



U.S. Citizenship
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Services

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File: WAC 04 179 53217 Office: CALIFORNIA SERVICE CENTER Date: MAR 07 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

SELF-REPRESENTED

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

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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 The director's decision will be withdrawn and the petitioner will be remanded to the director for further review and entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its company 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 in the State of California that claims to be engaged in the import, wholesale and retail sale of clothing and fashion accessories. The petitioner claims that it is the subsidiary of [REDACTED], located in Delhi, India. The beneficiary was initially granted a one-year period in L-1A status in order to open a new office in the United States and was subsequently approved for a two-year extension of stay. The petitioner now seeks to extend the beneficiary's status for an additional two years.

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, the petitioner states that the petitioner submitted sufficient evidence to establish that substantially all of the beneficiary's duties are performed at the managerial or executive level, and to establish that the beneficiary would supervise professional employees. The petitioner further contends that the director failed to properly consider the petitioner's reasonable need for an executive employee, and erroneously speculated that the beneficiary would perform "menial tasks" and "day-to-day supervisory tasks" without specifying what these duties would entail. Finally, the petitioner cites a federal district court decision and several unpublished AAO decisions in support of its assertion that the beneficiary can be characterized as a "function manager."

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in 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 a June 1, 2004 letter, the petitioner provided the following description of the beneficiary's duties as president of the company:

Since his entry into the United States, he has served as president and Chief Executive Officer of petition and has embarked on an aggressive plan to create several business opportunities utilizing all levels of commercial trade including retail, wholesale and e-commerce. His involvement and leadership in the developmental stage of the company has placed it on the threshold of substantial commercial success . . .

Beneficiary presently controls the operations of the company and the primary functions of the company through the use of management teams, joint ventures and independent contractors. As the company grows, it is projected that within the year, the company will employ 6 individuals in the capacities mentioned in the business plan. Presently the staffing is being handled by independent contractors at each outlet working on a commission basis.

* * *

Finally, beneficiary is working in an executive and managerial capacity in that he clearly directs the management of the organization or a major component or function of the organization and establishes the goals and policies of the organization or function while exercising a wide latitude in discretionary decision-making and with only general supervision from the parent company.

The petitioner indicated on Form I-129 that it had one employee at the time of filing and achieved gross revenues of \$117,777. The petitioner also submitted a business plan dated June 7, 2004, in which it states that it operates a total of four retail establishments, including: a retail **clothing store in Inglewood, California, currently operated by a management company**; an outlet named [REDACTED] located in Torrance, California; and two "kiosk style" outlets trading under the names "Pure Essence" and "Taj of India," managed by "independent sales agents." The business plan further indicates that the petitioner operates a website launched in 2003, and has partnered with a television shopping network to supply apparel and home décor merchandise. The petitioner submitted lease agreements for its four locations, and a management agreement for the Inglewood, California store.

The petitioner provided an organizational chart identifying the beneficiary as its "manager" and supervising six different functions and the following staff within each function: (1) [REDACTED] Operations -- Self; (2) Inglewood Store -- Management company; (3) Kiosks at South Bay Mall -- [Representatives] on Commission Basis; (4) Incoming Cargo -- custom clearing agent; (5) Online/Wholesale Orders Fulfillment -- Self; and (6) Placing orders to overseas company -- Self.

The petitioner submitted its 2003 IRS Form 1120, U.S. Corporation Income Tax Return, indicating that the petitioner paid \$12,279 in compensation of officers, no salaries or wages, no cost of labor, and \$233 in commissions during the 2003 year.

The director denied the petition on August 2, 2004, 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 director observed that the petitioner's assertion that the beneficiary manages the petitioner's operations through "management teams, joint ventures, and independent contractors," is not supported by corroborative evidence in the record demonstrating that the petitioner pays salaries or wages. The director also observed that the petitioner had not submitted complete position descriptions for the beneficiary or his claimed subordinates, or corroborative payroll documentation. The director concluded: "The beneficiary's supervision of non-professional, non-managerial employees precludes USCIS from classifying the beneficiary as a manager or executive."

On appeal, the petitioner contends that the U.S. company submitted a letter on company letterhead reflecting the beneficiary's duties at the time of filing the petition and asserts: "This letter also discusses the job descriptions of his subordinates. Finally the letter describes a typical . . . day for the executive." The petitioner claims that the "nature and scope of the duties described in this letter, the status and activities of his subordinates staff and his responsibilities and obligations clearly demonstrate that substantially all of his activities are at the managerial or executive level."¹

The petitioner further contends that the director misapplied the regulation at 8 C.F.R. § 204.5(j)(4)(ii) and erred by stating that given the petitioner's organizational structure and the nature of the business, the petitioner would not reasonably require a president, and would necessarily require the beneficiary to assist in "menial tasks" and "day-to-day non-supervisory duties."² The petitioner states that the U.S. company, as a relatively new company, reasonably requires a president or executive to run the business during its critical stage of development, and cites unpublished AAO decisions in support of its assertion that the director applied an inappropriate legal standard.

The petitioner further states that the director mistakenly concluded that "the beneficiary's subordinates cannot be deemed professionals because their positions are not so complex as to require individuals with a college

¹ The AAO observes that the record does not contain a letter from the petitioner on company letterhead. The sole supporting letter in the record of proceeding is a June 1, 2004 cover letter prepared by a representative on behalf of the petitioner, the content of which does not coincide with the petitioner's description of its supporting letter. The index of supporting documents included in the June 1, 2004 letter makes no mention of a supporting letter from the petitioning company among the 32 included exhibits.

² The AAO observes that the regulation at 8 C.F.R. § 204.5(j)(4)(ii) applies to immigrant petitions filed under section 203(b)(1)(C) of the Act. The director's August 2, 2004 decision does not refer to this regulation, nor does it include the statements quoted in the petitioner's brief or otherwise include an analysis of the reasonable needs of the petitioner's organization.

degree.”³ The petitioner continues: “The facts in this case disclose that at least two employees, the operations manager and the programmer analyst, have bachelor’s degrees.” The petitioner asserts that it originally submitted, and resubmits on appeal, “an organizational chart replete with job descriptions and subordinates possess degrees,” and contends that the organizational chart evidences the beneficiary’s management of professional and managerial staff who relieve him from performing non-qualifying duties.⁴

Finally, the petitioner contends that the director “completely ignored the fact that clearly [the] beneficiary’s activities can be considered those of a ‘functional manager.’” The petitioner cites *Matter of Transkei v. INS*, 923, F. 2d 175 (D.C. Cir. 1990) and several unpublished decisions in support of this assertion.

Upon review, the AAO will withdraw the director’s decision and remand the petition to the director for further consideration and entry of a new decision.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence [I]n other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence

As the present petition is the second request for an extension of the beneficiary’s L-1A status, the petitioner was not required to submit supporting documentation pursuant to 8 C.F.R. § 214.2(l)(14)(i). The director examined the petitioner’s evidence and determined that the petitioner failed to establish eligibility. The director’s decision was based in part on a finding that the petitioner did not submit sufficient documentation regarding the beneficiary’s actual job duties and its organizational structure. However the director did not point to any evidence of clear ineligibility that would justify his decision to deny the petition without first requesting additional evidence or issuing a notice of intent to deny the petition. *See* 8 C.F.R. § 103.2(b)(8);

³ Again, the AAO observes that the director’s August 2, 2004 decision contains no such conclusion regarding the complexity of the duties performed by the beneficiary’s subordinates. The director in fact commented that the petitioner had failed to submit evidence confirming the employment or describing the job duties of any claimed subordinate employees. The director therefore concluded that the petitioner had not established that the beneficiary supervised professional employees.

⁴ The AAO notes that, despite this statement, the petitioner does not submit an organizational chart or any other evidence in support of the appeal. The only organizational chart submitted with the initial petition was discussed above and does not contain the names, job titles, job descriptions or educational qualifications of employees subordinate to the beneficiary, nor does it indicate that the petitioner employs an “operations manager” or “programmer analyst.”

see also Memo. of William R. Yates, Associate Director, Operations, USCIS, to Regional Directors, et al, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*, HQOPRD 70/2 (February 16, 2005).

Accordingly, as the evidence of record does not directly reflect that the petitioner or beneficiary is ineligible, the director should not have denied the petition based on a lack of evidence without first requesting additional explanation and documentation. *See* 8 C.F.R. § 103.2(b)(8); 8 C.F.R. § 214.2(l)(14)(i). The AAO agrees that the evidence of record raises underlying questions regarding eligibility. In such an instance, the director "shall request the missing initial evidence, and may request additional evidence . . ." 8 C.F.R. § 103.2(b)(8). The petition will be remanded to the director, who is instructed to request additional evidence consistent with the discussion below.

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.*

Contrary to the petitioner's assertions on appeal, the record does not contain a statement from the petitioner with the required detailed description of the beneficiary's job duties. The petitioner has indicated that the beneficiary "controls the operations of the company and the primary functions of the company through the use of Management Teams, Joint Ventures and Independent Contractors." This general statement does not describe the actual tasks the beneficiary will perform on a daily basis or clarify how his duties qualify as primarily managerial or executive, particularly in light of the petitioner's failure to provide evidence that it employs salaried employees and/or independent contractors, or that it participates in joint ventures. The petitioner also paraphrased the statutory definition of executive capacity by stating that the beneficiary "directs the management of the organization" and "establishes the goals and policies of the organization or function while exercising a wide latitude in discretionary decision-making and with only general supervision from the parent company." *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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 director is instructed to request a comprehensive, specific description of the duties performed by the beneficiary, including a breakdown of the percentage of time he will devote to those duties on a weekly basis, and a description of the duties he performs on a "typical day." 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 WL 144470 (9th Cir. July 30, 1991). The provided job descriptions do not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature, nor does it adequately indicate what proportion of the beneficiary's time will be devoted to qualifying duties. In addition, the organizational chart submitted with the petition suggests that the beneficiary himself is directly responsible

for performing non-qualifying duties associated with operating the petitioner's Torrance, California store, placing orders for goods to the foreign entity, and filling on-line orders made via the petitioners' web site. The petitioner should clarify the nature of the beneficiary's involvement in these aspects of the petitioner's business.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The record as presently constituted contains minimal evidence regarding the petitioner's staffing levels which makes it difficult to determine how the company operates. The petitioner claimed to employ only one employee at the time the petition was filed, but indicated that it used management teams, joint ventures and independent contractors to operate its various business ventures, which include four retail locations, a web site that accepts and fills orders for goods, and a wholesale business. The record is devoid of any evidence of payments to any type of employee, management company, contractor, or commissioned sales representatives. The petitioner should provide a detailed description of all the businesses it operates and the date each business commenced, and, if applicable, ended operations. The petitioner should submit a new organizational chart encompassing all of its claimed direct or contracted employees, describe the staffing and operating hours of each business, submit evidence of payments to any individual or company providing services on behalf of the petitioning company, and provide a description of the duties they perform or services they provide. The petitioner should also provide copies of its California Forms DE-6, Quarterly Wage and Withholding Report, for the first two quarters of 2004.

The AAO notes that the petitioner claims on appeal that the beneficiary supervises two professional employees, namely, an "operations manager" and a "programmer analyst." If the petitioner wishes these employees to be considered professionals for the purposes of establishing that the beneficiary is employed in a managerial capacity pursuant to section 101(a)(44)(A)(ii) of the Act, the petitioner must establish that they were employed by the petitioner as of the date of filing, provide job descriptions for both positions, and provide documentary evidence of their educational qualifications.

It is emphasized that 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). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, June 15, 2004. Documentation of business activity and hiring that occurred after the date of filing is not probative of the petitioner's eligibility and will not be considered.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the petitioner meets the requirements for L-1A classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated August 2, 2004 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.