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File: WAC-04-036-50404 Office: CALIFORNIA SERVICE CENTER Date: JUL 17 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, Chief
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 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 under the laws of the state of California and is engaged in diamond importing and sales. The petitioner claims that it is the affiliate of Belgium Super Abrasives, located in Ahmedabad, India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

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

The petitioner 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's decision was in error. In support of this assertion, the petitioner submits a brief and additional documentary evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

It should be noted from the outset that the petitioner's I-129 form is incomplete and has in some cases been marked incorrectly. Section 1 of the L Classification Supplement was not completed, and the petitioner indicated that it was not a new office, when, in fact, it was a new office at the time of the original petition. Every proscribed form submitted shall be executed according to instructions on the form. 8 C.F.R. § 103.2(a)(1).

A new office means an organization which has been doing business in the United States for less than a year. 8 C.F.R. § 214.2(l)(1)(ii)(F). In this case the original petition was filed at a time when the petitioner had been doing business in the United States for less than a year. The record indicates that the petitioner was formed on July 9, 2001, that the beneficiary arrived on March 26, 2002 and that the petition itself was filed on November 21, 2002. The record does not contain any evidence or indication that the petitioner was doing business, as the term is defined in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H), prior to the beneficiary's arrival in March of 2002. Thus, in applying for the extension, the petition is a visa petition that involved the opening of a new office.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity. The director's decision is thorough and well reasoned, determining that the petitioner did not have the complexity or operational volume to justify a non-revenue producing position, that the beneficiary was not managing professional, managerial or supervisory personnel, and that the petitioner had not demonstrated the beneficiary was operating at a senior level within the organization nor that he was managing an essential function.

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 Nov. 17, 2003 letter appended to the nonimmigrant petition, counsel described the beneficiary's job duties as follows:

As [g]eneral [m]anager, the [b]eneficiary is and will be involved in establishing the company's long and short term goals, establishing and implementing company policies, planning the strategic management of the company to ensure it's long term goals are met, directing the business activities, supervising all financial aspects of the company, directing and coordinating formulation of financial programs to provide funding for the company,

seeking new investment opportunities, and negotiating, reviewing and approving contracts. More specifically the beneficiary's duties will be:

- Planning – 25%: [the beneficiary] is involved in developing the business mission, objectives and goals and policies of [petitioner] and in determining how they will be accomplished. This involves overall strategizing from the broadest view to the narrowest view. He will develop and establish internal company policies and procedures to build a solid foundation for the company in the highly competitive market.
- Decision making 25%: [the beneficiary] has wide latitude in decision making in the following areas:
 - Organizing – Establishing the internal organizational structure of the company, with particular focus on division, coordination, and control of tasks and the flow of information within the organization.
 - Controlling – Establishing performance standards from the point of view of customers, measuring and reporting actual performance, comparing the two and taking corrective or preventative action as necessary.
 - Enterprise Management – As general manager, [the beneficiary] completely manages and directs the U.S. subsidiary. He will oversee and direct the expansion plans of the company, analyze market trends and ensure proper funding is available.
 - Sales and Marketing – Developing various sales and marketing strategies to keep the company's sales growth on target by identifying and developing new markets, planning company visibility through sales campaigns.
- Coordinating with Parent Company 20% - [the beneficiary] is in a unique position to communicate with the parent company's officers in their native language. With his skills and first hand knowledge for over 10 years with parent company, he is able to report directly on the demand for certain products and U.S. trends.
- Staff Supervision – 15%
- Strategic Alliances and Contract Negotiations 15% - It is the duty of the [g]eneral [m]anager to submit proposals that are advantageous to the company. These proposals could be in the form of mergers, acquisitions, territorial understanding or strategic alliances in the areas of sales, [nothing further]

The letter also asserts that the beneficiary will direct a manager, two sales consultants and an administrative assistant in the United States. The organizational chart submitted with the initial filing asserts that the manager of the petitioner will direct the CEO, production manager and production supervisor in the foreign organization.

On February 24, 2004, the director requested additional evidence. Specifically, the director requested evidence of doing business, evidence of a qualifying relationship, and a list of all of petitioner's employees with documentation to support any assertions.

In response, the petitioner submitted some pictures, stock certificates, a product catalogue for the foreign organization, tax forms and other miscellaneous documents.

On August 6, 2004, the director denied the petition. The director determined that the petitioner had not established that the beneficiary would be employed primarily in a managerial or executive capacity, reasoning that the petitioner had misrepresented the number of employees working for petitioner, failed to give specific examples or an hourly breakdown of activities, and failed to establish that: (1) the beneficiary was managing a staff of professional, managerial or supervisory personnel; (2) that the beneficiary was operating at a senior level within the organization; and (3) that the beneficiary was primarily managing an essential function.

On appeal, counsel for the petitioner makes an unclear assertion, however, it can be reasonably inferred that the petitioner believes the director's decision was in error.

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(1)(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.

The initial description provided by the petitioner in counsel's Nov. 17, 2003 letter is vague and ambiguously worded, and is thus not probative as to the nature of the beneficiary's employment in a managerial or executive capacity. While lengthy, the description itself is drafted in broad phrases and terms that preclude an informed determination of what it is the beneficiary had been and would be doing for the U.S. company. Statements such as "[t]his involves overall strategizing from the broadest view to the narrowest view" are not sufficiently detailed to provide a clear depiction of the beneficiary's activities. The actual duties themselves 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). Many of the descriptions reveal duties that should have already been accomplished during the petitioner's first year of operation. For example, "establishing the internal organizational structure of the company" is a start-up activity that would normally have been necessary to initiate operations, and since the record only supports the existence of two employees such a duty would not constitute a significant activity. Neither would the generically described "staff supervision", which the petitioner asserts occupies 15% of the activities.

This initial description of the beneficiary's job duties is also not supported by documentation. As an example, the petitioner asserts that the beneficiary establishes internal policy and procedure, runs sales campaigns to promote the petitioner, corresponds with the parent company, and considers "strategic alliances." However, the record contains no examples of any such work product or any corroborating documentary evidence demonstrating that these duties, while vague in composition, are executive or managerial in capacity. Without evidence to corroborate the petitioner's assertion the petitioner's assertions are not persuasive. 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)).

The petitioner asserts that a decision for eligibility may not be based solely on the number of employees managed by a beneficiary. 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 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.*

Here, the majority of the beneficiary's purported managerial and executive duties rely on the presence of other employees. Thus, the director's decision is not based on the number of employees managed, but on the fact that the record does not support the beneficiary's job description. The description relies on the presence of other employees to perform the duties associated with providing the product or service of the petitioner and to carry out the beneficiary's "policies" and yet the petitioner has failed to corroborate or substantiate its assertions with probative documentary evidence. The record does not support that the petitioner employed the identified lower level employees at the time of filing the petition. This is particularly important because the petitioner has not articulated who will be producing the product or providing the service of the petitioner, leaving the AAO to assume that either such duties are not being performed or that the beneficiary himself is performing such activities. This conclusion is further supported by the reference to the beneficiary on several sales invoices as the "petitioner's representative." An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Additionally, to establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not articulated how the reasonable needs of the petitioning enterprise justify having a non-revenue producing position. The reasonable needs of the organization at this stage and volume of operations is to produce revenue, and the need for a non-revenue producing manager or executive would be nominal relative to the need for a revenue producing position. The beneficiary's performance of non-revenue producing duties demonstrates that the reasonable need of the petitioner is to produce revenue, not to have a senior level manager or executive. The petitioner has failed to provide any evidence establishing that any essential function is being performed, or that this two-person business can support a non-revenue producing position. 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).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In this case the record only supports the presence of one other employee. The petitioner has not provided any credible, probative evidence beyond mere assertion that there are more than two employees. The organizational hierarchy of a two employee company does not support the assertion that the beneficiary's employment capacity is more than that of a first-line supervisor. Even if the record supported the petitioner's contention that it has five employees, the organizational structure and other inconsistencies revealed by the petition would preclude the need for a non-revenue producing managerial position relative to the need for a first-line supervisor to manage the employees. The petitioner has not articulated who is performing the revenue generating duties of the petitioner, leading to the conclusion that the petitioner cannot support a non-revenue producing managerial position. The petitioner has not demonstrated that any complex function warrants having an employee devoted primarily to a non-revenue producing function or which obviates the need for this manager to have employees under him.

Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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). In this case, as discussed above, the petitioner has failed to articulate who is performing the revenue generating duties of the petitioner, who is performing the duties related to the beneficiary's alleged managerial activities, or provided specific examples or an hourly breakdown of the beneficiary's activities such that Citizenship and Immigration Services (CIS) can determine the nature and capacity of the beneficiary's activities. The director's decision must be based on the record, if the record does not support the petitioner's assertions on a particular issue then a favorable decision on that issue would not be based on the record.

It is clear from the record that the petitioner has failed to staff itself such that the beneficiary would be relieved of having to perform the routine, revenue-generating activities necessary to provide the product or service of the petitioner. State Tax forms submitted indicate a differing number of employees from what is listed on the federal tax returns. Also, while the petitioner has stated that it has persons operating on commission, the amount of compensation paid to each is not clearly identified on the state tax forms. The petitioner has not provided any probative evidence that these commissioned personnel are actual employees of the petitioner performing duties other than commission sales. This leads the AAO to conclude that there are only two employees to perform the day-to-day tasks necessary to operate the petitioner. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify

the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. The petitioner has asserted that the beneficiary is a function manager, but has not clearly articulated exactly what essential function the beneficiary is performing. Nor has the petitioner corroborated assertions of being a function manager with any probative documentary evidence. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not established that the beneficiary's duties are managerial in nature, nor has it provided evidence that the beneficiary manages an essential function as opposed to performing the function.

To allow the broad application of the term "essential function" to include any minor or low-level function within a business would render the term meaningless. The term "essential" is defined as "inherent" or "indispensable." *Webster's II New College Dictionary* 384 (2001). Accordingly, the petitioner must establish that the function is inherent and indispensable to the business rather than a low-level collateral task that is superfluous to the company's essential revenue producing operations. Characterizations are not sufficient, the petitioner must demonstrate that the function is actually essential to the petitioner's operations.

The petitioner's description of the beneficiary's duties relies on the presumption that there is sufficient staff to relieve the beneficiary of having to primarily perform the duties associated with providing the service or product of the petitioner. In this case the ambiguity of the petitioner's description of other employees and their duties and inconsistencies in the record with regard to the date these workers began providing services to the U.S. petitioner prevents the AAO from determining who is actually providing the service or product of the petitioner. Even accepting that there are individuals selling diamonds on behalf of the petitioner, this would not rise to the level of conducting business because the petitioner is acting as a mere agent or office. It is not clear what product or service the petitioner itself provides beyond that petitioner's assertion that it imports diamonds and sells them through commissioned agents. The record only supports that there are two employees, one of whom appears to be part-time because of the annual pay listed on tax forms, and the petitioner is alleging that the only full-time employee (beneficiary) is planning, making decisions, coordinating with the parent company, supervising the staff and involved in "strategic alliances" and contract

negotiations. Therefore the petitioner's assertions that the beneficiary is primarily operating in a managerial or executive capacity and not performing the routine duties necessary to provide the petitioner's product or service are not persuasive. The AAO's position is that the petitioner's description of the facts does not sufficiently articulate how the petitioner will conduct business with only one full-time, non-revenue producing managerial position and are not persuasive.

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). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

The record contains a number of inconsistencies that undermine the veracity of the petition. Most important, as noted by the director, is the petitioner's inconsistent representation to the number of employees the petitioner employs, particularly since this goes to the heart of the issue in this matter – the beneficiary's employment capacity. Other inconsistencies include the amount of compensation the beneficiary is to receive, and the petitioner's 2002 tax forms which show an address different than the one listed on a lease submitted by the petitioner. These same tax forms indicate compensation amounts that are different from the beneficiary's proffered wage. Moreover, many of the invoices submitted by the petitioner show the signature of the beneficiary himself and identify him as either the customer contact or the company contact. This leads the AAO to conclude that the beneficiary is acting as the primary source of sales for the petitioner and undermines the petitioner's assertion that the beneficiary is acting primarily in a managerial or executive capacity.

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine 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). In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested immigrant visa classification.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 and the petition hereby denied.