



U.S. Citizenship  
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File: EAC 04 033 54130

Office: VERMONT SERVICE CENTER

Date: OCT 27 2005

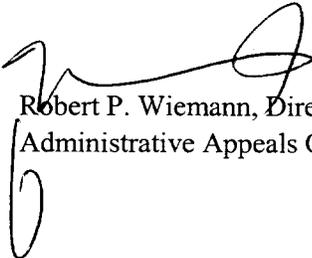
IN RE: Petitioner:  
Beneficiary:

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, 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 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 New York that claims to be engaged in the import, export and distribution of textiles and miscellaneous merchandise. The petitioner claims that it is a branch of [REDACTED] located in Cordoba, Argentina. The beneficiary was initially granted three years in L-1A classification and the petitioner now seeks to extend her stay for a two-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in a managerial or executive capacity.

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 disputes the director's findings and asserts that the petitioner submitted adequate descriptions of its employees' positions. Counsel contends that the director failed to consider that the beneficiary manages both the United States entity and the foreign entity, and failed to consider the reasonable needs of the petitioning company in determining whether the company requires the services of a manager or executive. Counsel emphasizes that the petitioner is still in an "initial stage of development" and has been negatively affected by the economic environment following September 11, 2001. Counsel submits a statement attached to Form I-290B and additional evidence 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 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.

The petition was filed on November 18, 2003. On the L Classification Supplement to Form I-129, the petitioner described the beneficiary's duties as:

General supervising of the business, setting company policies, purchasing and pricing decisions, overseeing operations in the U.S. and Argentina, supervising general managers, approving or rejecting suggestions from CPAs charged with running the financing/account department.

The petitioner indicated on Form I-129 that it had three employees at the time of filing, but provided no further description of the beneficiary's duties or the company's staffing levels.

On February 23, 2004, the director requested additional evidence to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity with the U.S. company. Specifically, the director instructed the petitioner to submit: (1) a complete position description for all current employees in the United States, including one for the beneficiary's position, along with a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis; (2) a copy of its IRS Form 941, Employer's Quarterly Tax Return, for the fourth quarter of 2003; (3) if applicable, evidence pertaining to any independent contractors utilized by the petitioner during 2002, 2003 and 2004, including the number of contractors, documentation of wages paid, and the duties performed; and (4) copies of fully executed Forms I-9, Employment Eligibility Verification, for all employees, including copies of documentation submitted to establish eligibility to seek employment in the United States.

In a response received on May 17, 2004, the petitioner submitted the following job description for the beneficiary:

As a General Manager, [the beneficiary] is the general supervisor of the business. She sets up the company policies, makes purchasing and pricing decision. [The beneficiary] is also in charge of strengthening the commercial relations between the parent company, the business enterprises in the U.S. She makes strategic decisions to expand [the petitioner's] share in the U.S. and new foreign markets. She is responsible for securing office/warehouse space and also for hiring, firing and training personnel.

The petitioner indicated that it employs a full-time salesman, who is responsible for visiting clients to take orders and collecting payments when orders are received. The petitioner also stated that it employs a full-time "packing" employee who is responsible for preparing orders, packaging merchandise for delivery, and checking merchandise when it is delivered by vendors. The petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return and New York Form NYS-45, Employer's Combined Withholding, Wage Report, and Unemployment Insurance Return, for the fourth quarter of 2004 confirming the

employment of the three claimed employees. Finally, the petitioner submitted the requested Forms I-9 for its three employees, all of which were executed in July 2003.

On July 14, 2004, the director denied the petition concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. The director observed that the petitioner had failed to provide the requested complete position descriptions for its employees and noted that the beneficiary's job description does not identify the duties she performs on a day-to-day basis. The director further noted that upon review of the financial and other supplementary documentation submitted, the petitioner is not conducting business in a manner that would require the services of an individual engaged in primarily managerial or executive duties.

On appeal, counsel for the petitioner asserts that the director's decision is "unreasonable and capricious." Counsel contends that the petitioner provided a full description for its employees' positions, noting that the position descriptions closely resemble those for the respective occupations in the Department of Labor's Standard Occupational Classification (SOC) system. Counsel further notes that the petitioner was unable to comply with the director's request for a breakdown of the number of hours its employees devote to their various duties because they do not keep "time logs."

In addition, counsel contends that the beneficiary is responsible for managing both the U.S. company and the foreign entity, noting that the beneficiary receives oral reports from the foreign company's managers and imparts instructions to them on a weekly basis. Counsel claims: "The U.S. company is an integral part of the foreign company and the beneficiary's duties must be assessed in toto, not only as to the U.S. company." Counsel further objects to the director's finding that the U.S. company is not conducting business in a manner that would require the services of an employee who is primarily engaged in executive or managerial activities as "incorrect and unreasoned." Counsel contends that the director failed to consider that the company is in "an initial stage of development" and did not consider the devastating economic consequences of the terrorist attacks of September 11, 2001. Counsel also asserts that the beneficiary recently hired an administrative employee, a showroom salesperson and a packaging employee and submits evidence documenting the employment of the new staff.

In support of the appeal, the petitioner submits a July 29, 2004 letter from its accountant who lists the beneficiary's responsibilities and accomplishments as:

- Searched and negotiated new office space, increasing space from 400 square feet to almost 2,000 square feet.
- Successfully developed new overseas contacts that will enable the company to purchase its product cheaper, yet with the same quality.
- Solely responsible for the introduction of new products, packaging and all marketing materials.
- Solely responsible for all sales and customer relations.
- Solely responsible for all hiring, training and supervision of employees. The Company presently has three employees receiving payroll.

- Responsible for accounting – including billing and collections of all invoices, payment of all bills and reconciling bank balances.
- Responsible for overseeing and managing inventory levels and storage issues.
- Solely responsible for the shift in business focus that has enabled the Company to continue its strong growth – including importing directly from China, and focusing on sales within the United States, whereas, in the first few years of business the Company was focused on exporting product to Argentina.

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will 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.* In addition, 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 prove 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 (9th Cir. July 30, 1991).

The petitioner initially provided a brief and vague description of the beneficiary's duties that failed to convey an understanding of what types of duties she performs on a day-to-day basis. For example, the petitioner indicated that the beneficiary is responsible for "setting company policies," "general supervising of the business" and "overseeing operations in the U.S. and Argentina." However, the petitioner did not define the beneficiary's "policies," or specify what specific tasks the beneficiary performs to "supervise" the business or "oversee" operations, nor did it provide any description of its operations in Argentina or explain how the beneficiary manages such operations from New York. 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. 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. *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).

The petitioner further indicated that the beneficiary is charged with "purchasing and pricing decisions" and "supervising general managers." However, the petitioner does not claim to employ "general managers," other than the beneficiary, nor does it indicate that it has lower level employees to perform routine purchasing functions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, the petitioner indicated that the beneficiary is responsible for "approving or rejecting suggestions from CPAs charged with running the financing/account department." The petitioner did not provide evidence of payments to independently contracted accountants or describe the nature and scope of services they provide to the petitioning organization. Further, on appeal, the petitioner submits a letter from its accountant who states that the beneficiary is responsible for the petitioner's accounting functions, including routine administrative

tasks such as billing and collections of invoices, payment of bills and reconciling bank balances. Therefore, it would appear that the accountant's actual role is limited to preparing tax filings and financial statements, in spite of the petitioner's claim that its accountants are responsible for running a distinct department within the company. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Upon review of this limited job description, the director reasonably instructed the petitioner to provide a complete position description for the beneficiary and her subordinates, to include a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis, as well as a description of any services provided by independent contractors. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). As noted by the director, the petitioner failed to comply with this request, and simply added a few additional vague phrases to the beneficiary's job description, and very brief descriptions of the duties performed by the beneficiary's subordinates. Accordingly, based on the current record, the AAO is unable to determine the actual duties performed by the beneficiary, and therefore cannot determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). The 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).

Counsel argues on appeal that the provided job descriptions should be deemed sufficient because they resemble position descriptions found in the Department of Labor's Standard Occupational Classification (SOC) system. Counsel's argument is not persuasive. Generic job descriptions found in the SOC have no bearing on an assessment of this beneficiary's duties within the context of the petitioner's business, and the petitioner cannot satisfy its burden of proof by paraphrasing such descriptions; the regulations require the petitioner to submit a detailed description of the beneficiary's duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Specifics are clearly an important indication of whether a beneficiary's duties are primarily managerial or executive in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103. Counsel also addresses the petitioner's failure to provide a breakdown of the number of hours the beneficiary and her subordinates devote to their various job duties on a weekly basis, noting that the petitioner was unable to comply with the director's request because its employees do not keep time logs documenting how they spend "each and every hour of each work day." Again, counsel's argument is unpersuasive. The petitioner was granted 12 weeks in which to prepare a response to the director's request for evidence and had sufficient notice to provide at least an approximation of how its employees typically allocate their time. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. As the petitioner did not submit a meaningful response to the director's request for complete job descriptions for the beneficiary and her subordinates, the director reasonably evaluated other factors, such as the petitioner's financial records and other supporting documentation, to determine whether the beneficiary's vaguely defined managerial and executive responsibilities were credible within the context of the petitioner's business. The director considered the reasonable needs of the business and concluded that the petitioner is not conducting business in a matter that would require the services of an individual primarily engaged in executive or managerial activities.

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 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). Counsel claims that the director did not consider all relevant factors in analyzing the petitioner's reasonable needs. Specifically, counsel asserts the director failed to consider that the petitioner is still in an initial start-up phase and has been negatively impacted by the economic downturn following September 11, 2001.

At the time of filing, the petitioner was a five-year-old company engaged in selling beauty supplies and accessories to shops in the New York City area. The evidence shows that the firm employed the beneficiary as general manager, a salesperson who takes orders and receives payments upon delivery, and a packing employee who prepares orders for delivery and checks merchandise received from suppliers. The petitioner did not indicate who is responsible for many of the business's day-to-day operational and administrative tasks, such as marketing, purchasing products from vendors and suppliers, monitoring inventory, arranging transport and delivery of orders to customers, issuing invoices, paying bills and performing routine bookkeeping and banking tasks. The petitioner has not provided sufficient evidence that it employs a subordinate staff that can relieve the beneficiary from performing non-qualifying duties. This conclusion is supported by the more detailed job description submitted on appeal, which confirms that the beneficiary is actively engaged in operational duties such as contacting suppliers to purchase goods, supervising non-professional employees, performing sales and customer relations tasks, marketing, paying bills, reconciling bank balances, billing and collections, and inventory and storage activities. These duties comprise the basic daily operational and supervisory tasks of the company and have not been shown to be incidental to the beneficiary's daily duties. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 583, 604 (Comm. 1988).

The petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's regular performance of non-managerial or non-executive duties three years after she was granted L-1A status. The petitioner cannot simply explain that it remains in the "initial start-up phase" and expect to be exempted from the requirement that it employ the beneficiary in a primarily managerial or executive capacity. Although the beneficiary was initially granted L-1A status commencing on November 30, 2000, there is no evidence that the petitioner hired any additional employees until July 2003. The beneficiary has therefore been solely responsible for all operational tasks of the petitioning company for the majority of her initial period of L-1A classification.

In sum, the lack of a detailed description of the beneficiary's actual duties, considered in conjunction with the petitioner's failure to respond to the director's request for evidence and the evident lack of employees to perform the non-qualifying operational and administrative functions of the organization, precludes the AAO from determining that the beneficiary is employed in a primarily managerial or executive capacity. The fact that an individual manages a small business and is assigned a managerial or executive job title does not necessarily establish eligibility as an intracompany transferee. While the beneficiary may exercise discretionary authority over the U.S. company, the record 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, 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). 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 appeal will be dismissed.

Although not addressed by the director, a remaining issue to be examined is whether the petitioner has established 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. In this matter, the record shows that the beneficiary is the sole stockholder of the U.S. company and either the majority partner or sole proprietor of the foreign entity. On the petition, the petitioner indicated that the beneficiary's services would be required for two years. No evidence of the claim was provided. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that she will be transferred to an assignment abroad upon completion of the position in the United States. As the director did not request additional evidence on this issue, the AAO notes this deficiency for the record and will not discuss it further.

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.

**ORDER:** The appeal is dismissed.