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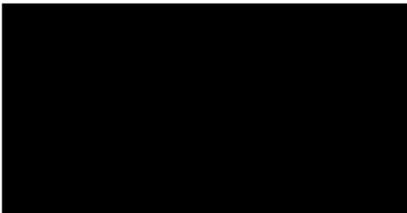
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FILE: SRC 06 130 53559 OFFICE: TEXAS SERVICE CENTER Date: DEC 21 2007

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)

ON 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, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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, a Florida corporation, states that it is engaged in woodworking and carpentry. It claims to be a subsidiary of [REDACTED], located in the United Kingdom. The beneficiary was initially granted a one-year period in L-1A classification in order to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's status for two additional years.

The director denied the petition concluding that the petitioner had not established that the beneficiary would be employed by the U.S. entity in a managerial or executive capacity.¹

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner emphasizes that the request for an extension of the beneficiary's status was submitted four months prior to the expiration of his initial period of stay in L-1A classification, and contends that the petitioner "had plans to engage US workers in the near future and within the required period." Counsel asserts that the beneficiary's spouse remains responsible for non-managerial responsibilities within the U.S. company. Counsel submits a brief in support of the appeal.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate in a managerial, executive or specialized knowledge capacity.

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

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

¹ The director initially denied the petition on July 25, 2006 for abandonment, pursuant to 8 C.F.R. § 103.2(b)(13). The director determined that the petitioner had not responded to a request for evidence, issued on April 17, 2006, within the required time 84-day time period. It was later determined that the petitioner's response was timely submitted, but, due to USCIS error, it was not matched with the record of proceeding. The director re-opened the matter pursuant to 8 C.F.R. § 103.5(a)(2) and, after reviewing the submitted evidence, denied the petition on October 23, 2006.

- (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 sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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.

The nonimmigrant petition was filed on March 20, 2006. The petitioner stated on Form I-129 that it had one employee as of the date of filing. On the L Classification Supplement to Form I-129, the petitioner stated that the beneficiary's duties as president would include the following: "Development of Company. Overall management and direction of the company, full executive powers for policy making decisions, responsibility for recruitment and training of staff."

In a letter dated March 17, 2006, counsel for the petitioner stated that the beneficiary's duties to date were as follows:

[The beneficiary] has been wholly instrumental in the progress that the company has made within the US market. He has negotiated and secured contracts on behalf of the entity, devised and implemented successful marketing and advertising strategies and has generally developed the company from one that had yet to trade into a credible entity that is currently systematically conducting business.

The director issued a request for evidence on April 17, 2006, in which she instructed the petitioner to submit: (1) an organizational chart for the U.S. entity including a detailed job description for each employee; (2) a copy of the U.S. entity's income tax returns; (3) evidence of the U.S. petitioner's state quarterly wage reports for the last four quarters; (4) copies of IRS Forms 941, Employer's Quarterly Federal Tax Return; and (5) a copy of the beneficiary's IRS Form W-2 for 2005.

In a response received on June 28, 2006, the petitioner provided the following position description for the beneficiary:

Vice President/Managing Director

- Overall management of the business which includes evolving marketing strategies and making decisions as to the direction of the company
- Negotiating and finalising [sic] contracts
- Liaising with pertinent parties such as suppliers, financial institutions and subcontractors
- Designates joinery and carpentry projects to those subcontracted for these purposes. He directs the contracts in their duties ensuring that operations are performed effectively and [sic] safely.
- Responsibility for the company's budget
- Reports to President of the company who is in the UK

The petitioner indicated that the beneficiary's spouse serves as the company's secretary and is responsible for the following duties:

- She performs the administrative projects within the company including the invoicing, filing and general paperwork
- Deals with queries in person and by telephone
- Administers sales

The petitioner stated that the company utilizes the services of contractors to execute carpentry and joinery projects, "but will be employing one full time carpenter at the beginning of August 2006 and a Joiner in October 2006." With respect to the director's request for evidence of wages paid to employees, the petitioner submitted a letter from its accountant, dated May 1, 2006, who stated that the company had not yet paid any wages, but expected to begin paying W-2 wages to the beneficiary and his spouse in the second quarter of 2006.

As noted above, the director initially denied the petition due to abandonment on July 25, 2006, but subsequently re-opened the matter when it was discovered that a timely response to the request for evidence had been submitted. The director ultimately denied the petition on October 23, 2006, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that the petitioner had not shown that it has any employees and therefore the beneficiary would not have staff to relieve him from performing non-managerial duties.

On appeal, counsel for the petitioner emphasizes that the beneficiary's initial period in L-1A classification was due to expire on July 19, 2006, more than four months after the petition was filed, and therefore the petitioner was not required to submit evidence that it had hired employees at the time of filing. Counsel further notes that at the time the petitioner responded to the director's request for evidence on June 28, 2006, the petitioner was still not required to show that it had hired staff, as the response was submitted nearly one month prior to the expiration of the initial period of L-1A status. Counsel therefore asserts that the "rules were not appropriately applied," as the petitioner "categorically intended to engage staff in compliance with immigration regulations, but has not been given a viable opportunity to do so as a consequence of the denial of the petition." Counsel contends that the beneficiary's spouse "was and remains responsible for the non-managerial responsibilities within the petitioning company." Counsel further asserts that the petitioner was given neither adequate time nor opportunity to employ staff, and highlights errors on the part of USCIS in the processing of the case, particularly, the error that led to the denial for abandonment in July 2006.

Upon review of the record and for reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

The errors made in processing the case, while regrettable, do not exempt the petitioner from having to meet the statutory and regulatory requirements for this visa classification. The lack of staff at the end of the first year of operations is only one factor in determining the beneficiary's eligibility for an extension of his L-1A status. Counsel does not specifically address the substantive issue of whether the petitioner established that the beneficiary was performing managerial or executive duties at the end of the first year of operations.

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 in either an executive or a managerial capacity. *Id.*

The definitions of executive and managerial capacity have two separate requirements. 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). In the instant matter, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time.

The petitioner initially provided a vague and nonspecific description of the beneficiary's duties that failed to demonstrate that he would be employed in a primarily managerial or executive capacity. The petitioner's statements that the beneficiary is responsible for "development of company," "overall management and direction," "full executive powers for policy making decisions," and devising marketing and advertising strategies suggest that the beneficiary exercises discretionary authority over the business; however, the petitioner failed to explain what specific managerial or executive duties the beneficiary performs on a day-to-day basis. The regulations require a detailed description of the duties the beneficiary performed during the first year of operations and the duties he will perform if the petition is extended. *See* 8 C.F.R. § 214.2(l)(14)(ii)(C). 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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).

Furthermore, the petitioner's response to the director's request for a detailed position description did little to convey an understanding of what the beneficiary's primary duties would be under the extended petition. For example, the beneficiary's responsibility for "liaising with pertinent parties such as suppliers, financial institutions," cannot be considered to be managerial or executive in nature. Without further explanation, these duties may involve nothing more than purchasing materials from suppliers and day-to-day banking. The petitioner further indicates that the beneficiary liaises with sub-contractors, designates joinery and carpentry projects to subcontractors, and directs the contractors in their duties. However, despite repeated references in the record to subcontractors, the petitioner has not provided any documentary evidence of their existence, nor has it identified the contractors utilized, or the nature and scope of the services they provide. 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)).

Furthermore, even if the petitioner had submitted documentary evidence to corroborate its use of contract employees, the petitioner's statement that the beneficiary is responsible for negotiating and finalizing contracts suggests that he is primarily responsible for marketing and selling the petitioner's services to clients and designing the customers' carpentry projects. 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). In addition, the beneficiary's responsibility for directly overseeing the carpentry and joinery work performed by the claimed contractors cannot be considered managerial in nature pursuant to the statutory definition. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

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 fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial, administrative and operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine that the beneficiary is primarily performing duties in a managerial or executive capacity. See, e.g., *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) 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. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

At the time of filing, the petitioner was a one-year-old company engaged in providing carpentry and woodworking services. Although not acknowledged by the petitioner, evidence in the record shows that the petitioner is also engaged in the sale of pet accessories. The petitioner employs the beneficiary as president and claims that the beneficiary's spouse serves as the company's secretary, responsible for customer inquiries, administrative tasks, and administering sales. The petitioner's accountant implied that the beneficiary and his spouse would begin receiving wages during the second quarter of 2006; however, USCIS records show that the beneficiary's spouse has not applied for an employment authorization document that would allow her to work while in L-2 status. Furthermore, as discussed above, the petitioner has not provided evidence pertaining to its claimed sub-contractors, such as their names, the duties they perform, they number of hours they work, or documentation showing payments to these workers.

The AAO acknowledges that the director did not specifically request evidence of payments made to contract workers, but the request for evidence clearly conveyed the petitioner's need to document evidence of wages paid to its workers. If the petitioner claims that contractors provided the majority of its services, it was reasonable to expect the petitioner to provide evidence of payments to such workers. Furthermore, the petitioner failed to provide a copy of its 2005 corporate tax return, which was specifically requested by the director, and which would have included information regarding payments made to contractors. 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). Although counsel insists on appeal that the petitioner had every intention of hiring employees before the end of the first year of operations, the petitioner specifically stated that it intended to hire one carpenter in August 2006, and one joiner in October 2006. The initial L-1 petition expired on July 19, 2006, so these workers would not have been hired within the one-year timeframe.

Therefore, the records shows that the beneficiary was the only full-time employee of the company as of the end of the first year of operations, and he appears to have been primarily responsible for marketing and selling the petitioner's services to customers, as well as purchasing materials. Even if the petitioner had hired a full-time carpenter and joiner prior to the end of the first year of operations, there is no evidence that such employees would have relieved the beneficiary from performing these non-qualifying duties. Although the petitioner indicated that the beneficiary's spouse "administers sales," her claimed duties have not been described in detail and the petitioner has not adequately supported its claim that she performs all non-

managerial duties of the company. Again, 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. at 165. Based on the invoices submitted, the beneficiary's spouse appears to be involved in the sale of pet accessories. Finally, the lack of evidence regarding sub-contracted employees raises questions as to whether the beneficiary was relieved from directly providing the petitioner's services. A review of the totality of the record fails to establish that the petitioner has a reasonable need for the beneficiary to perform primarily managerial or executive duties at its current stage of development.

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; however the petitioner in this matter has not indicated that the beneficiary would spend a substantial amount of time performing duties at the managerial or executive level. The petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). Here, the record fails to establish that the majority of the beneficiary's duties under the extended petition would be primarily directing the management of the organization or a component or function of the organization.

As stated above, 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 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the appeal will be dismissed.

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.