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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] OFFICE: CALIFORNIA SERVICE CENTER Date: FEB 07 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:

[REDACTED]

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 international trade. The petitioner indicates that it is a subsidiary of ~~The Brothers Trading Pty Ltd.~~ located in Australia. The beneficiary was initially granted a one-year period of stay from March 1, 2002 to March 1, 2003 to open a new office in the United States. The petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that the petitioner did not sufficiently demonstrate that the beneficiary would primarily perform duties within a managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits a brief 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:

In charge of all overall management of the company. Plans, develops and establishes policies and objectives of the company in accordance with Board directives. Under the supervision of the Board of Directors, exercises wide latitude in discretionary decision[-]making. Directs the implementation of the business expansion plan and operation policies. Directs the utilization of financial reports and activity data to determine the strategy and progress of the company's business and designate further business goals and plans. Meets with local

business leaders to build up the network for the company. Oversees management strategies and promotion activities, and approve the management improvement. Has the authority to hire, terminate, evaluate and promote the managerial personnel based on their job performance, qualification and contributions.

The petitioner also submitted an additional statement written by the beneficiary, who stated that his efforts during his brief stay in the United States have resulted in the hiring of five employees; creating a base of clients who buy the petitioner's merchandise at regular intervals; soliciting new clients through marketing, referrals, and trade shows; and introduction of new products into the market.

In addition, the petitioner submitted job descriptions for its office clerk, bookkeeper, sales representative, sales manager, and warehouse clerk.

On April 4, 2003, CIS issued a request for additional evidence in which 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.<sup>1</sup> The petitioner was also instructed to provide a more detailed description of the beneficiary's job duties, indicating the percentage of time spent performing each of the listed duties.

The petitioner responded with a letter, dated June 12, 2003, in which it provided a list of seven employees under the beneficiary's supervision and another list of ten employees that it claims to currently employ. Although the petitioner provided its payroll summary for March 1, 2003 through April 30, 2003, 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). Thus, an employee payroll that names employees that had been working for the petitioning organization after the petition was filed is not relevant in this proceeding. Based on the submitted W-2 employee wage and tax statements for 2002 the petitioner employed a total of seven employees (including the beneficiary) during the year 2002. However, based on the petitioner's wage and withholding report for the fourth quarter of 2002, which names a total of five employees, the petitioner did not employ all seven employees at one time. Therefore, it is apparent that not all of the seven employees for whom the petitioner provided W-2 wage and tax statements for 2002 were actually employed by the petitioner when the petition was filed.

It is noted that the petitioner failed to provide a more detailed description of the beneficiary's duties and instead provided the exact same description submitted earlier in support of the petition. Thus, the petitioner provided no new information or insight into the beneficiary's proposed duties.

On July 10, 2003, the director denied the petition concluding that the petitioner did not adequately establish that the beneficiary would primarily perform qualifying duties under an approved petition.

On appeal, counsel submits a brief stating that the beneficiary would be employed in an executive capacity and argues that the director only considered the beneficiary's duties within the context of the definition of "managerial capacity." However, a review of the various statements on record indicates that the petitioner did not explicitly specify whether the beneficiary would be employed in a managerial or executive capacity.

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<sup>1</sup> The AAO acknowledges that the petitioner initially submitted an organizational chart in support of the petition. However, the chart listed only position titles and did not name any of the employees that filled the listed positions.

Although the petitioner provided a more specific list of the beneficiary's duties in a letter written by the beneficiary on February 24, 2003, the petitioner failed to provide an explanation as to how these duties fall under the definitions of managerial or executive capacity. Furthermore, the first full paragraph on page three of the denial notice clarifies the two main elements that must be present regardless of whether the beneficiary seeks classification as a manager or executive. Therefore, contrary to counsel's assertion, CIS effectively indicated that the beneficiary's duties would be considered in the context of both definitions.

Counsel also repeats the prior descriptions of the beneficiary's duties, referring to the list as "[s]pecific responsibilities." While counsel apparently acknowledges the importance of being specific in describing the duties to be performed by the beneficiary, the petitioner's description of duties is vague and provides no insight or understanding as to what the beneficiary would be doing on a daily basis. The only duty that was specific to any degree was the beneficiary's meeting with local and regional business leaders. However, even that duty lacks sufficient specificity, as the petitioner failed to describe what is meant by "business leaders" and what would be discussed at such meetings. Without such specifics the AAO cannot distinguish the beneficiary's duties from those of a sales representative. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the instant case, the record contains two separate descriptions of duties. The description that is repeated by counsel and was previously submitted in support of the petition and in response to the request for evidence clearly lacks specificity and essentially consists of paraphrased portions of the regulatory definitions. The other list, provided by the beneficiary in the February 2003 letter discussed above, merely indicates that the beneficiary has been and will continue to serve as the petitioner's main conduit for soliciting clients. 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). The beneficiary did not explain how the duties listed in his letter fall under the definition of managerial or executive capacity.

Counsel asserts that the director's decision was "impliedly based on the small size of the appellant" and claims that the director failed to consider the petitioner's early stage of development. However, 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. Thus, if after one year of operation the petitioner has not achieved a stage of development where the beneficiary can primarily focus on qualifying duties while others perform the petitioner's essential operational tasks, the AAO cannot conclude that such an entity can support an executive or managerial position. In the instant matter, the record suggests that at the time the petition was filed the beneficiary's efforts were, in large part, focused on providing the petitioner's essential services. Therefore, while the beneficiary is not required to directly supervise anyone, the petitioner must nevertheless demonstrate that it is sufficiently staffed so that the beneficiary is relieved from having to perform the company's daily operational tasks. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. Therefore, regardless of the petitioner's reasonable needs, the petitioner is required to establish that the beneficiary's duties are primarily of a qualifying nature. Moreover, the AAO case cited by counsel in support of his assertion is unpublished and consequently not binding in this proceeding. *See* 8 C.F.R. § 103.3(c).

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 in the business of selling products suggests that a sufficient staff is required to perform the essential sales function. Regardless of the beneficiary's high degree of discretionary authority over all aspects of the company, the record indicates that the petitioner lacked the necessary staff to sell its products. 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 petitioner has not 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 record indicates that the petitioning entity was incorporated in 2001 and that the beneficiary's visa became valid for a one-year stay on March 1, 2002. Therefore, based on the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) the petitioner must establish that it had been doing business since March 1, 2002. Although the record contains a single sales contract dated December 28, 2001, there is no evidence of continued, ongoing business from that date until December 2002, the date on the next set of shipping documents. There is no evidence that the petitioner was conducting business on a continuous, regular, or systematic basis from March 1, 2002, when validity of the beneficiary's L-1A visa commenced, until December 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.