

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PETITION COPY

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



U.S. Citizenship
and Immigration
Services

D7



File: WAC 02 061 54291 Office: CALIFORNIA SERVICE CENTER Date: MAY 11 2005

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

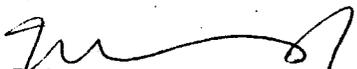
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


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, a Hawaii corporation, is the affiliate of [REDACTED] located in Fukuoka, Japan, and is engaged in the exportation of clothing. The petitioner also advised that it recently began operating a video rental and retail operation. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted that the evidence in the record was insufficient to establish that the petitioner would primarily be functioning in a managerial or executive role, since the record indicated that the beneficiary would be performing the majority of the company's day-to-day tasks himself.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner asserts that the denial was erroneous, and that the director misinterpreted the law with regard to the beneficiary's position. Specifically, counsel reiterates that the beneficiary is the only person in charge of the U.S. petitioner, and thus functions as both a manager and an executive. In support of this contention, counsel submits a brief and additional evidence.

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 primary issue in this matter is whether the beneficiary has been and will continue to 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 November 27, 2001, which provided an overview of the U.S. entity's business dealings and the beneficiary's role within this structure. With regard to the beneficiary, the petitioner stated:

As the principal officer and financial head of [the petitioner] in Honolulu, Hawaii, his principal duties entail, besides management of the day-to-day activities of the company, the buying of merchandise in the United States, for export to Japan for the various stores owned and operated by the foreign company . . .

* * * * *

. . . . [The beneficiary], as the principal buyer and General Manager and operator of [the petitioner] has supervised the overall activities of the company in Hawaii and will continue to do so as is demonstrated by the financial statements prepared by [REDACTED], attached.

The petitioner further stated that the beneficiary had studied fashion design in Japan, and that the U.S. petitioner currently employed one other person.

On January 15, 2002, the director requested additional evidence pertaining to the manner in which the beneficiary functioned primarily in a managerial and/or executive capacity. The request specifically asked

the petitioner to submit a more detailed description of the beneficiary's duties, including the percentage of time devoted to each of these duties. Additionally, the director requested an organizational chart for the U.S. entity denoting all employees by name and position title, and requested details regarding the employees' job titles, dates of employment with the petitioner, educational level, and salary. Furthermore, the director requested details regarding which employees were deemed professional, supervisory, or managerial, and requested proof of the petitioner's employment of all named individuals. In the petitioner's response, an organizational chart was submitted which indicated that the beneficiary, as president, buyer, general manager, and shipping clerk, oversaw one other employee, namely [REDACTED] the sales manager. Below Mr. [REDACTED] on the chart were [REDACTED], and [REDACTED]

In addition to the organizational chart, the petitioner submitted several letters. First, the petitioner submitted a letter from [REDACTED] C.P.A., dated February 6, 2002, which explained that his accounting firm had represented the petitioner since July 2000. He stated that their services to the petitioner included bookkeeping, consultation and corporate income tax preparation, and payroll and payroll tax accounting. The second letter, dated February 13, 2002, was from the beneficiary, who, in his capacity as president of the petitioner, explained his duties and the organizational structure of the company. Essentially, the beneficiary stated that the U.S. petitioner did not need many employees, because the nature of its business was purchasing goods and shipping them to the foreign entity in Japan. Since the petitioner utilized the services of Offroad Express, a shipping company, the need for additional employees, according to the beneficiary, was obviated. The petitioner further stated that all accounting and bookkeeping was done by Mr. [REDACTED]. Finally, counsel for the petitioner submitted a four-page letter, dated February 6, 2002, addressing the director's queries in the request for evidence.

Counsel's letter corroborated the beneficiary's claims, and essentially stated that the beneficiary and the sales manager were capable of handling all of the petitioner's operations on their own. Counsel stated that the beneficiary acted as the principal purchase buyer and agent for the petitioner, and the sales manager assisted him with these tasks. Counsel confirmed that the two other agencies listed below the sales manager on the organizational chart were outside agencies hired as independent contractors to assist the petitioner in specialized areas. Finally, counsel provided the following description of the beneficiary's duties:

General management functions:	15%
Purchasing, selection of merchandise, meeting and review of merchandise with manufacturers and wholesaler:	50%
Communication and discussions with Japan:	10%
In-office function of shipping, detail inventory, etc.:	10%
General sales activity and meeting with new manufacturer, agent, distributor of new products:	15%

In addition, counsel stated:

[The beneficiary's] basic day-to-day duties at the company includes [sic] the supervision of [REDACTED] coordination with Offroad Shipping Company and working with [REDACTED]. [The beneficiary] is principally involved in working with the attorneys and the accountants on a regular basis to determine the day-to-day needs of the company.

Finally, counsel noted that Mr. [REDACTED] graduated from Northwest Missouri State, but did not state what degree he received.

On March 26, 2002, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary was primarily employed in a managerial or executive capacity. The director further concluded that the evidence appeared to suggest that the beneficiary, as buyer for the U.S. company, performed most of the day-to-day tasks of the business, and therefore his duties were not primarily managerial or executive. Furthermore, the director concluded that the petitioner employed only one other employee, and based on his general duties, which were unspecified, the beneficiary was not relieved from performing the general operational and administrative tasks of the business.

On appeal, counsel for the petitioner reasserts that the beneficiary is the sole person in charge of the U.S. entity, and paraphrases the regulatory definitions of managerial and executive capacity when restating the beneficiary's duties. Counsel specifically states that the petitioner's type of business does not require a large staff, and further states that the video rental and retail store, which the petitioner recently acquired, is run by Mr. [REDACTED] the sales manager.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner'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 description of duties provided by the petitioner in the initial petition did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a generic description of the nature of his duties, and at times merely paraphrased the regulatory definitions. As previously stated, the initial evidence submitted was insufficient to warrant approval, and consequently, the director requested more specific information, including details regarding the beneficiary's duties and the duties of his subordinates. The evidence submitted in response to the director's request for evidence was found to be insufficient to establish that the beneficiary's duties qualified under the requested classification.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary has not been and will not be employed in either a primarily managerial or executive capacity. First, the petitioner failed to specifically articulate the 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). Although the petitioner provided descriptions of the beneficiary's duties in both the initial petition and the response to the request for evidence, these descriptions did not articulate what a specific day in the role of the beneficiary would consist

of. Instead, the descriptions merely provided a brief synopsis of the beneficiary's alleged managerial responsibilities, and failed to discuss or identify job-specific tasks or obligations the beneficiary was required to perform. The petitioner does, however, indicate that 50% of the beneficiary's duties consist of purchasing goods for exportation, which is not classified in the regulatory definitions as either a managerial or an executive task. In addition, another 15% of his time is allegedly spent on general sales activity. Clearly, the beneficiary is devoting at least 65% of his time to sales and purchasing activities. Consequently, the beneficiary is not *primarily* acting as a manager or executive.

Whether the beneficiary is a manager 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, the petitioner provides virtually no detail or discussion of the beneficiary's actual duties. Instead, the petitioner merely claims that the services of the beneficiary are essential, and that as a result of the beneficiary's work experience abroad and education qualifications, he is the ideal candidate for the position. The petitioner and counsel basically equate managerial and executive capacity with the beneficiary's multiple titles of president, general manager, and shipping clerk, yet fail to provide solid examples of how this managerial and/or executive capacity is actually attained. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner's description of the beneficiary's job duties, as well as the description of the duties of his subordinate, is extremely vague and nonchalant. Without evidence to the contrary, the AAO must presume that the beneficiary is performing many of the essential tasks necessary to the functioning of the business. For example, counsel for the petitioner indicates on appeal that the sales manager's job is "to assist [the beneficiary] in the collection and shipping of merchandise." In addition, counsel further asserts that the sales manager is the only person in charge of operating the video rental and retail store. Clearly, with Mr. [REDACTED] working at the video store, and assisting the beneficiary, it is obvious that the beneficiary primarily performs the tasks necessary to acquire the merchandise for exportation, with assistance when available from Mr. [REDACTED]. The beneficiary, therefore, is the primary sales and purchasing agent for the company, and since the petitioner's main business goal at this time is to expand its exportation business, it is clear that the beneficiary is responsible for the company's prosperity. 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).

Additionally, the petitioner has not established that the beneficiary is supervising professional, managerial, or supervisory employees. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. In this case the petitioner contends that the beneficiary supervises the sales manager as well as the C.P.A. and the shipping company, which are essentially independent contractors.

Though requested by the director, the petitioner did not provide the level of education required to perform the duties of its sales manager. Although the petitioner stated that the sales manager was a college graduate, it did not address the director's specific question, which focused on the level of education necessary to perform the duties of the position. 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).¹ Thus, the petitioner has not established that this employee possesses or requires an advanced degree, such that he could be classified as a professional. Nor has the petitioner shown that this employee supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that he could be classified as a manager or supervisor. Thus, the petitioner has not shown that the beneficiary's subordinate employee is supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

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. However, 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. Since the record lacks any credible evidence that establishes that the beneficiary is relieved from performing the purchasing and sales tasks essential to the business, the AAO must conclude that the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner indicates that the beneficiary is the sole owner of both companies. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. Generally, the petitioner for an L-1 nonimmigrant classification need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovich*, 18 I&N Dec. 361 (Comm. 1982); *see also* 8 C.F.R. § 214.2(l)(3)(vii). In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used

¹ The AAO further notes that the petitioner failed to submit the requested DE-6 forms, which would serve as confirmation that Mr. [REDACTED] actually employed by the petitioner. As previously stated, 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). Furthermore, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(d) specifically requires the petitioner to submit evidence of wages paid to all employees during the first year of operations when seeking the extension of a petition which involved the opening of a new office. 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).

temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

In addition, 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. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H). The petitioner submitted a number of financial statements listing the prices of various garments; however, it is unclear whether these documents represent purchases, sales, or something else. Furthermore, in the course of examining whether a petitioning company has been doing business as an import and export firm, it is reasonable to expect that the company produce copies of documents that are required in the daily operation of the enterprise due to routine regulatory oversight, such as customs forms. Any company that is doing business through the regular, systematic, and continuous provision of goods through importation and exportation may reasonably be expected to submit copies of these forms to show that they are doing business as such a firm. There is no such evidence here. 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 since the approval of the initial petition. For this additional reason, the petition will not be approved.

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.