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File: WAC 04 047 51666 Office: CALIFORNIA SERVICE CENTER Date: NOV 28 2005

IN RE: Petitioner:  
Beneficiary:



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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that claims to be engaged in the manufacture of wrought iron and stainless steel products. The petitioner claims that it is an affiliate of [REDACTED], located in Penang, Malaysia. The beneficiary was initially granted a one-year period of stay in the United States in order to be employed in a new office, and the petitioner now seeks to extend the beneficiary's stay for a three-year period.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary would be employed in the United States in a primarily managerial or executive capacity; or (2) the United States entity was doing business for the year preceding the filing of the petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director failed to consider the evidence submitted to establish the petitioner's ongoing business operations. Counsel argues that the director applied an overly stringent standard with respect to the beneficiary's managerial or executive capacity considering that the petitioner was still in the start-up phase of operations. Counsel also contends that the director placed undue emphasis on the size of the petitioning company. Counsel submits a brief in support of the appeal.

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.

At issue in the present 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.

The I-129 Petition was submitted on December 3, 2003. The petitioner indicated that it employed two individuals at the time of filing and provided the following description of the beneficiary's job duties as president of the company:

He will be responsible for the establishment and management of the U.S. company. He will plan business objectives, develop organizational policies and responsibilities for attaining objectives, expand markets and plan and develop policies to promote company's image and products. With more than 20 years experience and his knowledge skilled in technical work, he will lead the U.S. manufacturing, administration and staff to compete competitively in the important products from Italy, Thailand and China in quality.

In lieu of supporting documentation, counsel for the petitioner submitted a letter advising that the petitioner had failed to arrange for the beneficiary's extension filing in a timely manner and would submit the supporting documentation required by 8 C.F.R. § 214.2(l)(14) at a later date in response to a request for evidence.

On March 22, 2004, the director requested additional evidence. In part, the director instructed the petitioner to provide: (1) the total number of employees at the beneficiary's work site; (2) an organizational chart listing all employees under the beneficiary's supervision and including the names, job titles, educational level, annual salaries, wages and job duties of all employees; (3) a more detailed description of the beneficiary's duties in the United States, including the percentage of time spent in each of the listed duties; (4) copies of California Forms DE-6, Quarterly Wage Report, for the last three quarters; (5) copies of the company's

payroll summary, Forms W-2 and Form W-3 evidencing wages paid to employees; (6) clarification regarding the purpose of the beneficiary's transfer to the United States; (7) a list of the specific discretionary decisions the beneficiary had exercised over the last six months; and, (8) a specific day-to-day description of the duties the beneficiary had performed over the last six months. The director also instructed the petitioner as follows:

If the petitioning corporation is still in the "new office" set-up stage, submit an original cover letter from the foreign parent company explaining why this situation exists after almost a year since the petitioner's original approval. Clarify the specific nature of the new office's business and include a description of the beneficiary's initial year of employment with the new office in the United States.

In response, the petitioner submitted a letter from a director of the foreign entity dated May 26, 2004. The foreign entity indicated that the nature of the new office's business is to expand its U.S. market, coordinate incoming shipments from Malaysia to ensure timely delivery to clients, to establish new sales channels and industry contacts, and warehouse shipment. The foreign entity's director noted that the company had obtained several well-known hardware and steel suppliers as clients and established a "potential network" for its future business during the first year of operations. The director of the foreign entity further explained that the initial set up of the U.S. company had faced unexpected problems during the first year of operations, including an economic downturn, the resignation of the company's first CEO in October 2002, the September 2003 resignation of its sales manager, and the need to find a new location for its factory.

The petitioner submitted a second letter from the foreign entity dated May 20, 2004, indicating that the beneficiary "needs to travel to US for the purpose of developing sales and marketing rapport in Los Angeles," and that he will "visit business related community [to] introduce new products, or discuss on the improvement of the existing products in design, material, floral etc."

In response to the director's request for a detailed description of the beneficiary duties, the petitioner referred to the above-referenced letters from the foreign entity. The petitioner also submitted an organizational chart for the United States company depicting the beneficiary as president supervising a finance and administration employee, an online marketing executive, a marketing executive, and a production supervisor. The chart shows that the production supervisor will oversee a "skilled worker" who in turn will supervise two part-time production helpers. The petitioner indicated that it currently employed a finance and administration employee who is "in charge of the administration, accounting and arrangement of delivery." The petitioner explained that the company planned to hire additional workers soon. The petitioner's California Form DE-6, Employer's Quarterly Wage Report, confirmed the employment of the beneficiary and the finance and administration employee as of December 2003 when the petition was filed. Finally, the petitioner submitted a letter from the beneficiary, who explained that the company is currently attempting to locate new premises with the intention of commencing production and employing additional personnel. The beneficiary further noted that once the company has moved to a new location and commenced production "we will definitely provide list of employees, their job description, immigration status, college degree or not, salary, and fresh Lease agreement."

On July 11, 2004, the director denied the petition concluding that the beneficiary will not be employed in a managerial or executive capacity. The director observed that the petitioner employed only one individual other than the beneficiary, and determined that the petitioner had not established that the beneficiary will be managing a subordinate staff of professional, managerial or supervisory personnel who relieve him from performing non-qualifying duties. The director therefore concluded that the preponderance of the beneficiary's duties will be directly providing the services of the business.

On appeal, counsel for the petitioner asserts that the director placed undue emphasis on the size of the United States company and contends that "CIS Is now reserving L-1A classification for large-scale pre-existing operations in effect rendering the beneficiary of the L-1A program unobtainable by start-up enterprises." Counsel suggests that the director's decision constitutes an abuse of discretion and argues: "The CIS must take into consideration that the company is still in its start up stages and because of unforeseen problems has been unable to move forward with its business plan."

Counsel further contends that the petitioner's other employee performs office-related duties, leaving the beneficiary "free to attend meetings to improve company business." Counsel further explains that the beneficiary "will be primarily visiting business related communities for introduction of new products and discussions on improvements of existing products." Finally, counsel claims: "When start up companies undergo hardships and require additional time to get established the CIS must comply with the request and grant extensions to allow company executives the time to steer the company toward a path consistent with its business plan."

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary has been or would be employed in a primarily managerial or executive capacity. 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.* Further, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9<sup>th</sup> Cir. July 30, 1991).

In this case, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary actually does on a day-to-day basis. The initial description of the beneficiary's duties consisted of only three sentences and merely paraphrased the statutory definition of "executive capacity." *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For example, the petitioner indicated that the beneficiary will "plan business objectives," "develop organizational policies and responsibilities," and will be responsible for "management of the U.S. company." 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

In the request for evidence, the director instructed the petitioner to submit: (1) a detailed description of the beneficiary's initial year of employment; (2) a more detailed description of the beneficiary's duties in the U.S., including the percentage of time spent in each of the listed duties; (3) a list of the specific discretionary decisions that the beneficiary had exercised over the last six months; and (4) a specific day-to-day description of the duties the beneficiary had performed over the last six months. Accordingly, the director clearly emphasized throughout the request for evidence that a detailed, specific account of the beneficiary's actual day-to-day duties is required in order to establish that the beneficiary would be employed in a managerial or executive capacity.

The petitioner failed to submit the requested comprehensive description of the beneficiary's duties in response to the director's request. Instead, the petitioner submitted a letter from the foreign entity briefly describing the purpose of the United States office and its difficulties during the previous year, and a second letter indicating that the beneficiary's duties in the United States would be comprised of "developing sales and marketing rapport," and "visit[ing] business related community [to] introduce new products, or discuss on the improvement of the existing products. . . ." The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit the 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 petitioner's descriptions of the beneficiary's duties are insufficient to establish that he will be employed in a managerial or executive capacity. The actual duties reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Based on the limited information provided, it is reasonable to conclude, and has not been shown otherwise, that the beneficiary was primarily engaged in sales and marketing duties at the time the petition was filed. In addition, counsel confirms on appeal that the beneficiary "will be primarily visiting business related communications for introduction of new products and discussions on improvements of the existing products," and does not refute the director's conclusion that the preponderance of the beneficiary's time is devoted to non-qualifying duties. Although the petitioner claims that it employed a sales manager from May 2003 to September 2003, the beneficiary was the only employee responsible for non-qualifying sales and marketing tasks at the time the petition was filed. 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).

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). In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient

staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

At the time of filing, the petitioner employed the beneficiary as president and a finance and administration employee who is claimed to be "in charge of the administration, accounting and arrangement of delivery." The petitioner markets, sells, imports and distributes wrought iron and stainless steel products from its affiliate company in Malaysia, and may also be engaged in manufacturing of similar products, based on its claim that it has a factory and "has one complete line of wrought iron machine in operation." The reasonable needs of the petitioner thus require that its employees market the products, maintain relationships with suppliers, distributors, dealers or customers, create invoices, purchase raw materials and/or goods, ensure collection of payment for products sold, manage a checking account, pay routine bills, order office supplies, arrange shipment of products from the foreign entity, arrange domestic delivery to clients, respond to questions from clients, and, if applicable, operate machinery in the petitioner's factory. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and one additional employee. The petitioner's minimal staffing levels further support a conclusion that the beneficiary is primarily engaged in non-qualifying duties. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

In sum, the petitioner has failed to provide a comprehensive description of the beneficiary's duties as requested by the director and has therefore not established that his duties are primarily managerial or executive in nature. Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. The petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Counsel asserts that CIS must consider any hardships faced by a petitioner during the first year of operations and grant an extension to a fledgling business in order to allow a company to carry out its business plan. Although counsel vaguely asserts that his argument is supported by the regulations, the AAO notes that the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. Regardless of any unexpected obstacles the petitioning company may encounter during its first year of operations, any request for an extension of a petition that was originally approved as a new office must be evaluated under the criteria set forth at 8 C.F.R. § 214.2(l)(14)(ii). The AAO observes that virtually any petitioner could plausibly argue that it will eventually grow to the point where it will support an executive position if given enough time; CIS is not obligated to grant extensions to petitioners that are unable to support a primarily managerial or executive position within the

one-year period established by the regulations. Counsel's argument that the director abused his discretion by not considering the petitioner's claimed hardships is not persuasive.

Finally, the AAO acknowledges the petitioner's claim that the company expects to expand and hire additional employees in the future. However, 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).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner has established that it was doing business in the United States for the year preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) states: "*Doing Business* means the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad."

The director denied the petition in part concluding that the petitioner did not establish that it had been doing business. The director noted that the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, showed a negative taxable income for the 2002 tax year.

On appeal, counsel asserts that the director overlooked invoices and other documents submitted in response to the request for evidence that demonstrated company's continued operation and sales in excess of \$257,000 in 2003. Counsel further claims that the petitioner's negative taxable income is not indicative of the petitioner's failure to engage in qualifying business activities.

Counsel's arguments are persuasive. The AAO finds sufficient evidence in the record to establish that the petitioner was doing business for the year preceding the filing of the petition. The director's reliance on the petitioner's negative net taxable income as a basis for determining whether the company was doing business was inappropriate. Accordingly, the director's decision on this issue only will be withdrawn.

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 petition will be denied.

**ORDER:** The appeal is dismissed.