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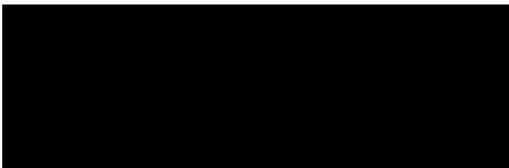
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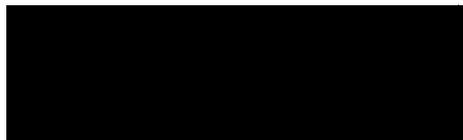
U.S. Citizenship
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Services

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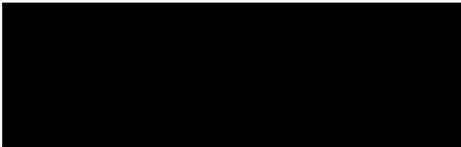
File: WAC 03 025.52092 Office: CALIFORNIA SERVICE CENTER Date: JUN 17 2005

IN RE: Petitioner:
Beneficiary:



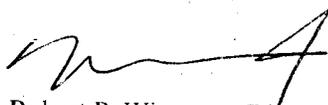
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 the importation and distribution of food products. The petitioner claims that it is the subsidiary of [REDACTED] located in [REDACTED]. The beneficiary was initially granted a two-year period of stay to open a new office in the United States, which was subsequently extended for an additional three years. The petitioner now seeks to extend the beneficiary's stay for two more years.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary has been and will continue to be employed in the United States in a primarily managerial or executive capacity; (2) the petitioner was doing business as required by the regulations; and (3) the petitioner had the financial ability to remunerate the beneficiary.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the director acted arbitrarily in denying the petition, and that the denial was not logical. In support of these contentions, counsel submits a brief and additional evidence for consideration.

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.

The first issue in this matter is whether the beneficiary will 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 the initial petition, counsel submitted a letter dated October 18, 2003 from the petitioner detailing the nature of the beneficiary's duties. Specifically, the petitioner stated:

Under [the beneficiary's] direction, the business volume of the U.S. subsidiary have [sic] grown tremendously. In consideration of [the beneficiary's] excellent performance, our company had filed an application to extend [the beneficiary's] L-1A visa

* * * * *

Under [the beneficiary's] policy, company operation, and business strategy, the sales volume of our business expanded rapidly. The gross sales of our company in the year 2001 raised [sic] to \$498,543.00. The current asset of our company as of 07-30-2002 reached \$196,277.21. These encouraging figures ensured us promising future sales revenue. In addition, there are large on-going contract negotiations and projects to which [the beneficiary] is personally involved and has in-depth knowledge.

On January 8, 2003, the director requested additional evidence pertaining to the nature of the beneficiary's position. Specifically, the director requested a description of the beneficiary's day-to-day duties for the past 6 months, and requested clarification as to the nature of the petitioner's business and the beneficiary's role therein.

In a response dated March 25, 2002, the petitioner, through counsel, submitted a detailed response to all of the points raised by the director. With respect to the beneficiary's duties, the petitioner stated:

The beneficiary's responsibilities included: To develop and maintain sales progress. To coordinate sales distribution by establishing sales territories, quotas, and sales. To advise dealers distributors, and clients concerning sales and advertising techniques. To analyzes [sic] sales statistics to formulate policy and to assist dealers in promoting sales. To review analyses to determine customer needs, volume potential, price schedules, and discount rates. To manage product simplification and standardization to eliminate unprofitable items from sales lines. To represent company at trade association meetings to promote products. To prepare periodic sales reports showing sales volumes and potential sales. To recommend budgets and expenditures.

The petitioner further stated that the beneficiary acted as the sales manager for the U.S. entity, and advised that in the capacity of sales manager, his duties could be described as follows:

The beneficiary usually spends the morning hours in the office in managing the sales personnel and matters. He allots time to process paper works such as reviewing and responding to correspondence; reports; contracts; and approving budget and sales proposals. He also receives and returns telephone calls from customers and business associates. Approximately once in a week, or when such need exists, he holds a regular meeting discussing sales matters, and to review and to discuss if promotional methods are necessary to boost the company sales volume.

The beneficiary usually spends the afternoon hours in the field, such as visiting markets to inspect our company products which are put on display by our vendors, or visiting our business associates discussing and negotiating terms of purchasing contracts. The beneficiary usually sets aside the late afternoon hours for appointments and meetings with visitors.

The beneficiary has also made business trips to attend food product meetings, to participate in trade shows and conventions, and to present progress report to our parent company.

The petitioner further stated that their peak season is during the holidays, namely, the Chinese and Vietnamese traditional holidays such as the Lunar New Year. During this period, the petitioner stated that the beneficiary is busy "gathering prices of competitors; checking and comparing product qualities, approving product prices; confirming purchase orders, negotiating and approving terms for discount and commission, inspecting product displays at vendors' markets, and participating in sales promotion activities."

On May 13, 2003, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, found that the evidence in the record was insufficient to warrant a finding that the beneficiary had been and would continue to be functioning in a capacity that was primarily managerial or executive. Specifically, the director found that the petitioner did not employ a sufficient staff to relieve the beneficiary from performing non-qualifying duties. Additionally, the director found that the beneficiary was involved in substantially all of the day-to-day duties of the business as opposed to merely directing such actions through other managers, supervisors, or professional employees.

On appeal, counsel asserts that the director's conclusion were erroneous, and submits the petitioner's quarterly tax returns for the quarters ending December 31, 2002 and March 31, 2003. Since these returns list another employee besides the petitioner [REDACTED] the petitioner alleges that it did employ a subordinate staff to relieve the beneficiary from performing non-qualifying duties, and thus it had established the beneficiary's eligibility. Specifically, counsel states that these documents "support the fact that the petitioning corporation maintained other employees performing clerical duties to subordinate [sic] the beneficiary."

Upon review, counsel's assertions are not persuasive. 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(1)(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.* The burden is on the petitioner to specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

As previously stated, the initial description of the beneficiary's duties was insufficient. Consequently, the director requested additional details regarding the beneficiary's duties and an example of a typical day in the beneficiary's job. The petitioner's response further clarified the beneficiary's duties, and explained that the beneficiary would devote a large portion of his time doing market research and dealing directly with clients and vendors. The response further indicated that the beneficiary would be performing customer service and administrative duties. Although a detailed description of the beneficiary's duties was provided, the petitioner failed to provide a breakdown in terms of the percentage of time he would devote to each duty.

Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. In this case, counsel alleges that the beneficiary is a manager by virtue of his position title, experience, and associated duties. However, the stated duties identified in the record do not substantiate the claims of the petitioner and counsel for two reasons. First, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial and non-executive. Although the petitioner provided an updated overview of the beneficiary's duties while in the U.S., it failed to provide a breakdown of the percentage of time spent on each of the identified duties. Consequently, it is impossible to determine, based on the current record, how much time the beneficiary will allocate to executive or managerial duties as opposed to the numerous non-qualifying duties listed in the response. The failure to provide this requested information is important because several of the beneficiary's daily tasks, such as representing the company at trade association meetings, participating in sales promotion activities, checking and comparing competitor prices, and receiving and returning calls from customers, do not fall directly under traditional managerial duties as defined in the regulations.

Additionally, it appears that the beneficiary is directly responsible for generating the services of the business, since some of the other specified duties, namely, visiting markets to inspect company products and meeting with visitors, are essential services needed to establish a company's reputation in the industry. Furthermore, there is no evidence in the record, other than the quarterly tax returns submitted on appeal, that the petitioner

employed any other individuals to relieve the beneficiary of these duties prior to the end of 2002. Therefore, absent evidence to the contrary, the beneficiary is directly responsible for generating the petitioner's business and potential sales and, thus, is personally ensuring that the petitioner's product and/or services penetrate the U.S. market. 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).

Finally, the fact that there is no evidence of a subordinate staff further supports the conclusion that the beneficiary has not been employed in a primarily managerial or executive capacity. Although a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying classification as a multinational manager or executive, it is appropriate for Citizenship and Immigration Services (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 § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C); see, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *id.*

As required by section 101(a)(44)(C) of the Act, 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. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise, which was established in 1996 and has employed the beneficiary for five years, justify the beneficiary's performance of non-managerial or non-executive duties, such as performing marketing duties and customer service tasks. 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).

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. Since there is no evidence that the petitioner employed any other individual until the final quarter of 2002, the AAO must conclude that the majority of the beneficiary's time has been spent performing the essential non-managerial duties necessary to the running of the company.¹ The burden is on the petitioner to clearly establish that the beneficiary qualifies as a manager or executive.

¹ The AAO notes that according to the quarterly tax returns for the quarters ending December 31, 2002 and March 31, 2003, the petitioner hired a second employee. However, the nature of this person's position, as well as his duties and job title, have been omitted from the record. Consequently, the AAO cannot

Counsel further alleges that CIS overlooked the petitioning entity as a whole, and failed to take into account the duties of all employees named in the record. At the time the petition was filed, however, the petitioner only employed one other employee in addition to the beneficiary. Although the petitioner alleges that numerous subcontractors work for the company, and the petitioner has since hired other employees and will continue to do so, these assertions are misplaced and unpersuasive. The regulation at 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 petitioner did not reach the point where it could employ the beneficiary in a predominantly managerial or executive position by the end of this one-year period.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties are primarily managerial or executive in nature. For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner has been doing business as required by the regulations for the previous year. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad."

In this matter, the petitioner claims that it is engaged in the importation and distribution of food products. The director denied the petition, finding that the petitioner had failed to satisfy the regulatory requirements for doing business, and specifically noted the absence of customs and regulatory documentations pertaining to the import business.

With the initial petition, insufficient evidence of the petitioner's business practices was submitted. Consequently, in the request for evidence issued on January 8, 2003, the director requested additional information pertaining to the nature of the petitioner's business. Specifically, the director requested a description of the petitioner's business and the role of the beneficiary therein. In the response filed on March 25, 2003, the petitioner submitted a large amount of documentation pertaining to the foreign entity, and a brief discussion of the U.S. business.

determine whether this employee actually did relieve the beneficiary from performing non-qualifying tasks in the last quarter of 2002, because no details are provided regarding this person's duties. More importantly, however, the fact that an additional employee was hired at the time the beneficiary's visa was due to expire (the valid period was January 1, 2000 through December 31, 2002) does not establish the beneficiary's eligibility as a manager or executive, since he was required to run the business alone in 2000, 2001, and the majority of 2002. The records for the first quarter of 2003 are likewise unpersuasive, since 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).

The director denied the petition on May 13, 2003, and specifically stated that the record failed to contain the company's Form 7525-V, and/or Shipper's Export Declaration for In-Transit Goods, Form 7513 or U.S. Customers Forms 7501, Entry Summary, and 301, Customs Bond. On appeal, counsel submits copies of the petitioner's Form 301 from 2000 and copies of its Forms 7501 from November and December 2002.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the previous year. However, the AAO must first note that the director's denial did not thoroughly address the grounds for denying the petition on this basis. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). In this matter, the director merely stated that the record did not contain certain customs forms, but did not explain why this statement had any relevance to the decision. The AAO will endeavor to explain why the petitioner failed to satisfy its burden of proof in this matter.

The record indicates that the beneficiary was granted an initial two-year period of stay from February 2, 1997 to December 31, 1999 to open a new office. The record further indicates that his stay was extended for an additional period, from January 1, 2000 through December 31, 2002. The petitioner claimed that it would engage in the importation and distribution of food products.

The record contains the following documentation regarding the business transactions for the petitioner during this period. For 1997, 1998, and 1999, a handful of shipping documents were submitted. There is no documentation whatsoever pertaining to the year 2000. For the year 2001, the record contains copies of invoices from January 23, 2001 and July 5, 2001. For the year 2002, the petitioner submitted a total of six invoices, one from April, two from June, one from July, one from August, and one from October.

In the course of examining whether a petitioning company has been doing business as an import and export firm, it is reasonable to request that the company produce copies of documents that are required in the daily operation of the enterprise due to routine regulatory oversight. Upon the importation of goods into the United States, the Customs Form 7501, Entry Summary, serves to classify the goods under the Harmonized Tariff Schedules of the United States and to ascertain customs duties and taxes. The Customs Form 301, Customs Bond, serves to secure the payment of import duties and taxes upon entry of the goods into the United States. According to 19 C.F.R. § 144.12, the Customs Form 7501 shall show the value, classification, and rate of duty for the imported goods as approved by the port director at the time the entry summary is filed. The regulation at 19 C.F.R. § 144.13 states that the Customs Form 301 will be filed in the amount required by the port director to support the entry documentation. Although customs brokers or agents are frequently utilized in the import process, the ultimate consignee should have access to these forms since they are liable for all import duties and taxes. Any company that is doing business through the regular, systematic, and continuous provision of goods through importation may reasonably be expected to submit copies of these forms to show that they are doing business as an import firm. In this case, there are no copies of such forms, aside from those submitted on appeal, to establish that the petitioner was regularly, systematically, and continuously providing goods through importation as it claims.

In addition, it is clear that the petitioner also failed to regularly, systematically, and continuously provide goods through distribution during this period. Thus, the petitioner was not doing business during the relevant period as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO acknowledges the petitioner's claim that business may have been slow to start. However, the record is devoid of an explanation as to what the petitioner did during the most recent period, from January 1, 2000 through December 31, 2002, and a total of 8 invoices during this period is not enough to establish that the petitioner has been conducting a regular and continuous distribution business during this time.

The regulation at 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of a new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) require the petitioner to demonstrate that it has been doing business for the previous year. In the present matter, the evidence submitted at the time of filing confirmed that the petitioner had not been conducting business as required, and notably, the petition in this matter was filed over five years after the petitioner commenced operations. For this additional reason, the petition may not 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.