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U.S. Citizenship
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Services

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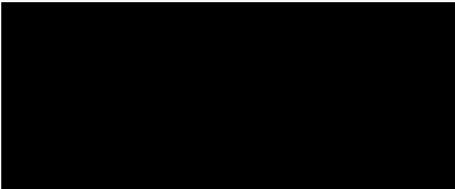


FILE: EAC 03 143 50590 Office: VERMONT SERVICE CENTER Date: JUN 10 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

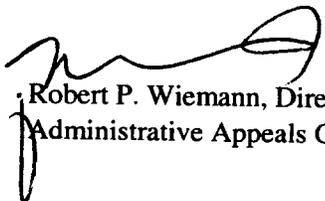
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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 nonimmigrant visa petition was denied by the Director, Vermont 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 established March 22, 2001, and claims to be a wholesaler/retailer and importer/exporter of hand/machine knitting yarn and knitting supplies. The petitioner claims to be a subsidiary of [REDACTED] located in India. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its CEO and senior manager for an additional two years, at a monthly salary of \$850.00. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been or would be employed by the U.S. entity in a primarily managerial or executive capacity. The beneficiary was initially granted a one-year period to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

On appeal, counsel disagrees with the director's decision and asserts that the petitioner has submitted sufficient evidence to establish that the beneficiary has been and will be employed by the U.S. entity in a managerial or executive capacity.

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) 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 (1)(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 with 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 serves 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.

The issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary has been and will be employed by the U.S. entity in a primarily 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.

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.

The petitioner initially described the beneficiary's job duties in the United States as: "As CEO of Petitioner, [the beneficiary] has been, and will continue to direct the overall functioning of the corporation, responsible for all financial and business matters."

In the letter of support, dated April 1, 2003, counsel described the beneficiary's duties as:

[The beneficiary] is employed in an executive and managerial capacity as Chief Executive Officer/Senior Manager of [the U.S. entity]. He is responsible for the overall direction of the corporation. He plans and develops all aspects of the U.S. investment and establishes both the long-term and short-term goals and policies of the company. He makes decisions as to the areas in which to concentrate marketing and sales efforts. He makes decisions regarding the expansion into other business ventures. He personally makes decisions for management and sales positions. In his sole discretion, he controls all the financial aspects of the Corporation. He receives only general supervision or direction from the parent firm.

The petitioner submitted as evidence a copy of the Form I-797B authorizing the beneficiary's stay in the United States from April 8, 2002 to April 7, 2003. The petitioner also submitted copies of the U.S. entity's IRS Form 1120, U.S. Corporation Income Tax Return for 2002, IRS Form 941, Employer's Quarterly Federal Tax Return for the fourth quarter of 2002, and NYS-45-MN, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return. The petitioner submitted as evidence a copy of a three-year Diploma in Business Administration from the University of Allahabad issued to [REDACTED] in 1974, and a copy of a Bachelor of Science Degree in Engineering Technology from the New Jersey Institute of Technology issued to [REDACTED] in May of 2002.

In the request for evidence, dated May 9, 2003, the director requested in part:

Submit a comprehensive description of the beneficiary's duties. (Emphasis in original.) Also, indicate how the beneficiary's duties have been, and will be, managerial or executive in nature. (Emphasis in original.) For executive or managerial consideration, you must: (1) demonstrate the beneficiary functions at a senior level within an organizational hierarchy other than in position title, and (2) demonstrate the beneficiary has been, and will be, managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties, if appropriate. (Emphasis in original.)

Submit a list of your United States employees identifying each employee by name and position title. In addition, submit a complete position description for each of your United States employees. Submit a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis, including one for the beneficiary.

Submit the United States entity's organizational chart describing its managerial hierarchy and current staffing levels.

In response to the director's request for evidence, the petitioner described the beneficiary's duties as:

- Responsible for tactical implementation of corporate strategic plan; management of day-to-day operations of the corporation. (9 hrs/wk).
- Set and achieve sales performance goals. (3 hrs/wk).
- Manage all financial aspects of business. (3 hrs/wk).
- Develop and implement financial performance standards. (3 hrs/wk).
- Accountable for development and implementation of retail operational standards and all corporate policies. (3 hrs/wk).
- Develop, implement and measure operating systems and quality operational standards. (3 hrs/wk).
- Negotiate and oversee purchase contracts. (2 hrs/wk).
- Successful in creating and implementing strategic plans, settings and administering budgets and developing improved processes to meet short and long term objectives. (6 hrs/wk).
- Act as liaison and representative for Petitioner and foreign parent company. (5 hrs/wk).
- Hire, develop and lead marketing and sales staff. (3 hrs/wk).

The petitioner described the marketing officer's job duties in the United States as:

- Develop firm's detailed marketing strategy, including product development and market research and determine the demand for products and services offered by the firm and its competitors and identify potential customers-for example, business firms, wholesalers, retailers or the general public (16 hrs/wk).
- Develop pricing strategy with a view towards maximizing the firm's share of the market and ultimately its profits (7 hrs/wk).
- In coordination with sales manager, monitor trends that indicate the need for new products (3 hrs/wk).
- Experienced in operating restructuring to address business growth, reduce costs and improve service. (4 hrs/wk).

The petitioner described the web master's job duties in the United States as:

- Develop and maintain company website, including designing graphics and text (15 hrs/wk).
- Oversee all Internet inquiries. (15 hrs/wk).
- Use latest technology to arrange online marketing and sales (10 hrs/wk).

The petitioner submitted a copy of the U.S. entity's organizational chart, which depicted the beneficiary as CEO, with a marketing manager and web designer under his direction. The chart also showed that a sales representative and sales assistant were under the direction of the marketing manager who in turn was under the direction of the beneficiary. The petitioner also submitted copies of two employment appointment letters; one appointing the marketing officer to begin work for the U.S. entity on January 6, 2003, and the other appointing the web designer to begin work for the U.S. entity on January 13, 2003. The petitioner submitted copies of Form W-2 and W-3 for 2002, and Form 941 for the fourth quarter in 2002 as evidence.

The director subsequently denied the petition noting the inconsistencies contained in the record with regard to the actual number of employees employed by the U.S. entity at the time the petition was filed. The director stated that according to the company's 2002 tax returns, the beneficiary was the only employee compensated for his services in that year. The director further stated that based upon the gross receipts figures for 2002 and employee information contained in the petitioner's tax documents, it didn't appear that the entity employed a sales person during that period, and that therefore, the beneficiary was most likely primarily engaged in providing sales and/or services to the organization's clients rather than directing the organization. The director also stated that the record failed to demonstrate that the beneficiary would function at a senior level within the organizational hierarchy or that he would be managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties. The director stated that the beneficiary's duties as described were vague and resembled general managerial functions and restated portions of INS regulations. The director also stated that the subordinate's duties as described were mundane. The director concluded that based on the company size and nature of the U.S. entity, it was unlikely that the beneficiary would be engaged in primarily managerial or executive duties.

On appeal, counsel argues that the evidence is sufficient to establish that the beneficiary has been and will be employed by the U.S. entity in a primarily managerial or executive capacity. Counsel contends that the petitioner explained that the beneficiary did not begin work for the U.S. entity until November of 2002 and that the company hired two additional employees in January of 2003. Counsel further contends the petitioner submitted all tax documents for 2002, and that none were requested and therefore, none were submitted for the 2003 tax year. Counsel also contends that the petitioner submitted descriptions of employee job duties as

requested by the director. Counsel argues that the beneficiary's job duty descriptions do not "parrot" the regulations. Counsel further argues that the director ignored the relevant regulations by not accurately considering the beneficiary's primary duties and by failing to take into consideration the reasonable needs of the organization in light of its overall purpose and state of development. Counsel also argues that Citizenship and Immigration Services (CIS) ignored relevant evidence submitted, and wholly skipped timeline explanations concerning the number of employees employed by the U.S. entity and the steady growth in revenue experienced by the organization.

Counsel claims the petitioner employed three individuals at the time the petition was initially filed and hired two additional employees subsequent to the Request for Evidence. Counsel also contends that the U.S. entity business has been and continues to grow and develop. However, the evidence shows that the petitioner had been doing business in the United States for more than one year prior to the filing of the instant petition. Therefore, it will not be considered a new office pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(F) for purposes of evaluating the beneficiary's position in the U.S. entity. In this matter, the evidence demonstrates that the U.S. entity is still in its developmental stage and that the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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 must clearly describe the duties to be performed by the beneficiary and 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 not clear from the evidence which of the beneficiary's duties are considered managerial and which are considered executive. Nor has the petitioner submitted sufficient evidence to demonstrate that the beneficiary's position has involved and will involve significant authority over generalized policy or that the job duties she performs are primarily managerial or executive in nature.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include planning, developing and establishing policies and objectives, and supervises the development of new products and techniques. The petitioner did not, however, describe its goals or policies, or clarify who actually develops the petitioner's products and techniques. 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). 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).

Rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as directing the entire operation of the organization, establishing goals and policies of the organization, and exercising sole discretionary decision making. However, 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 does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd.* 724 F. Supp. at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. The beneficiary is not primarily engaged in supervising a staff of professional employees.

Even though the petitioner claims that the beneficiary directs and manages the petitioner's sales activities, it does not claim to have had anyone on its staff at the time the petition was filed to actually perform the sales function. Thus, either the beneficiary himself is performing the sales function or she does not actually manage the sales function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing the sales function, the AAO notes 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).

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* § 101(a)(44)(C) of the Act, 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).

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Accordingly, the appeal will be dismissed.

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.