

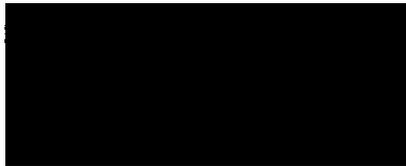
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FILE: EAC 02 166 53129 Office: VERMONT SERVICE CENTER Date: JUN 28 2005

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

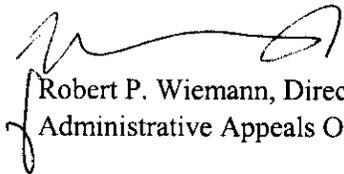
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 Director, Vermont 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 is a new office engaging in the jewelry retail, wholesale, and export business. It seeks to employ the beneficiary as its chief executive, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition, concluding the U.S. entity would not support a primarily managerial or executive position within one year of approval of the petition and, therefore, the beneficiary would not be employed in the U.S. entity in a qualifying capacity.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel claims that the director erred by failing to closely examine the evidence of record and by applying a stricter and incorrect standard of law for a “new office” as defined in 8 C.F.R. § 214.2(l)(3). Counsel submits a detailed brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary’s application for admission into the United States, 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. 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 in part 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.

Moreover, pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;

- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The issue in this proceeding is whether within one year of approval of the petition the beneficiary would be employed in 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In an addendum to Form I-129, petition for a nonimmigrant worker, the petitioner provided the following description of the beneficiary's proposed duties in the United States:

The beneficiary has been elected a director of the U.S. subsidiary. Upon his arrival, he will assume the role of Chief Executive of the U.S. subsidiary. In this role, he will guide, direct, and manage the U.S. subsidiary. His responsibilities will include starting the location in New Jersey, organizing it, developing it, and growing it.

In addition, counsel for the petitioner stated in a letter accompanying the petition that the beneficiary would "make the major business decisions, including establishing overall objectives, and business development strategies." The initial petition contained no information regarding the staff of the U.S. entity, actual or projected, other than the beneficiary.

On October 5, 2002, the director requested that the petitioner submit additional evidence to establish that the beneficiary will be employed in a primarily managerial or executive capacity by the U.S. entity. Specifically, the director requested: (1) an organizational chart for the U.S. entity; (2) a comprehensive description of the beneficiary's proposed duties, indicating how the beneficiary's duties will be managerial or executive in nature; (3) a complete position description for and educational credentials of all of the beneficiary's subordinates in the U.S. entity; and (4) a breakdown of the number of hours devoted to each employee's job duties on a weekly basis.

In a response dated October 14, 2002, counsel for the petitioner indicated that at that time, there were no employees or staff in the U.S. office. Counsel further stated that as Chief Executive Officer, the beneficiary "will first manage a function – that of development of the retail business for the first year of business." Counsel submitted an organizational chart with ten positions below the beneficiary, and indicated that the beneficiary would begin hiring as the business moves beyond the formative stages, and would try to achieve the staffing objectives within the first year. Counsel also described the beneficiary's anticipated duties as follows:

His proposed supervisory duties include supervising an Accountant, Business Developer/Marketing Manager, Design Expert and Showroom Manager. The work performed by [the beneficiary] will consist of supervising the Design Expert to ensure the jewelry's purity and superior quality. He will also supervise the Business Developer/Marketing Manager to study the U.S. market, to identify areas where [the petitioner's] retail business can grow. [The beneficiary] will also engage in supervising and

overseeing the development of prospective markets in the U.S. He will supervise both the [d]esign team and [b]usiness development team to study the U.S. customer requirements and sensibilities.

[The beneficiary] will also oversee the general management of [the petitioner]. For this reason, beneficiary will supervise an Accountant and Showroom manager in the U.S. entity. These personnel will be responsible for the general day-to-day operations of the retail business.

The petitioner submitted job descriptions, indicating the percentage of time to be spent weekly on each duty, for the positions of accountant, business developer/marketing manager, showroom manager and design expert. There was no hourly breakdown per job duty provided for the beneficiary.

On October 28, 2002, the director denied the petition. The director determined that the record does not demonstrate that the beneficiary would be employed in a primarily managerial or executive position within one year of approval of the petition, or that the U.S. entity could support such a position within a year's time. Specifically, the director found that the description of the beneficiary's position was vague, does not expound on the beneficiary's day-to-day activities, and merely paraphrases the regulatory definition of a manager or executive. The director further found that the beneficiary would be engaged in the non-managerial, day-to-day operations involved in fabricating a product or providing a service rather than performing primarily executive or managerial job duties. The director also concluded that the petitioner did not establish that the beneficiary would manage supervisory, professional, or managerial employees who would relieve him from performing the services of the U.S. entity. The director therefore concluded that the beneficiary does not qualify for L-1 classification.

On appeal, counsel contends that in denying the petition, the director made a subjective judgment as to whether the petitioner will succeed or fail in its first year of business, which is beyond the scope of the director's authority and jurisdiction under the regulations. Counsel further contends that the director's denial is prejudicial toward small businesses and start-up companies setting up "new offices" in the United States. Counsel reiterates much of the information previously provided regarding the beneficiary's anticipated position in the U.S. entity, this time including a percentage breakdown of the beneficiary's job duties. Counsel then asserts that the petitioner has "clearly established" that the beneficiary will be involved in an executive or managerial capacity in the U.S. entity.

Counsel's assertions on appeal are not persuasive. The director did not make a determination "as to whether the petitioner will succeed or fail in its first year of business," as counsel contends. The director determined that the record does not establish that the intended United States operation, within one year of the approval of the petition, would support an executive or managerial position occupied by the beneficiary, in accordance with the regulations at 8 C.F.R. § 214.2(l)(3)(v)(C). Upon review of the record, the AAO concurs with the director's conclusion.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans, organizational structure, and size of the United States investment, and thereby

establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The AAO recognizes that while the petitioner submitted descriptions of certain managerial job duties to be performed by the beneficiary in the U.S. entity following the developmental stage, the petitioner has not sufficiently established that, within one year of approval of the petition, the beneficiary's responsibilities would be in a primarily managerial or executive capacity. Whether the beneficiary will be a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, although requested by the director, the petitioner fails to provide a breakdown of the amount of time the beneficiary would spend each week on each job duty. Absent that information, it cannot be determined based on the record what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner's 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).

The AAO notes that counsel includes in his appeal brief a percentage breakdown of the beneficiary's intended duties. However, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The AAO will not consider such information submitted for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Moreover, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The appeal will be adjudicated based on the record of proceeding before the director.

Additionally, the record does not demonstrate that the beneficiary would be relieved from performing non-qualifying functions within the requisite one year of approval of the petition. As counsel indicated in his letter in response to the director's request for further evidence, "there are currently no employees or staff in the U.S. office." Although the organizational chart identifies ten proposed employees who would be subordinate to the beneficiary, the record does not indicate that there is any set timeline for hiring these employees. Moreover, the petitioner indicated in its "profitability projections" that the projected employee salaries for the first year would be \$69,600. Considering the beneficiary's annual salary is set at \$40,000, the remaining \$29,600 cannot be sufficient to cover the first year salaries of the projected subordinate staff. It is therefore unclear whether any of the projected staff indeed would be in place to relieve the beneficiary from performing non-qualifying job duties to function in a primarily managerial capacity. 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). Also, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Moreover, the petitioner has not provided adequate documentation establishing that the U.S. entity will support the beneficiary in a managerial or executive position within one year of approval of the petition. Other than five short paragraphs discussing the "business expansion plan" of the U.S. entity in a letter counsel submitted with the petition, the record does not contain a detailed business plan in which the company's policies, strategies, and financial goals are clearly defined. The record also contains insufficient information

regarding the foreign entity's financial ability to remunerate the beneficiary and to commence doing business in the United States, as required by the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The AAO is unable to determine the financial status of the foreign organization as all financial data submitted by the petitioner is identified in rupees rather than U.S. dollars. *Cf.* 8 C.F.R. § 103.2(b)(3). Moreover, the petitioner only substantiated a transfer of funds in the amount of US\$40,000 from the foreign entity to the U.S. entity. This amount does not appear sufficient to remunerate the beneficiary and to allow the U.S. entity to commence doing business, given the projected operating cost for the first year of US\$206,600, as stated in the profitability projections provided by the petitioner. Counsel indicated in his letter accompanying the petition that the foreign entity "plan[s] to transfer over [an] additional US\$100,000 to meet the operating needs of [the] U.S. entity." However, even assuming that the additional funds would be sufficient to remunerate the beneficiary and to allow the U.S. entity to commence business, a statement by counsel of the foreign entity's intention to take such action in the future is not sufficient to meet regulatory requirements. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. 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). Also, 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).

Based on the evidence presented, the record does not demonstrate that within one year of approval of the petition the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity.

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.