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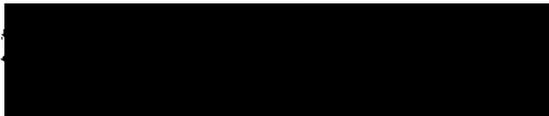
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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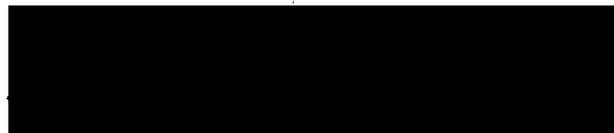


File: WAC 04 076 52819 Office: CALIFORNIA SERVICE CENTER Date: JUN 29 2005

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)

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 general manager 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 retail sale of consumer goods and gifts. The petitioner claims that it is the subsidiary of [REDACTED] located in Shinding City, Taiwan. The beneficiary was initially granted a one-year period of stay in the United States, and the petitioner now seeks to extend the beneficiary's stay for an additional three years.

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

On appeal, counsel for the petitioner submits additional evidence and descriptions with regard to the beneficiary's duties and contends that this newly-submitted evidence establishes the beneficiary's eligibility for the benefit sought.

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 managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary 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 from the petitioner dated January 11, 2004 detailing the nature of the beneficiary's duties. Specifically, the petitioner listed his duties as follows:

1. Overseeing and supervising all departments in [the petitioner], i.e. the purchasing department, the sales department, personnel department, and the accounting department.
2. Exercising firing and hiring authority throughout [the petitioner].
3. Overseeing and supervising all day-to-day operations of [the petitioner].
4. Directing, implementing, and formulating [the petitioner's] corporate strategies.
5. Reporting to the president and the board of directors of [the foreign entity].

On February 3, 2004, the director requested additional evidence. Specifically, with regard to the beneficiary's claimed managerial/executive position, the director requested a more detailed description of the beneficiary's duties as well as the duties and position titles of all the petitioner's other employees. Additionally, the director requested a breakdown of the amount of time each employee devoted to each of the identified duties.

In a response dated February 27, 2004, the petitioner submitted a response to the director's request. In the response, the petitioner stated that it currently employed a total of three employees including the beneficiary, and restated the previously provided description of the beneficiary's duties. In addition, in lieu of providing an organizational chart for its organization, the petitioner provided the following list of the names, titles, and salaries of its employees:

Name: [Beneficiary]

Position: President
Education: Bachelor's Degree in Banking
Salary: \$50,000/annually

Name: [REDACTED]
Position: Business Consultant
Education: Bachelor's Degree in Accounting
Salary: \$12,000/annually

Name: [REDACTED]
Position: Secretary
Education: Certificate of Business Studies
Salary: \$36,000/annually

In addition, the petitioner provided copies of its state quarterly wage reports and its payroll summaries from August 2003 to the present as well as copies of its federal quarterly wage reports for the quarters ending June 30, 2003, September 30, 2003 and December 31, 2003.

On March 16, 2004, the director denied the petition. The director 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 executive or managerial. Specifically, the director found that the petitioner's failure to provide a detailed description of the beneficiary's subordinate employees, coupled with the fact that the business consultant earned only \$1,452 in 2003, suggested that the beneficiary was not performing managerial or executive duties since he was not overseeing a staff of professionals. In addition, the director concluded that as a result of this employment structure, the beneficiary was primarily performing many of the day-to-day tasks essential to the operation of the business as opposed to exclusively managerial or executive tasks. Finally, the director noted that a new office is given one year in which to become established and in which to support a managerial or executive position, and noted that based on the evidence provided, the petitioner did not possess the organizational complexity at the end of this first year to support the beneficiary in such a position.

On appeal, the petitioner addresses the director's conclusion that the petitioner lacked the organizational complexity to employ the beneficiary in a primarily managerial or executive capacity, and provides three reasons for the petitioner's slow development: (1) the board of directors was indecisive with regard to the petitioner's business plan; (2) the beneficiary was busy tying up loose ends abroad and his trans-pacific trips during the first year of operations hindered the petitioner's ability to become established; and (3) the petitioner had difficulty obtaining office space and did not secure its current lease until July 2003. Consequently, the petitioner contends, the beneficiary had only six months to "set up the shop."

The petitioner further states that in response to the director's denial, the petitioner's board of directors "convened and decided, within a week (decisively this time due to the fact that it realized the stake was high), that the [p]etitioner shall be given all the resources it needed in order to continue with the business plan." As a result, the petitioner was authorized by the board to hire the necessary executives, managers,

and staff, and it submitted copies of job advertisements placed by the beneficiary as evidence of this step on appeal.

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, the number of hours worked per week, and a breakdown of a typical week in the beneficiary's job. The petitioner's response failed to provide additional details and merely restated the list of five duties previously submitted.

The petitioner failed to provide a sufficient description of the beneficiary's duties despite the director's specific request. 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, consequently, has reviewed the brief description of duties provided and concurs with the director's conclusions. The petitioner has used the terms "overseeing," "exercising," and "directing," all of which do not sufficiently describe the exact nature of the beneficiary's duties. 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). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. In this case, the petitioner has merely paraphrased portions of the regulatory definitions in lieu of providing a detailed and thorough description of the beneficiary's actual duties. Consequently, the petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Id.* at 1108.

Consequently, it is impossible to determine, based on the current record, what the beneficiary actually does in the course of his employment and how much time the beneficiary will actually allocate to executive/managerial duties. Although the record establishes that the beneficiary oversees two other employees, this fact alone is not enough to establish that the beneficiary qualifies as a manager, particularly since the petitioner has failed to present a thorough description of the beneficiary's role in the organization.

As discussed by the director, the business manager earned a salary of only \$1,452 for the year 2003, and his employment records indicate that he was not hired until November 2003. The record further indicates that the secretary was hired on July 29, 2003. Based on this minimal documentation, it does not appear that the beneficiary had been supervising a subordinate staff of managers or professionals. Without providing a detailed description of their duties or the minimum qualifications required to perform the duties of the position, the AAO is unable to conclude that by virtue of overseeing subordinate staff the

beneficiary qualifies as a manager. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* section 101(a)(44)(A)(ii) of the Act.

Though requested by the director, the petitioner did not provide any details with regard to the level of education or minimum qualifications required to perform the duties of its business consultant and its secretary. Furthermore, the petitioner failed to provide a description of their positions beyond their position titles. Any 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). Thus, the petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner has failed to establish that the beneficiary's duties are primarily managerial or executive in nature and has submitted no information to establish the percentage of time the beneficiary actually performs or will perform the claimed managerial or executive duties. It appears from the record that there are only two other employees working for the petitioner and that the beneficiary maintains a full-time position. Collectively, in addition to the inadequate description of the beneficiary's duties, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. Furthermore, the petitioner admits on appeal that it will seek to hire new employees because "it is not feasible for the beneficiary, as the General Manager, to carry out the business plan entirely on his own." As stated in the statute, the beneficiary must be *primarily* performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. This statement by the petitioner acknowledges that the beneficiary, to date, has been performing many or all of the routine tasks of the business in order to commence the petitioner's business operations. The petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future and attributes the petitioner's inability to support the beneficiary in a managerial or executive position to his multiple trans-pacific travels and the board of director's hesitancy to approve the petitioner's business plans. While these reasons certainly explain why the petitioner has not developed extensively in the past year, they are insufficient to overcome the denial in this matter. 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. Despite the most legitimate excuses, 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 has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary will be acting in a primarily managerial or executive capacity.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business from January through July of 2003. For this additional reason the petition may not be approved.

In addition, the record reflects that the U.S. entity did not secure a commercial lease until, July 8, 2003 nearly six months after the approval of the original new office petition. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. In the present matter, either the petitioner did not comply with this requirement, misrepresented that they had complied, or the director committed gross error in approving the petition without evidence of the petitioner's physical premises. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(l)(9)(iii).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.