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File:



Office: VERMONT SERVICE CENTER

Date: SEP 02 2005

IN RE:

Petitioner:

Beneficiary:



Petition:

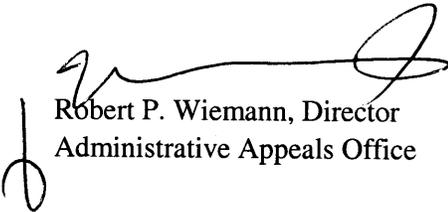
Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 managing director 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 is engaged in the import and distribution of olive oil. The petitioner claims that it is the subsidiary of Izdas Holding, A.S., located in Istanbul, Turkey. The beneficiary first entered the United States in L-1A status in 1997. The petitioner currently 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 will be employed in the United States in a primarily 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 evidence on record establishes that the beneficiary serves in an executive capacity.

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.

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.

In the initial petition, the petitioner described the beneficiary's job duties as follows:

She is responsible for all aspects of the company's operations which now entail direct control of finances, operations and administrative affairs. She selects contractors to perform various administrative and sales functions and review there [sic] performance. She makes strategic decisions which will determine how the company can continue to do business in the US.

In a letter dated July 9, 2002, counsel for the petitioner provided the following description of the beneficiary's duties as managing director of the company:

In this capacity she reports directly to the President of the Turkish entity and receives only general supervision and direction. While she achieved early success in expanding the company's position in the U.S. market with respect to the distribution of its brand of olive oil, the economic climate in the last two years has played havoc with the previous marketing scheme. . . . [The beneficiary] has implemented a number of cost cutting measures including giving up the company's former offices in the Empire State Building and contracting out many of the functions which were previously performed "in-house."

[The beneficiary] will continue to reevaluate the company's position and, if conditions warrant, expand the office and hire U.S. workers as necessary. Until that time she will continue to develop and implement a new strategic business plan required to deal with the economic realities which face [the petitioner]. She will continue to seek out marketing partners as well as large wholesale customers. . . . [The beneficiary] closely monitors financial indicators and market forecasting reports in the US and abroad.

* * *

It should be clear that [the beneficiary] has the ultimate responsibility for the making and implementing the decisions which will determine the company's future. She will continue to exercise wide latitude in discretionary decision-making, and for ensuring that the corporate mission, goals and objectives are successfully completed.

The beneficiary's resume was also submitted with the petition and describes her duties as follows:

- Managing Director and member of the Board, in charge of management of the company
- Responsible from [sic] directing strategic business development for the company's U.S. market. Established short and long-term business strategy, tactical plans and goals
- Established new administrative policies and procedure suited for the American market
- Responsible from [sic] financial planning coordinated revenue flow and secured business expansion
- Managed brand and product development projects. Directed marketing strategy for new product launches into retail consumer market. Brands include Nuretti Olive Oil
- Managed operations of the company and implemented corporate objectives
- Functioned as a liaison between with [sic] the parent company and developed an effective internal working relationship

- Established global standards ensuring a productive approach to conducting business in a global industry

On August 10, 2002, the director requested additional evidence to establish that the beneficiary will be employed in a primarily managerial or executive capacity. Specifically, the director requested that the petitioner submit: (1) an organizational chart indicating where the beneficiary will assume a role in a managerial capacity; (2) a comprehensive description of the beneficiary's proposed duties and an explanation as to how the duties will be managerial or executive in nature; and (3) a complete position description for and educational credentials for all of the beneficiary's subordinates in the United States, including a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis.

In response, counsel for the petitioner submitted only a letter from counsel dated November 4, 2002. Counsel provided the following description of the beneficiary's duties:

The beneficiary now remains as the sole employee of the U.S. entity and as such she has assumed full responsibility for all of the company's activities with respect to the U.S. market. Of most importance, she initiates and manages brand and product development projects through the various stages of implementation. She also holds the broadest scope of authority which encompasses ultimate responsibility for developing and implementing a strategic business plan designed to keep the company in business, become profitable and expand within the U.S. market.

* * *

The beneficiary spends the majority of her work week maintaining liaison with her US distributors and the Turkish supplier. She also spends some time directly contacting potential US customers in order to inform them of the various benefits of the company's product. She reviews bills from outside contractors to assure that they are accurate and she authorizes payment. The beneficiary continually maintains and reviews current information on the pricing of all competing brands in order to develop the pricing policy for her product line. Obviously, there is only so much time one can spend in developing strategies where the goal is fairly clear. . . . The business needs more US customers. The lion's share of that time must be spent in finding new outlets for the products and securing this business. . . . It is the beneficiary's prime function until such time as she can delegate it.

The beneficiary will continue to perform a wide variety of functions including accounting, warehousing, [c]ustoms brokerage, freight forwarding, marketing and advertising through the utilization of outside contractors and related professionals.

On April 18, 2003, the director denied the petition. The director concluded that the beneficiary would not be employed in a managerial capacity, citing the vague job description provided and the beneficiary's lack of subordinate employees as determining factors in the decision.

On appeal, counsel for the petitioner asserts that the director's "decision ignores the reality that the beneficiary does function at a senior level within the organization." Counsel again asserts that the beneficiary "conducts the day-to-day business of the entity through the utilization of independent contractors, including sales people, warehouseman, bookkeepers and accountants" and that she has been and will continue to be employed in an executive capacity.

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.*

Rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as "overseeing all aspects of the company's operations," "exercising wide latitude in discretionary decision-making" and "ensuring that the corporate mission, goals and objectives are successfully completed." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. 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 addition, the petitioner has stated that the beneficiary spends "the majority of her work week maintaining liaison between her U.S. distributors and the Turkish supplier," but has not described how this task, which suggests that the beneficiary is personally involved in submitting and following up orders, qualifies as managerial. Counsel has also conceded that securing new outlets for the petitioner's products "is the beneficiary's prime function until such time as she can delegate it" and has noted that the beneficiary "directly spends some time directly contacting potential U.S. customers in order to inform them of the various benefits of the company's products." Since the petitioner describes the beneficiary as marketing the petitioner's products and maintaining liaison between suppliers and distributors to ensure fulfillment of orders, she is performing tasks necessary to provide a service or product and this duty, apparently her primary task, will not be considered managerial or executive in nature. 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).

In the initial petition, and in response to the director's request for evidence, counsel referred to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. 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)). Furthermore, while 8 C.F.R.

§ 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel repeatedly asserts that the beneficiary conducts the day-to-day functions of the business through a variety of “independent contractors” who allegedly perform duties that were previously assigned to employees of the petitioning organization. In support of this assertion, the petitioner submitted a list of its “sales and marketing force” consisting of five companies that the petitioner claims are responsible for selling the petitioner’s product to retailers and are compensated by commission. The petitioner also submitted a list of ten professional services providers who allegedly perform services related to accounting, legal matters, insurance, credit services, marketing consulting, advertising, customs and importation of goods, inventory, ocean shipping, and logistics and storage. The only evidence presented to document the existence of the petitioner’s relationship with any of these independent contractors is a single activity report from the claimed logistics and storage services provider for the month of April 2002. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner’s business and perform routine operational and administrative tasks. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The fact that the petitioner imports and sells a product suggests that a sufficient staff is required to perform the essential tasks relating to ordering, customs and import regulations, warehousing, marketing, sales and distribution. Regardless of the beneficiary’s high degree of discretionary authority over all aspects of the business, which the AAO does not question, the record indicates that the petitioner lacks the necessary staff to perform these essential functions, as well as other administrative and operational tasks. The fact that an individual manages a small business and holds an executive-level job title does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that at the time the petition was filed a majority of the beneficiary’s duties consisted primarily of directing the management of the organization or supervising a subordinate staff of professional, managerial or supervisory personnel. Nor has the petitioner demonstrated that at the time the petition was filed it was maintaining a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making and setting company goals and policies constituted significant components of the duties performed by the beneficiary.

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 [REDACTED] 9th Cir. July 30, 1991). In this case, while the beneficiary clearly exercises discretion over the day-to-day operations of the company, she is just as clearly directly involved in performing many of the non-qualifying operational tasks necessary to operate a small import and distribution business. Based upon the evidence submitted and in light of the petitioner’s admitted financial difficulties and lay offs, it is evident that the beneficiary cannot currently devote the majority of her time to duties which could be considered managerial or executive in nature. The petitioner indicates that it may recover sufficiently from its current financial problems to 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). In the instant matter, the petitioner is not currently operating at a level which enables it to employ the beneficiary in a predominantly managerial or executive position, as required by 8 C.F.R. § 214.2(1)(3). For this reason, the appeal will be dismissed.

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.