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U.S. Citizenship  
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File: LIN 04 122 54709      Office: NEBRASKA SERVICE CENTER      Date: **OCT 23 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, Nebraska 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 international sales director as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Washington that is engaged in the sale of backpacks and apparel. The petitioner claims that it is the affiliate of [REDACTED] located in Seoul, South Korea. 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 (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity, or (2) the petitioner had been doing business for the previous year as required by the regulations.

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 made incorrect legal decisions about what constitutes doing business and what constitutes a function manager. Counsel further asserts that the director ignored the fact that the beneficiary had one employee and ten individual sales representatives under him to relieve him from performing non-qualifying duties. In support of these assertions, counsel for the petitioner submits a brief and additional 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.

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.

With the petition, the petitioner submitted a letter of support dated March 11, 2004 in which it described the beneficiary's job duties as follows:

[The beneficiary] will continue to undertake the U.S. assignment as International Sales Director for the U.S. affiliate, to supervise the expansion, marketing and distribution of [the petitioner's] products in the U.S. and Canada. [The beneficiary's] job functions do have great economic value to the company and directly [relate] to the products with which the company sells. [The beneficiary] will maintain his position in supervising the office personnel and subcontracted representatives presently with the U.S. company. He will not be performing sales functions himself. As his previous position, [the beneficiary] will have the discretionary authority to decide how to expand the market and distribution of [the petitioner's] products in the U.S. and Canada.

Additionally, the petitioner submitted quarterly wage reports for the quarters ending June 30, 2003, September 30, 2003 and December 31, 2003. During the most recent two quarters, the records indicated that the petitioner employed two persons, namely, [REDACTED] and [REDACTED]. Their positions within the petitioning organization, however, were not specified.

On April 19, 2004, the director requested additional evidence. Specifically, the director requested more specific information with regard to the duties of the beneficiary and the percentage of time he devoted to each, as well as a statement outlining the staffing of the organization. The director also requested a similar overview of the duties of all other employees and/or contractors along with their titles and rank within the petitioner's organization.

In response, the petitioner submitted a letter dated January 7, 2004. The petitioner stated that at the time of filing of the petition on March 19, 2004, the petitioner employed [REDACTED], who served as its office manager, in addition to the beneficiary. (The petitioner indicated that since the filing of the petition, she had since been replaced with a new office manager, [REDACTED]). The quarterly tax return for the quarter ending March 31, 2004 demonstrated that this claim was in fact correct, as it indicated that they were the only employees on the petitioner's payroll at that time.

With regard to the director's request for a more specific discussion and breakdown of the beneficiary's duties, the petitioner stated as follows:

*From July 2003 through April 2004, [the beneficiary] performed the following duties:*

- 1) *manage and expand whole sales and distribution of [the petitioner's] brand; (25%)*
- 2) *manage U.S. territorial sales representatives, manage and set goals of annual sales plan with sales representatives, and support sales representatives' activity; (25%)*
- 3) *manage and control of shipping [the petitioner's] backpacks to retailers; (25%)*
- 4) *searching for potential Original Equipment Manufacture customers in the U.S. and once establishing a business relationship, working with the OEM to coordinate with offices in South Korea and Vietnam; (10%)*
- 5) *managing the entire process of revenue flow and financial status of [the petitioner]; (10%) and*
- 6) *traveling to regional shows in order to assist sales representatives. (5%)*

*If approved, [the beneficiary] will perform the following duties during the extended period:*

- 1) *manage the entire process of revenue flow and financial status of [the petitioner]; (5%)*
- 2) *prepare and draft business plan concentrating on inventory orders in the Vietnam plant; (10%)*
- 3) *continue to support and collaborate with sales representatives [8 sales representatives as of June 14, 2004] in 7 territories, visit with retailers and support sales activity by clinics, strategizing with sales representatives to locate potential retailers; (25%)*
- 4) *prepare, market and coordinate the following trade shows: [REDACTED] in Salt Lake City, Utah, which is scheduled for August 12, 2004 through August 15, 2004 [[the beneficiary] will work with the Korean head design team developing new items for sale in the U.S. market, [REDACTED] in Fort Worth, TX, which is scheduled for September 11, 2005 through September 17, 2005 [[the beneficiary] will prepare sales terms and conditions at a pre-screening in Las Vegas, Nevada and he will arrange meetings with existing and potential retailers, [REDACTED] in Salt Lake City, Utah, which will take place by the end of January 2005 [sic]; (10%)*
- 5) *manage and collaborate all phases of marketing in house and with marketing/PR companies; (10%)*

- 6) *manage communications with existing OEM and continue searching/marketing OEM buyers in the U.S.; (20%)*
- [7] *travel to sales representatives' regional shows to provide customer service support to retailers; (10%)*
- [8] *work with CEO and CFO at the head office to develop future business plans for [the petitioner] (10%).*

It is noted that contained in the description of duties set forth above was the statement that as of June 14, 2004 the petitioner had retained the services of eight sales representatives.

On August 27, 2004, the director denied the petition. The director determined that the beneficiary was not acting in a primarily managerial or executive capacity during the previous year, and that the petitioner had not yet reached the point where it could support the beneficiary in such a capacity. The director also noted that the petitioner had failed to establish that the beneficiary was managing an essential function of the organization, such that he could be deemed a function manager.

On appeal, counsel for the petitioner submits additional evidence in support of the beneficiary's qualifications. The petitioner also blames any deficiencies in the record prior to adjudication on the fact that its office manager, who had prepared the supporting documentation for the petition, was engaged in illegal activity at the time and consequently did not have the best interests of the beneficiary and/or the petitioner in mind.

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 initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a vague overview of the nature of his duties. As previously stated, the initial evidence submitted was insufficient to warrant approval, and consequently, the director requested more specific information, including a more specific description of the beneficiary's duties. The petitioner responded to this request and, in addition to describing the beneficiary's duties in further detail, the petitioner submitted a breakdown of the percentage of time he would devote to each of the identified duties.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner did provide a breakdown of the beneficiary's proposed duties. However, the duties largely included sales functions, such as overseeing the expansion of the petitioner's products and traveling to sales shows. In addition, although 25% of the beneficiary's time was accorded to overseeing sales representatives, the evidence in the record clearly indicates that the beneficiary had no subordinate sales

representatives at the time the petition was filed. Although the petitioner alleges that several sales representatives have since been retained to perform these essential duties, there was no subordinate sales team working under him at the time the one-year new office petition expired. While the beneficiary did oversee an office manager, the presence of this one additional employee does not explain how the sales and marketing functions of the petitioner were carried out from the time the petition was filed until June 14, 2004 without the beneficiary actively and directly engaging in such tasks during this time.

Generally, sales and marketing functions are not primarily managerial or executive in nature. Since 25% of his duties involve overseeing sales representatives, and since there is no evidence that any such persons were employed by the petitioner at the time the petition was filed, this statement is inconsistent with the evidence presented and cannot be deemed accurate for purposes of determining the beneficiary's day-to-day duties. In addition, without evidence of sufficient staff to actually perform the functions the beneficiary reportedly manages, the AAO is left to conclude that the beneficiary himself performs these non-qualifying tasks. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In the event that the petitioner had in fact submitted documentation verifying the employment of sales representatives at the time the petition was filed, there is no evidence in the record establishing that the positions require an advanced degree, such that they could be classified as professionals. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Similarly, there is no evidence to show that the office manager was required to possess a professional degree to fulfill the duties of her position. Additionally, although the office manager possesses a "managerial" title, there is no evidence submitted to show that she supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that she could be classified as a manager or supervisor. Thus, the petitioner has not established that the beneficiary oversaw subordinate employees who were supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. In the event the petitioner had established that a subordinate staff of sales representatives reported to the beneficiary at time of the filing of the extension, there is likewise no evidence in the record to establish that such subordinate employees were supervisory or managerial.

With regard to the petitioner's employees, 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 Citizenship and Immigration Services (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.* In this matter, the petitioner claims to have employed only one other employee possessing a managerial title at the time of filing. The petitioner simultaneously claims, however, that 25% of the beneficiary's time was spent managing the

sales representatives of the petitioner. It is inconsistent for the petitioner to claim that he acted primarily as a managerial or executive employee when it is clear that he lacked a subordinate staff to relieve him from performing non-qualifying tasks. 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). Regardless, the evidence of record fails to establish that the beneficiary will be relieved from having to primarily perform non-qualifying tasks by an employee that has been proven to have been employed at the time the instant petition was filed.

Counsel further refers to several unpublished decisions 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 or part of a minimally staffed organization. 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.

Based on the evidence submitted, it appears that absent evidence to show that the petitioner had hired a subordinate staff to relieve the beneficiary from performing non-qualifying duties at the time of filing, it cannot be determined that he functions in a primarily managerial or executive capacity. As previously stated, 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. at 604. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). 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 hired additional sales representatives since the filing of the extension in March 2004. 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. *Id.* 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 managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

The second issue in this matter is whether the petitioner has been doing business as required by the regulations for the previous year. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad."

In this matter, the petitioner claims that it is engaged in the sale of backpacks and apparel. The director denied the petition, finding that the petitioner had failed to satisfy the regulatory requirements for doing business.

With the initial petition, insufficient evidence of the petitioner's business practices was submitted. Consequently, in the request for evidence issued on April 11, 2004, the director requested documentation establishing that the petitioner had been doing business during the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). Specifically, the director requested that the petitioner submit documentation such as dated purchase orders, contracts, or sales agreements that established that the beneficiary had been providing goods and services during the previous year. In the response filed on July 7, 2004, the petitioner submitted a variety of documentary evidence, including credit applications, price lists, and some invoices, most of which were dated in the early months of 2003. Based on this documentary evidence, as well as a statement on appeal contending that its former office manager had misrepresented the petitioner's financial dealings during the previous year, the petitioner asserts that it has sustained its burden.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the previous year. The record indicates that the beneficiary was granted a one-year period of stay from May 20, 2003 to April 30, 2004 to open a new office. The record further indicates that the petitioner would engage in the sale of backpacks and apparel. However, there is no indication of regular sales activity during this period. For example, a sporadic sampling of invoices evidencing transaction from late 2002 through May 2003 are submitted, as well as some documentation of minor sales in July 2003 and September 2003. There is no preponderance of evidence that sales were continuously made during the course of the beneficiary's stay in the United States.

On appeal, counsel alleges that the embezzlement by the petitioner's office manager of \$72,000 resulted in an inaccurate portrayal of the petitioner's financial dealings for the previous year. Specifically, the petitioner claims that in an effort to disguise the monies taken from the company, the office manager either omitted or submitted erroneous financial documents in an effort to cover her financial indiscretions. Counsel submits copies of the petitioner's website and a list of twelve clients who regularly place orders with the petitioner.

Based on this limited information, it appears that the petitioner was not doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO acknowledges the petitioner's claim that it experienced financial difficulties as a result of its office manager's criminal conduct. However, the fact remains that there is no evidence of a consistent provision of goods and services by the petitioner to outside clients during the period from May 2003 to April 2004. While the newly-submitted documentation on appeal indicates regular sales since the summer of 2004, there is no indication that such regularity with regard to the provision of the petitioner's goods took place during the first year of operations, and further lacks any explanation or documentation regarding other activities engaged in by the petitioner to promote its business during this period. The fact that the petitioner did not supply a staff of sales representatives until after the request for extension was filed does not excuse the petitioner from meeting the regulatory requirements.

As previously stated, the regulation at 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of a new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B)

require the petitioner to demonstrate that it has been doing business for the previous year. In the present matter, the evidence submitted at the time of filing confirmed that the petitioner had not been conducting regular business as required. The fact that the petitioner began to consistently improve its sales after the expiration of the beneficiary's initial stay does not entitle the petitioner to an extension of the visa, for it fails to change the fact that the petitioner did not meet the regulatory requirement of conducting business during the previous year. For this additional reason, the petition may not be approved.

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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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.