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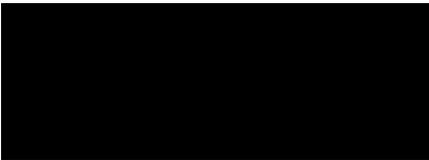
File: WAC 03 075 51138 Office: CALIFORNIA SERVICE CENTER Date: FEB 15 2005

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)

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 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 that is engaged in trading, travel agency and property development. The petitioner claims that it is a subsidiary of [REDACTED] located in Mumbai, India. 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.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts both that the beneficiary is performing job duties of an executive nature and that the beneficiary qualifies as a "function manager." Counsel also asserts that the U.S. entity is in the process of expanding and hiring full-time employees and that it is diversifying. In support of this last assertion, the petitioner submits 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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

At issue in this proceeding is whether the beneficiary would 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 a letter dated October 15, 2002, submitted with the initial petition, the petitioner described the beneficiary's job duties as follows:

Direct and coordinate activities of the U.S. Corporation. Formulate and administer organizational policies; Participate [sic] in formulating and administering company policies and developing long range goals and objectives; Direct [sic] and coordinate activities of the company for which responsibility is delegated to further attainment of goals and objectives. Review analyses of activities, cost, operation ad forecast data and objectives. Negotiate the contracts with the vendors and the customers. Do market research to look into diversifying the business.

On April 3, 2003, the director requested additional evidence. Specifically, the director requested a more detailed description of the beneficiary's duties in the U.S., which should indicate percentage of time spent in each of the listed duties and all employees under the beneficiary's direction, including their job titles and position description. The director also requested an organization chart identifying the names and positions of all current employees of the U.S. entity, and specifically, all employees under the beneficiary's direction with a brief description of their job duties, educational levels, annual salaries/wages, and immigration status. The director also requested that the petitioner submit its federal and state quarterly wage reports for the last three quarters, payroll summary, federal and state income tax returns for the last two tax years, and the annual report of the foreign company.

In response, the petitioner submitted the following description of the beneficiary's job duties in the U.S. entity:

[The beneficiary] is President of the U.S. Company and is responsible for overall management, operation, and administration of the business. He oversees the Gen. Manager. Gen. Manager oversees the Marketing & sales Manger [sic], Export/Import Manager, and will oversee the Property Manager.

- a. He directs and coordinates activities of the U.S. Corporation related to the business development. Oversee the travel agency and the export/import, and Property Management business [sic] 25%
- b. He coordinate the finance [sic] and formulate and administer organization policies; Participate [sic] in formulating and administering company policies and developing long range goals and objectives; 20%
- c. He studies the market for new venture. Do market research to look into diversifying the business. 15%
- d. Meet the vendors; negotiate the contracts with the vendors and the customers. 20%
- e. Review the property agreements, and follow up with escrow and management companies. Make profitable deals. Hire Management team to manage the properties purchased. Oversee the management team. 20%

The petitioner also submitted an organizational chart showing that the U.S. entity has four employees. In addition to the beneficiary, the chart reflects a business/operations manager, a marketing/sales manager, and an export/import manager. The position of property management manager appeared to be vacant. The petitioner indicated that all employees are salaried and have bachelor's degrees. However, the petitioner did not include any description of the job duties of the beneficiary's subordinates, as the director requested.

On August 4, 2003, the director denied the petition. The director determined that given the duties of the beneficiary and the employees he supervises and the wages they make, it does not appear that the beneficiary is performing managerial or executive duties. Specifically, the director found that less than half of the beneficiary's duties as described represent qualified managerial duties. The director also noted that the other employees of the U.S. entity, who have managerial titles, are not presented as having any particular functional duties. Further, the director found the evidence does not establish that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. Finally, the director found there is no indication that the beneficiary will exercise significant authority over generalized policy, or that the beneficiary has been or will be functioning at a senior level within the organizational hierarchy other than in position title. The director concluded the evidence presented by the petitioner is insufficient to establish that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary is performing job duties of an executive nature. Counsel also asserts that the beneficiary is a function manager. In support of this assertion, counsel

repeats the description of job duties previously submitted to the director, and points out that it has not been stated in the job description that the beneficiary will spend time supervising the managers. Finally, counsel asserts that the wages paid by the U.S. entity are low because the managers working under the beneficiary are employed on a part-time basis, and that the U.S. entity is in the process of expanding and hiring full-time employees.

On review, the AAO finds that 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. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(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 in either an executive or a managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

It is noted that the petitioner did not specify in the petition and supplementary materials whether the beneficiary would be functioning primarily in a management or executive capacity. On appeal, counsel appears to claim that the beneficiary functions in both capacities. With respect to the executive nature of the beneficiary's duties, however, counsel merely paraphrased the statutory definition of executive capacity rather than providing a sufficiently specific description of the beneficiary's duties. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, counsel asserts that the beneficiary is performing job duties of an executive nature "by making major decisions, establishing goals and policies of the company, directing the management and marketing of the company. Further he receives only a general supervision of the foreign company." To the extent the job description provided by the petitioner presented any job duties of an executive nature, it also does so in general terms, depicting the beneficiary as "direct[ing] and coordinat[ing] activities of the U.S. Corporation related to the business development . . . oversee[ing] the travel agency and the export/import, and property management business . . . coordinat[ing] the finance and formulate and administer organization policies . . . participat[ing] in formulating and administering company policies and developing long range goals and objectives." The petitioner provided no specifics as to what the "goals, objectives, or policies" of the organization might be, or what "directing, coordinating, or overseeing" the organization and its activities would entail. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations without specifics does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The AAO further agrees with the director that a significant percentage of the beneficiary's job duties are not qualifying duties. For example, according to his job description, the beneficiary's responsibilities include such tasks as market research (15%), meeting and negotiating contracts with vendors and customers (20%), and follow up with escrow and management companies (unspecified part of 20%). Since the job description appears to indicate that the beneficiary actually performs these functions, he is performing duties 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).

For the same reason, counsel's assertion that the beneficiary qualifies as a "function manager" is not persuasive. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner should identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this matter, the petitioner has not specifically identified any specific essential functions that the beneficiary manages. Moreover, as noted earlier, to the extent the petitioner claims that the beneficiary is involved in functions such as market research, contract negotiation, and handling escrow and management companies, there is no evidence that the beneficiary manages those functions rather than perform directly the duties relating to such functions. Again, 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, supra*.

Furthermore, the AAO notes that contrary to counsel's assertion on appeal that the beneficiary does not supervise other employees, in the letter dated June 25, 2003 responding to the director's request, the petitioner did claim that the beneficiary "oversees the General Manager," who in turn oversees the marketing & sales manager, the export/import manager, and will oversee the property management manager. The letter further describes one of the beneficiary's duties as "oversees the management team." To the extent the petitioner claims that the beneficiary is managing a subordinate staff, the petitioner must establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. In light of the petitioner's failure to include any description of the job duties of the other employees of the U.S. entity, as the director had requested, the AAO agrees with the director that the record is insufficient to establish that the beneficiary would be managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties. Furthermore, 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).

Finally, with respect to counsel's assertion that the U.S. entity is in the process of expanding and hiring full-time employees, the AAO notes 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). Furthermore, 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. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant

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

In light of the foregoing, the AAO agrees with the director's conclusion that the petitioner has failed to establish that the beneficiary will be employed in a primarily executive or managerial capacity, as required by 8 C.F.R. § 214.2(1)(3).

Beyond the decision of the director, the AAO notes that the record contains inconsistent information relating to the ownership of the U.S. entity. The petitioner indicated on the Form I-129 that the foreign entity owns 51% of the U.S. entity. The petitioner also submitted copies of share certificates, all issued in September 2001, showing the following ownership of the issued and outstanding shares of the U.S. entity:

1. [REDACTED] - 5,100 shares
2. [REDACTED] -- 100 shares
3. [REDACTED] 2,000 shares
4. [REDACTED] - 1,400 shares
5. [REDACTED] - 1,400 shares

Contrary to the above information, however, the U.S. entity's Internal Revenue Service (IRS) Form 1120, Corporate Income Tax Return, for the fiscal year ending August 31, 2002 indicated, "Pawan Aggarwal, an individual, owns 100% of the Company's voting stock." 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). The petitioner has not provided any explanation or any further evidence to reconcile the above inconsistency relating to the ownership of its shares. In light of this unresolved inconsistency, the AAO cannot conclude that the petitioner has established that there exists a qualifying relationship between the U.S. and the foreign entities pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(G).

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.