed to submit sufficient information about the beneficiary's proposed position in the United States to establish that as of the date the petition was filed the beneficiary would primarily perform duties within a managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits a brief along with additional evidence in support of the petitioner's claim.

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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) 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 (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.

At issue in this proceeding is whether the petitioner has established that the beneficiary would be employed 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 support of the petition, the petitioner provided the following description of the beneficiary's proposed job duties in the United States:

[The beneficiary] will continue to hold position of President of [redacted] In this capacity, [his] duties and responsibilities will remain unchanged. He will be responsible for developing and directing all policies and procedures of the company relating to corporate

image marketing, finance, financial programs and all aspects of the growth and development of the company. He will be responsible for developing and directing the company's expansion in the U.S. and will also be responsible for formulating all policies and procedures regarding the company's worldwide operations. [The beneficiary] will be responsible for developing and directing all policies and procedures related to setting budgets, allocating resources in its operations, determining the company's marketing image, determining the rate and pace of expansion, and generally overseeing the entire business operation of the company. . [Sic]

[The beneficiary] will have the ultimate authority to direct and control expansion and other business plans that involve significant expenditure by our company and will have wide latitude in all discretionary decision-making within the company. All managerial staff will report to him and he will have the authority to identify personnel needs as well as to hire and fire.

On April 8, 2003, CIS issued a request for additional evidence. The petitioner was asked to provide a copy of its organizational chart naming all of its employees and pointing out those employees that are directly under the beneficiary's supervision. The petitioner was also instructed to provide a more detailed description of the beneficiary's duties, as well as the job title(s) and position description(s) of the employee(s) the beneficiary directs.

The petitioner's response included the following description of the beneficiary's duties:

[The beneficiary] will continue to hold the position of President of [the petitioner]. He will be responsible for developing and directing all policies and procedures of the company relation to corporate image, marketing, finances, financial programs and all aspects f the growth and development of the company. He will be responsible for developing the company's expansion in the U.S. and will also be responsible for formulating all policies and procedures regarding the company's worldwide operations. [The beneficiary] will be responsible for developing and directing all policies and procedures related to setting budgets, allocating resources in its operations, determining the company's marketing image, determining the rate and pace of expansion, and generally overseeing the entire business operation of the company.

[The beneficiary] will have the ultimate authority to direct and control expansion and other business plans that involve significant expenditure by our company and will have wide latitude in all discretionary decision-making within the company. For example, [he] has masterminded and set in place the new [redacted] which he anticipates will be the most prestigious hair academy of its kind that utilizes methods developed by him and his business. . . .

All managerial staff will report to him and he will have the authority to identify personnel needs as well as to hire and fire.

Ninety percent of his time will be taken up by executive level duties including planning business strategy and expansion, negotiating business contracts, meeting with management and reviewing management performance, and other high level responsibilities.

On July 25, 2003, the director denied the petition noting that the petitioner did not provide sufficient detail regarding the beneficiary's actual duties and concluded that this lack of detail precludes CIS from determining that the beneficiary is eligible for classification as an L-1A intracompany transferee.

On appeal, counsel submits a brief focusing primarily on the petitioner's progress and development since the filing of the petition. Counsel discusses at length the additional personnel that has been and will be hired, their proposed duties, and the significance of such an expansion to the petitioner's overall business goals. Counsel also submits evidence of the considerable funds that have been recently transferred from the petitioner's foreign affiliate for the purpose of investing the money to further expand the U.S. entity. While the information and evidence submitted indicates that the petitioner has been able to expand to the point that it now requires a managerial or executive employee to primarily perform qualifying duties, the record does not indicate that the petitioner had attained this point in its development at the time the petition was filed. Case law precedent is clear in establishing that 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). In the instant case, the record shows that at the time the petition was filed in February 2003, the petitioner's support staff included the beneficiary, an accountant, a marketing manager and a single stylist. The chart also shows that the petitioner anticipated hiring a general manager in March of 2003, shortly after the petition was filed. However, any events that may have occurred after the filing of the petition are not relevant in this proceeding. See *id.* In light of the petitioner's overall business purpose, which is to sell hair products and related services, the fact that the petitioner had only one stylist to provide the services and no employees to actually sell the hair products suggests that the beneficiary must have been performing the petitioner's daily operational duties out of sheer necessity, as the petitioner lacked a sufficient staff to relieve the beneficiary from the essential, yet non-qualifying, day-to-day tasks. It is noted 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*, 19 I&N Dec. 593, 604 (Comm. 1988). Regardless of the petitioner's current circumstances, the beneficiary in the instant case was not in a position to primarily perform managerial or executive duties when the petition was filed.

On review, the record as presently constituted is not persuasive in demonstrating that at the time the petition was filed the petitioner was able to employ the beneficiary in a managerial or executive capacity. The fact that the petitioner is a product and service provider suggests that a sufficient staff is required to perform the essential tasks of selling the petitioner's products and services. Regardless of the beneficiary's high degree of discretionary authority over all aspects of the business, the record indicates that the petitioner lacked the necessary staff to sell its products and to provide its services. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that at the time the petition was filed a majority of the beneficiary's duties consisted primarily of directing the management of the organization or supervising a subordinate staff of professional, managerial, or supervisory personnel. Nor has the petitioner demonstrated that at the time the petition was filed it had reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constituted significant components of the duties performed

on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner had been doing business in the United States for one year prior to filing the petition, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B). The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines doing business as the continuous provision of goods and/or services by a qualifying organization in the United States and abroad. In the instant case, the petitioner submitted four invoices for various hair treatments in support of the petition. The earliest of those invoices, however, was dated November 2002. In light of the fact that the beneficiary's visa was granted in March of 2002, the relevant time period during which the new office was expected to have been doing business was from March of 2002 to March of 2003. There is no indication that the petitioner had been doing business over the course of that entire one-year period, particularly in light of the petitioner's statement, submitted in support of the petition, which indicates that the beneficiary entered the United States in June 2002 and did not actually start doing business until September 2002. Based on the evidence in the record and on the petitioner's own statements, the AAO cannot conclude that the petitioner had been doing business for the required period of time prior to filing the petition. It is noted that 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). As such, due to the additional grounds discussed in this paragraph, this petition cannot 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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.