

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529

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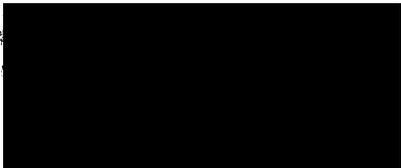


FILE: WAC 03 176 50201 Office: CALIFORNIA SERVICE CENTER Date: JUN 13 2005

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

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DISCUSSION: The nonimmigrant visa petition was denied by the Director, California 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 incorporated in 2002 and claims to be engaged in the import and wholesale of women's shoes. The petitioner claims that the U.S. entity is a subsidiary of [REDACTED] located in Indonesia. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager for a period of two years, at an annual salary of \$50,000.00. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary would be employed by the U.S. entity primarily in a 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 determination and asserts that the beneficiary's duties have been and will continue to be managerial or executive in nature.

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.

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.

The petitioner initially stated in the petition that the beneficiary would be responsible for executing business goals and policies as set by the board, developing a U.S.-based business network, representing the foreign

entity in contract negotiations, and supervising department heads and other employees. The petitioner submitted a copy of the U.S. entity's IRS Form 1120 for the year 2002. In a letter of support, dated May 15, 2003, the petitioner described the beneficiary's duties as:

1. Execute business goals and policies as set by the board
 - [The beneficiary] will be responsible for implementation of our strategy of increasing US sales, such as marketing, trade show, promotions, etc.;
 - [The beneficiary] will be responsible for the acquisition of larger facility [sic], including warehouse facility [sic] for our US subsidiary;
 - [The beneficiary] will spend approximately 35% of his time on these duties.
2. Continue to develop US business network [sic], represent parent company in contract negotiation[s]
 - [The beneficiary] will continue to develop business contacts and to establish additional sales;
 - [The beneficiary] will represent our company at all contract negotiations and pricing structures;
 - Marketing services: order processing, sampling, customization/packaging, and brochure design for customers;
 - Production planning: coordination of material purchase, production schedule, quality assurance, finished product, packaging customization;
 - Shipping: supervise and coordinate payment arrangements, shipping schedule, shipping document – letter of credit, billing of lading, [sic] custom forms, certificate of origin, and fumigations;
 - [The beneficiary] will spend 50% of his time on these duties.
3. Supervise department heads and of [sic] employees (firing and hiring of staff).
 - [The beneficiary] will continue to implement our staffing increase to maintain and create a work force sufficient to support our business;
 - [The beneficiary] will spend 15% of his time on these duties.

In response to the director's request for evidence on this subject, the petitioner submitted an organizational chart depicting the hierarchical structure of the U.S. entity. The chart demonstrated that the entity employed the beneficiary as general manager, along with a sales and accounting manager, an account representative, and a part-time bookkeeper. The chart also showed a warehouse manager, shipping and receiving, and warehouse staff positions that had not yet been filled. The petitioner also submitted Form DE-6, Quarterly Wage and Withholding Report for the quarters ending September 31, 2002, December 31, 2002, March 31, 2003, and June 30, 2003.

The director, in denying the petition, stated that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director noted that although the petitioner had stated that the beneficiary would be supervising executive and management personnel by the end of its first year in operation, it had failed to establish that the beneficiary was engaged in such supervision with the submission of the instant petition. The director also noted that based upon a review of the evidence it appeared that the beneficiary, rather than managing the U.S. entity, would be performing the day-to-day operations of the business. The director stated that based upon the number of employees employed by the U.S. entity, the nature of the business (import and wholesale of women's shoes), and the volume of sales, it was evident that the beneficiary would be involved in providing the entity's product. The director further stated that based upon the description of the beneficiary's job duties,

if accurate, he would be primarily performing sales duties. The director also stated that the beneficiary's duties described as developing business contacts, contract negotiations, and marketing have not been demonstrated to be managerial or executive in nature.

On appeal, counsel disagrees with the director's decision and asserts the director failed to properly apply the definitions of managerial and executive capacities to the facts in the instant matter. Counsel reiterates the beneficiary's duties described in the petition and contends that the descriptions indicate the beneficiary possesses significant authority over generalized policy within the U.S. entity. Counsel further contends the term "generalized policy" is inherently "broad and general," and therefore, complies with regulatory requirements. Counsel also contends that the beneficiary, as general manager, is inevitably involved in providing the company's product to its customers. Counsel contends that the beneficiary is involved in this process in that he sets goals and policies, and direction for his staff to follow. Counsel asserts the petitioner has a sales representative and a manager of sales and accounting to execute general and broad sales and marketing policies that are set forth by the beneficiary. Counsel reiterates the definition of executive capacity and asserts that the beneficiary's duties as an executive "largely match the requirements set forth in 8 C.F.R. § 214.2(l)(1)(ii)(C)." On appeal, the petitioner resubmits copies of the U.S. entity's balance sheet as of June 30, 2003, and Form DE-6, Quarterly Wage and Withholding Report for the quarters ending September 31, 2002, December 31, 2002, March 31, 2003, and June 30, 2003. The petitioner also resubmits copies of the letter of support, dated May 15, 2003, and letter in response to the request for evidence, dated July 15, 2003. The petitioner submitted a copy of an unsigned commercial lease agreement, dated July 21, 2003.

Counsel's assertions are not persuasive. On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. In evaluating whether the beneficiary will be employed in a primarily managerial or executive capacity, the AAO will look first to the petitioner's description of the beneficiary's 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 either in an executive or managerial capacity. *Id.* In the instant matter, the record demonstrates that the beneficiary will perform various job duties while employed by the U.S. entity. Although the petitioner indicates that the beneficiary will be responsible for establishing company goals and policies and for supervising department heads and other employees, there has been no evidence submitted to substantiate this claim.

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 will spend 35 percent of his time executing business goals and policies, 50 percent of his time will be spent marketing products and negotiating contracts, and 15 percent of his time will be spent supervising department heads and other employees. The petitioner did not, however, detail the organization's goals and policies, nor clarify the beneficiary's duties in marketing the petitioner's products or in supervising department heads. 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).

Further, 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 establishing and executing business goals and policies of the organization. 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. v. Sava, supra.*; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner stated that the beneficiary spends 50 percent of his time marketing the U.S. entity's products. In addition, the petitioner describes the beneficiary as being responsible for the U.S. entity's marketing services, production planning, and shipping and receiving departments. However, evidence of record does not demonstrate that the U.S. entity has a marketing or production department. Further, the evidence shows that the warehouse, shipping and receiving departments have yet to be staffed. Accordingly, it appears that the beneficiary would necessarily have to perform non-qualifying job duties associated with producing, marketing, warehousing, and shipping and receiving the petitioner's products. Since the beneficiary would actually have to perform such non-qualifying duties, he will be performing tasks 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).

Although the petitioner asserts that the beneficiary will be managing department heads, 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. In this matter, it appears the beneficiary will be responsible for supervising shoe assemblers and administrative staff. Because the beneficiary will be primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity. Likewise, it appears from the record the beneficiary will only be spending a fraction of his time actually performing executive duties.

The petitioner infers throughout the record that it plans to hire additional managers and employees in the future. In addition, the U.S. entity's organizational chart depicts proposed employee positions. However, 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 Citizenship and Immigration Services (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 this 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.

Beyond the decision of the director, the petitioner has not established that it is eligible for an extension of the initial one-year "new office" validity period. As previously noted, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not satisfied all of the enumerated evidentiary requirements.

Although the petitioner claims that it has acquired sufficient physical premises to house the U.S. entity, a review of the record demonstrates that the petitioner submitted a copy of an unsigned lease agreement for warehouse space, dated July 21, 2003. Counsel contends the lease agreement was submitted unsigned because it was still circulating for signature at the time the appeal was filed. It is noted that the petition in this matter was filed May 21, 2003. Therefore, the petitioner had not secured sufficient physical premises to house the new office pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A) at the time the instant petition was filed.

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.2nd 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.