



U.S. Citizenship  
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File: WAC-04-070-51460 Office: CALIFORNIA SERVICE CENTER Date: JUN 13 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 ~~F.~~ 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 president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the state of California and is engaged in import and export operations and auto repairs. The petitioner claims that it is the subsidiary of [REDACTED] in New Delhi, India. The beneficiary was initially granted a one-year period of stay in the United States to open a new office, 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 Citizenship and Immigration Services (CIS) erred in its denial, and that the director misinterpreted the law with regard to the definition of managerial and 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.

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

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

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:

- Establishing company policies and controlling the overall management of the U.S. subsidiary and its affiliate Automasters.
- Overseeing the company's day to day operations and developing the company's long term goals in the U.S. market.
- Reviewing analysis and reports of company's activities, operations, and financials to determine company's profits and forecast future performance.
- Direct and supervise managerial staff and evaluate their performance of assigned duties.
- Receive direction, evaluation and supervision from the Board of Directors.

On March 17, 2004 the director requested additional evidence. Specifically, the director requested copies of tax returns, photos of the foreign organization, an organizational chart and corresponding list of employees, their position titles, position descriptions and duration of employment with the company, as well as an explanation with supporting documentary evidence with instructions to *be specific* about the beneficiary's managerial or executive duties.

In response, the petitioner submitted some organizational charts, photos of the foreign organization, bank statements and corporate stock documentation.

On June 24, 2004, the director denied the petition. The director determined that the beneficiary would not be employed primarily in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director misinterpreted the regulations and that it has established eligibility.

Upon review, counsel's assertions are not persuasive and the decision of the director will be upheld. 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, and in a detailed manner, 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. In the instant case petitioner stated that the beneficiary was its president but did not clearly state whether the beneficiary's employment would be in a primarily managerial or executive capacity. A petitioner may not claim that the beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

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 "directing the entire operation of the organization, establishing goals and policies of the organization, and directing and supervising managerial staff." 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.). 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. at 1108, *aff'd*, 905 F.2d 41.

As pointed out by the director, the petitioner has not submitted any probative documentary evidence that supports the description of the beneficiary's duties, and relies primarily on conclusory assertions and characterizations. This classification is not based on a characterization or legal fiction, the petitioner must establish that the beneficiary will *actually* be employed primarily in a managerial or executive capacity through the submission of probative documentary evidence. 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 this case the petitioner has repeatedly stated that it has established eligibility, but the record does not support these assertions. Without any supporting evidence to clarify the beneficiary's duties or even to support the petitioner's depiction of the facts, CIS cannot make a reasonable, objective determination that the facts are as the petitioner' portrays them. There is no evidence in the record of work product, no evidence of guidance from the board of directors, no evidence of any personnel actions, no evidence of market analysis, no goal statements or policy memos. Thus, the petitioner's assertions of eligibility rely solely on broad characterizations.

The director gave notice to the petitioner of the petition's deficiency and requested additional evidence to supplement the record. However, the petitioner's response failed to give a more detailed description of the

beneficiary's duties and failed to provide any clarifying evidence of what it is the beneficiary has actually been doing for the last year and would actually do in the future. The percentage breakdown submitted as petitioner's exhibit 8 does nothing to clarify the nature of the beneficiary's duties, as "marketing and promotion; inventory control; budget and sales forecasting" are not detailed descriptions and not probative of any detailed activities. 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). 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). In this case, determining the employment capacity of the beneficiary is a direct and material line of inquiry; thus it was not persuasive for the petitioner to conclude its response to the director's RFE with "[w]e have supplied to you all that you have requested; we have even divulged information that is of no concern to your organization" without ever clearly articulating what it is the beneficiary actually does.

The petitioner also claims that the beneficiary is a functional manager. But an analysis of being a functional manager still rests on a finding that the beneficiary performs in a primarily managerial or executive capacity. 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. § 204.5(j)(5). 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.

Here, the petitioner has failed to meet the burden that the beneficiary's duties would be primarily managerial functions. It is not sufficient for the petitioner to merely assert that a beneficiary "manages an entire operation" and thus is a function manager. In this case the petitioner also lists the beneficiary's duties as executive, but it fails to describe in detail what the duties entail on a day-to-day basis. This failure of documentation is important because the picture of the beneficiary's actual daily duties is unclear. Without a detailed description and supporting documentary evidence, the CIS cannot make a determination that the beneficiary's duties are *actually* executive or managerial in capacity. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). 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)). The petitioner was given notice of this deficiency by the director and chose not to respond. Thus, the director's decision that the petitioner had failed to establish the executive or managerial capacity of the beneficiary's position was based

on the record and will not be disturbed. In this matter, the petitioner has not provided sufficient probative evidence that the beneficiary manages an essential function.

On appeal counsel for petitioner incorrectly states that the level of staffing may not be used in determining the eligibility of a petitioner. 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, the absence of employees which are referred to in a petitioner's description of the beneficiary's duties, whether or not the beneficiary is acting as a first line supervisor, or if the petitioner is operating as 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.* Contrary to counsel's assertions, if a basis of the petitioner's claims are that a beneficiary is managing employees, which the petitioner has stated several times in this petition, the regulations require CIS to evaluate whether or not the employees managed are professional, managerial, or supervisory in capacity. Thus, for counsel to assert that the director's decision was based solely on the number of employees and that the director was incorrect in assessing the capacity of the employees that the petitioner claims the beneficiary manages is a mischaracterization. The AAO finds this assertion is not persuasive and notes that simply contesting the director's conclusions, without any further evidence or articulation, is not sufficient to carry the beneficiary's burden of establishing the managerial or executive capacity of an intracompany transferee position.

As a final note, counsel further refers 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. 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. Further, despite the fact that other petitioners may have met their burden of proof in establishing eligibility, each petition bears its own burden of establishing eligibility and merely citing a case will not absolve any petitioner of the burden to establish eligibility in their record of proceeding.

In conclusion, 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(1)(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 managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner has not submitted significant evidence of doing business, and only recently submitted a copy of the 2003 tax return. The record contains no evidence such as receipts, invoices, business accounts or business relationships or any other documentation that might demonstrate the conduct of business. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business, as that term is defined, from January 2003 through January 2004. For this additional reason the petition may not be approved.

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. 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.