

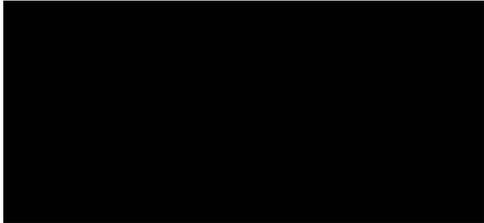
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U.S. Citizenship
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Services

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File: WAC 04 090 50493 Office: CALIFORNIA SERVICE CENTER Date: **APR 03 2006**

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 employ the beneficiary as its sales and marketing manager. Accordingly, the petitioner endeavors to classify the beneficiary 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 claims that it is a corporation organized in the State of California that is engaging in the wholesale marketing and distribution of liquor. The petitioner claims that it is the wholly-owned subsidiary of [REDACTED] located in Delhi, India.

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.¹

The petitioner subsequently filed a Form I-290B, Notice of Appeal to the AAO, and a brief entitled "Motion to Reopen and Reconsider." 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's decision is in error in law and in fact. Counsel submits additional evidence in support of his assertions.

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.

¹ The AAO notes that although the director states in several places in the decision that the record does not establish that the beneficiary "has been or will be employed in a primarily managerial or executive capacity," his analysis and final conclusion indicate that the denial is based on the finding that the petitioner has not shown that the beneficiary will be employed in a primarily managerial or executive capacity with the U.S. entity.

- (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 would be employed in the United States 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 a letter dated February 9, 2004 accompanying the Form I-129, Petition for a Nonimmigrant Worker, counsel described the beneficiary's intended duties in the United States as follows:

It is clear that the beneficiary will be performing executive functions. [The beneficiary's] major duties are outlined as follows:

- a. Reflect and interchanges [sic] ideas to the Chief Executive Officer, Directors and Stockholder regarding business expansion;
- b. Assist in the preparation of the business planning for the company, as well as establishing goals by: setting goals for new business, market and product development, analyze product and market feature, reinforce and expand business connections;
- c. Take [p]riority to create more sales, profits, etc.

The beneficiary . . . will exercise wide latitude and receive only general input and supervision from the CEO and other high company executives. Thus, based upon the definition of executive capacity, [the beneficiary] will serve as Sales and Marketing Manager overseeing the west coast operations and expansion, a major component of the organization.

Counsel indicated in the same letter that the staff of the U.S. entity at that time consisted of the president and a manager. Counsel also submitted an organizational chart for the U.S. entity. The chart shows the company's CEO and president at the top; directly below him are the secretary/CFO, a sales and marketing manager for the East Coast, and the beneficiary as sales and marketing manager for the West Coast. Each sales and marketing manager is shown as supervising seven or eight regional sales managers and a customer support center.² The chart does not list any names of individuals holding these positions, and there is no other indication that these subordinate positions were filled at the time the petition was filed.

On March 31, 2004, the director requested additional evidence. In connection with the beneficiary's position in the U.S. entity, the director requested a copy of the U.S. entity's organizational chart, which should include the current names of all executives, managers, supervisors, and the number of employees within each department; identify clearly the beneficiary's position; list the names, job titles, descriptions of job duties, educational levels, annual salaries, and immigration status for *all* employees under the beneficiary's supervision; and explain the source of remuneration of all employees and state whether the employees are on salary, wage, or paid by commission. The director also requested a more detailed description of the beneficiary's duties in the U.S., indicating the percentage of time spent on each duty, and listing all employees

² The AAO notes that the chart appears to show the West Coast and East Coast positions in reverse. Although the beneficiary is listed as the West Coast manager, the states listed under him are East Coast states, and the East Coast manager has West Coast states listed under him. The petitioner has not addressed this discrepancy anywhere in the record.

under the beneficiary's direction with their job titles and job description. The director also requested copies of the U.S. entity's California Quarterly Wages Reports for all employees for the preceding four quarters.

In response, counsel for the petitioner submitted the following statement from the petitioner regarding the beneficiary's job duties in the U.S. entity:

[The beneficiary] will be [i]n [c]harge of Distribution & Marketing. The company's new warehouse [l]ocation in the City of Anaheim in Southern California shall be under his direct charge, which will cater to the customers in 5 counties falling within the coverage [sic], initially. The sales persons and other team involved including the distributor of [the] Anaheim warehouse location shall work in coordination with him. He will also set up new distribution channels in the Midwest. His duties also include to add [sic] new accounts including retail customers as well as wholesale accounts and implementation of company's policies and plans to promote the brands/products in the territory that would be under his coverage.

He shall directly take instructions from the CEO and report directly to him.

Since the company is adding a few more brands of distilled spirits including 4-5 brands of whisky in the portfolio, he will coordinate with the manufacturers in India to ensure timely imports, adequate publicity support and ensure wider distribution to maximize sales in the territory under his charge.

In a letter dated June 22, 2004, counsel stated, "each of [the] territories [that will be overseen by the beneficiary] will have a regional marketing staff which will be supervised by the beneficiary upon completion of the expansion. Expansion [i]s currently underway with the opening (yet to be staffed) [in Houston, Texas. The beneficiary] will be supervising the staff at this facility, as well as other future facilities." Although counsel indicated that a new organizational chart was submitted per the director's request, there is no such document on the record. The petitioner submitted none of the requested information relating to the beneficiary's subordinate staff.

In denying the petition, the director concluded that the evidence provided is insufficient to establish that the beneficiary will be employed in the United States in an executive or managerial capacity. Specifically, the director observed that the beneficiary's proposed duties primarily comprised marketing tasks, which are tasks necessary to produce a product or provide a service. As such, the director found, the beneficiary cannot be considered to be performing primarily executive or managerial duties. The director also noted that even though the petitioner claimed that it planned to hire additional employees, at the time the petition was filed, the beneficiary was not supervising any employees and had no staff to relieve him of non-qualifying duties. The director further noted that although the beneficiary was employed at the U.S. entity since 2001, the record does not show that the company paid any salaries or wages for that year. The director found this to be an unresolved inconsistency that precludes a grant of the petition.

On appeal, counsel for the petitioner asserts that the director's decision is in error. Counsel contends that the number of employees on the staff of the petitioner should not be a determining factor in assessing whether the beneficiary is acting in a managerial or executive capacity. Counsel further asserts that that the beneficiary's

job is not "primarily of a marketing nature," as the director observed. Counsel claims the beneficiary would be functioning in a primarily managerial capacity in that he will be overseeing the entire East Coast operation of the U.S. entity with a wide range of duties and responsibilities. Counsel also contends that the director's statement that there are inconsistencies regarding the beneficiary's employment in 2001 is based on a misreading of the record. Counsel submits additional evidence, including revised organizational charts and new licenses and permits for the U.S. entity, as well as another copy of the receipts for payment of the beneficiary's salary in 2003 and 2004 by the foreign entity.

At the outset, the AAO acknowledges that counsel's assertions on appeal regarding the beneficiary's employment by the foreign entity in 2001 appear to be supported by the record. The petitioner stated on the L Supplement to Form I-129 that the beneficiary has been employed by the foreign entity since January 1, 2001 without interruption. The petitioner also submitted a number of receipts dating from March 2001 through April 2004 for payment of the beneficiary's salary by the foreign entity. The petitioner did not claim anywhere in the record that the beneficiary was employed by the U.S. entity in 2001. Therefore, the director's finding that the claim that the beneficiary was employed by the U.S. entity in 2001 is inconsistent with evidence in the record showing that the U.S. entity did not pay any salaries or wages during that year is in error and will be withdrawn.

Notwithstanding the foregoing, the AAO finds that the record is insufficient to establish that the beneficiary would be employed by the U.S. entity 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this instance, it is unclear whether the petitioner is claiming that the beneficiary is primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily engaged in executive duties under section 101(a)(44)(B) of the Act. In the February 9, 2004 letter accompanying the initial petition, counsel stated that "[i]t is clear that the beneficiary will be performing executive functions," and counsel provided a brief description of the beneficiary's job duties that generally paraphrased the statutory definition of executive capacity. However, on appeal, counsel asserted that the beneficiary would be "functioning in a primarily managerial capacity" and refers to the job description provided in response to the director's request for further evidence in support of that assertion. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. Here, neither of the job descriptions provided is sufficient to make that showing, as will be discussed further below.

As previously noted, the beneficiary's job description in counsel's February 9, 2004 letter generally paraphrased the statutory definition of executive capacity rather than providing a specific description of the beneficiary's duties. *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 "establishing goals" for the company and "exercis[ing] wide latitude and receiving only general input and supervision from the CEO and other high company executives." 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.).

The job description provided in response to the director's request for further evidence is also vague and nonspecific and fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary will "be in charge of distribution & marketing," "work in coordination with" other sales persons and distributors, "set up new distribution channels," "[implement] . . . company's policies and plans to promote the brands/products in the territory that would be under his coverage," and "coordinate with the manufacturers in India." Reciting the beneficiary's vague job responsibilities or broadly cast business objectives as the petitioner did here is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. Without further details as to what the beneficiary's tasks actually entail, the petitioner has failed to address the critical issue of what the beneficiary would be doing on a daily basis in his position with the U.S. entity. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In addition, the petitioner describes the beneficiary as performing sales and distribution tasks such as "add[ing] new accounts including retail customers as well as wholesale accounts;" in other words, tasks that are necessary to provide a service or product that would 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). Furthermore, it is noted that in addition to failing to provide a more detailed description of the beneficiary's anticipated duties in the U.S. entity, the petitioner also failed to provide a breakdown by percentage of time to be spent on each duty, as the director specifically requested. 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). Moreover, this failure of documentation is also significant because, as previously noted, a number of the beneficiary's daily tasks relate to the sale and distribution of the petitioner's product, and as such, do not fall directly under traditional managerial duties as defined in the statute. Absent further detail as requested by the director, the AAO cannot determine whether the beneficiary is *primarily* performing the duties of a manager, as counsel claims. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The AAO also notes that it is unclear from the record whether the beneficiary is the sale and marketing manager for the West Coast or the East Coast. While the Form I-129, counsel's February 9, 2004 letter and counsel's brief all indicate that the beneficiary would be the manager for the West Coast, the organizational chart on record shows him supervising East Coast personnel and/or facilities. The petitioner has offered no explanation or clarification for these inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). **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. *Id.*

The record also shows that although the organizational chart submitted with the initial petition shows the beneficiary supervising seven or eight regional managers, at the time the petition was filed, there is no such staff in place, and the U.S. entity's personnel consists only of two persons. Thus, even though the petitioner claims that the beneficiary would be "in charge of distribution & marketing," it does not appear to have anyone on its staff to actually perform the distribution and marketing function at the time of filing. Thus, either the beneficiary himself is performing these functions or he does not actually manage these functions as the petitioner claimed. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Again, 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. at 591. As previously noted, if the beneficiary is performing the sales and marketing functions directly, the AAO notes that 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 of Scientology International*, 19 I&N Dec. at 604.

It is noted that the petitioner had indicated that it plans to hire additional staff 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).

Finally, 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 the Citizenship and Immigration Service (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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* Moreover, 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) of the Act. As discussed above, the petitioner has not shown that there are employees who would relieve the beneficiary from primarily performing non-managerial tasks, and therefore the petitioner has failed to establish this essential element of eligibility.

Based on the foregoing, the record does not support the conclusion that the beneficiary would be employed in the United States in a primarily executive or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the director's decision, the petitioner has not provided sufficient evidence to establish that there is a qualifying relationship between the U.S. and foreign entities. The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and foreign entities for purposes of this visa classification. *Matter of Church*

Scientology International, 19 I&N Dec. at 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

On the Form I-129, the petitioner indicated that the U.S. entity is a wholly-owned subsidiary of the foreign entity. In counsel's February 9, 2004 letter, counsel stated that the following documentation was submitting along with the petition: (1) the U.S. entity's articles of incorporation, minutes, by-laws, share certificates showing 100% ownership by the foreign entity, wire transfers evidencing the foreign entity's payment for the shares; and (2) the articles and certificate of incorporation for the foreign entity. However, the AAO's review of the record reveals that none of these documents were submitted. In considering a petitioner's claimed qualifying relationship, CIS must be able to examine evidence such as the stock certificates, stock ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings 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. Contrary to counsel's claim, the petitioner has failed to provide any of the stated documentation regarding the ownership and control of the U.S. entity. Without full disclosure of all relevant documents, the elements of ownership and control, and consequently the qualifying relationship between the U.S. entity and its foreign parent, simply cannot be determined. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.