

identifying and...
clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



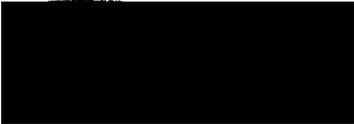
27

File: EAC 03 044 55567 Office: VERMONT SERVICE CENTER Date: MAY 12 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, 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 filed this nonimmigrant petition seeking to extend the employment of its vice-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 New Jersey that is engaged in the wholesale business. The petitioner claims that it is the subsidiary of Rannade Prakashan, located in Ahmedabad, India. 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.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the denial was erroneous, and that the director's decision was not supported by specific facts or reasons. Counsel further contends that the beneficiary's employment was in a managerial and/or executive capacity as required by the regulations. In support of these contentions, counsel for the petitioner 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 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 November 5, 2002, detailing the nature of the beneficiary's duties, which included seven distinct areas: corporate planning, general administration, finance, marketing-sales, business development, contracts, and personnel. In addition, counsel submitted a letter from the U.S. employer outlining the beneficiary's duties while employed in the United States. The petitioner described his duties as follows:

Corporate Planning :

[The beneficiary] as Managing Partner, participates preparation [sic] of the corporate plan to cover recommendations to the management with regard to economic objectives and policies of the company.

General Administration :

[The beneficiary] directs the overall business operations of the company, and will analyze the operating procedures and devise the most efficient methods to accomplish the tasks/work. [The beneficiary] is responsible to manage the affairs of the company in a manner to conduct the same in an orderly manner ensuring due compliance with statutory requirements and to achieve smooth and efficient operations overall.

Marketing-Sales :

[The beneficiary] undertakes to research the market conditions in local, regional and national environment to determine the potential sales of the company's products. [The beneficiary] studies economic and statistical data and utilizes the knowledge to stay abreast of the economic changes and to forecast future marketing trends. Also undertakes studies of competition, analyze their prices, sales and methods of marketing and distribution and accordingly, plan & implement corresponding policy and operations of the company.

Business Development :

[The beneficiary] is responsible for sales and business development, which will account for 100% incoming revenue of the company. [The beneficiary] meets potential clients, ensure[s] suitable customer services . . . during and after sales, looks for new products, and new markets. The aim and purpose of this exercise is to secure progressively increasing [sic].

Purchases :

[The beneficiary] is responsible for purchase of materials and supplies required by the company and reviews catalogue listings, examines samples, attends demonstration of products and conventions and calls for quotations. [The beneficiary] compares offers from alternative sources, negotiates contract terms and finalize[s] the same. [The beneficiary] is also responsible to ensure regular and continued flow of the materials and supplies required for the operations of the company.

Personnel :

[The beneficiary] will have the charge of the personnel department and shall operate with an authority to hire and fire the staff. Also review the performance of each individual staff member and will study the employee's attitude towards work environment. [The beneficiary] will evaluate their motivation and overall efficiency to perform vis-à-vis their job related skills, inter-personnel attitude and intellectual capabilities to deal with situations on the spot. [The beneficiary] will also review other factors, such as punctuality, sincerity, honesty, speed and other, for ongoing periodical rating of each employee and to decide about their remuneration and rewards. [The beneficiary] will establish and follow policies to continually boost the morale of the staff working for the organization.

On February 6, 2003, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business, including a detailed list of the beneficiary's duties. In addition, the director requested that the petitioner demonstrate that the beneficiary functioned at a senior level in the organization and that the beneficiary would be managing a subordinate staff of supervisory, managerial, or professional personnel who would relieve the beneficiary of the need to engage in day-to-day tasks. Finally, the director asked the petitioner to provide information on any contractors the U.S. entity retained, and further requested a statement regarding the staffing of the U.S. entity, including the number of employees retained by the U.S. entity as well as their positions and their duties. In a response dated April 28, 2003, the petitioner, through counsel, submitted a lengthy response that reiterated the seven main areas in which the beneficiary engaged. Though counsel's response provided an ample discussion of the law and history pertaining to this petition in addition to a detailed restatement of the beneficiary's duties, it failed to address the director's specific request for information regarding the staffing of the U.S. entity.

On July 16, 2003, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, found that the beneficiary's stated duties had satisfied neither. The director noted that the nature and structure of the business as currently functioning did not appear to support the position of a bonafide manager or executive. Instead, the director found that the beneficiary, although acting in title as vice-president, was essentially performing the majority of the tasks

required to keep the business in operation. On appeal, counsel for the petitioner asserts that the director's decision contains generalized statements that do not fully consider the evidence presented. Counsel continually avers that the beneficiary's stated duties satisfy the regulatory requirements, and that the director relied on assumption rather than fact in finding that the beneficiary had not been employed in a primarily managerial or executive capacity. Counsel, however, fails to address the director's specific reasons for the denial, and instead repeatedly accuses the director of providing a curt and abrupt review to the evidence that was deemed insufficient prior to adjudication.

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(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 petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements for one or the other capacity.

The AAO will first examine the beneficiary's duties in the United States. 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. Both counsel and the petitioner, in separate letters accompanying the initial petition, identified seven distinct areas in which the beneficiary would provide his services. Although these descriptions were lengthy, they lacked the specific information required in order for the director to ascertain the exact nature of the beneficiary's duties. When asked for additional information, counsel for the petitioner submitted a extensive response which restated the previously-identified duties, and added counsel's own assertions as to why such duties qualified the beneficiary as a manager and/or executive.

There are two problems with these stated duties. 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. The petitioner lists the beneficiary's duties as including both managerial/executive and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "attends demonstrations and conventions," and "conducts market research" and "promotes business and sales," do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Additionally, it appears that the beneficiary is directly responsible for generating the services of the business, since counsel asserts that the beneficiary's engagement in market research and his promotion of business and sales generates 100% of the company's revenue. This statement leads to the conclusion, absent evidence to the contrary, that the beneficiary is directly responsible for all of the petitioner's business and 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).

Second, the record contains no additional independent evidence or explanation establishing that the beneficiary is truly working as an executive. Merely claiming that the beneficiary is a manager or an executive is insufficient to establish eligibility in this matter. 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). In addition, counsel's statements on appeal are likewise unsupported by independent evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO further notes that the record indicates that a subordinate staff of two or three employees reports to the beneficiary. In extension requests that involved the opening of a new office, as here, the petitioner is required under 8 C.F.R. § 214.2(l)(14)(ii)(D) to submit 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. Although specifically requested by the director in the request for evidence, the petitioner failed to submit a statement addressing the staffing of the U.S. entity, and therefore no evidence is contained in the record which would indicate the nature and duties of each of these employees, or in fact clarify the exact number of employees overseen by the beneficiary. 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).

With an incomplete record upon which to base the decision, the director next looked to the staffing issue and the manner in which the beneficiary interacted with the other employees, since the petitioner claimed that the beneficiary supervised and had authority over the other employees of the U.S. entity under his "personnel" duties. 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* § 101(a)(44)(A)(ii) of the Act.

Though requested by the director, the petitioner did not provide any information regarding the other employees of the U.S. entity. 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). 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.

Finally, in response to the director's conclusion that the beneficiary cannot be qualified as a manager or executive based on the minimal personnel employed by the U.S. entity, counsel asserts that "we have failed to find any provision in the statute, regulation or even other commercial law where a relevance of the position of Vice-President is required to be adjudicated on the basis of number of employees." Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See*

§ 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). 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 justify the beneficiary's performance of non-managerial or non-executive duties, such as performing marketing duties and attending conferences and demonstrations. 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. Again, since the petitioner has failed to provide a concise and detailed description of the beneficiary's duties, the AAO cannot conclude that he will be engaged in primarily managerial or executive tasks.

The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

The petitioner has failed to establish that the beneficiary has been and will continue to be employed in a managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(iv). 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 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 findings in the previous decision, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship still exists between the petitioning entity and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). Specifically, the only evidence alluding to a qualifying relationship is an unsigned share certificate for 2,500 shares without par value issued to the foreign entity. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence

to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. In addition, the AAO notes that the petitioner filed IRS Form 1120-A, U.S. Corporation Short Form Income Tax Return in 2001 and 2002. Per the instructions for this form, a corporation may file the short-form return only if it does not have foreign shareholders that directly or indirectly own 25% or more of its stock. This insufficient and inconsistent evidence fails to demonstrate that a qualifying relationship still exists with a foreign entity (and that the foreign entity will continue doing business during the alien's stay in the United States). As the previous decision will be affirmed, this issue need not be examined further.

In addition, while not specifically addressed by 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 U.S. 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 invoices suggesting that it has been importing and selling its goods on a regular basis. However, the petition authorizing the beneficiary to open a new office was approved in December 2001. Thus 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 December 2001 through April 2002. 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.