

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

DT

FEB 12 2007

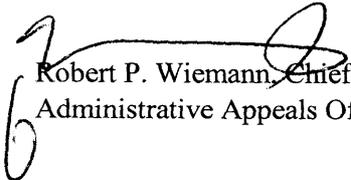
File: EAC 01 199 55178 Office: Vermont Service Center Date:

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center. The petitioner filed a motion to reopen and reconsider which the director granted. Upon review of the record in its entirety the Director ordered that its initial decision to deny the nonimmigrant visa petition be affirmed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as a business that imports and exports textiles, finished garments, and fabrics. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and chief executive officer for a period of three years. The director determined that the evidence did not demonstrate that the beneficiary's duties involved or would involve responsibilities that were primarily managerial or executive in nature.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will be managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must meet certain criteria. First, the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization. Additionally, the petitioner must establish that the beneficiary seeks to enter the United States temporarily in order to continue to render his or her services to the same employer, a subsidiary, or an affiliate in a capacity that is managerial, executive, or involves specialized knowledge, as defined by the statute.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

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 (1)(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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1997 as an import and export business of textiles, finished garments, and fabrics. The petitioner states that the U.S. entity is a subsidiary of [REDACTED], located in Mumbai, India. The petitioner declares three employees and gross income in the amount of \$259,582. The petitioner seeks to continue the beneficiary's services as president and CEO for a period of three years, at a yearly salary of \$36,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

The statute provides for a strict definition of managerial and executive capacity. Specifically, 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.

Regarding supervisory positions, the statute specifically mandates 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." *Id.*

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.

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

At the time of filing, the petitioner had three employees, including the beneficiary, but failed to specifically describe the duties of the three employees. The director requested that the petitioner submit additional evidence to establish that the beneficiary has been or would be functioning primarily in a managerial or executive capacity. The director requested the petitioner submit an organizational chart for the U.S. entity; a comprehensive description of the beneficiary’s proposed duties; and a description of how the proposed duties would be managerial or executive in nature. The director also requested complete position descriptions and educational credentials for all of the beneficiary’s subordinates in the United States; and a breakdown of the number of hours devoted to the employees’ job duties on a weekly basis.

In response to the director’s request for additional evidence, the petitioner submitted a letter of support, a copy of the business plan, a copy of the U.S. organizational chart, and a copy of the U.S. payroll records. The petitioner states in the letter of support that the beneficiary’s duties consist of managing the organization with the authority to hire and fire subordinates, scheduling daily job assignments, and holding regular meetings. The petitioner also states that the beneficiary’s subordinates report to him on a daily basis. An employee profile of the beneficiary reads as follows:

[The beneficiary] is the founding member of the company, who is President and CEO of the company. [The beneficiary] possesses vast and varied experience in textile business [sic] for over 20 years. He principally looks after the marketing of goods and establishing the footing of the company in the US market. He knows about everything in textile market right [sic]

from weaving of cloth, dying and manufacturing of readymade garments to fashion designing and marketing of goods. He books the order of distributors and satisfies their needs. He is the key officer who also looks after day to day functioning of the company.

The U.S. organizational chart depicts the beneficiary as president and CEO with two subordinates, an office manager and an office clerk/assistant/bearer. The job duty descriptions for the office manager include: customer follow-up, order taking, liaisons work, making appointments, and accounting and bank work. The job duty descriptions for the office clerk include: reception and answering, shipping and mailing, filing, corresponding, import documentation, and other clerical work. Job duty descriptions for the beneficiary include: marketing, planning, forecast, sales, analysis, import of goods, financial management, designing and creativity, development, office management, human resource, market research, quality control, and decision making.

Despite the director's request, the petitioner did not submit any evidence to establish the level of education possessed by the two subordinates or the number of hours devoted to the employees' job duties per week. By itself, a 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).

The director, in denying the petition, determined that the record lacked sufficient evidence to establish that the beneficiary was or would be operating in a managerial or executive capacity. The director stated that the beneficiary's proposed position descriptions were vague and merely paraphrased the statutory definitions of managerial and executive capacity. The director went on to state that the evidence did not establish that the beneficiary's subordinates possessed educational degrees or that their positions were professional in nature. The director also noted that it was not convinced that an organization of the petitioner's size and nature would require the beneficiary to perform primarily as a manager or executive.

In petitioner's motion to reopen it is stated that since the October 2001 decision of the service director, the petitioner had hired two additional employees. Counsel asserts that the two new hires both have professional degrees. Counsel also avers that the two new hires now perform the service duties that had been previously performed by the beneficiary. Counsel submits as evidence a revised organizational chart of the U.S. entity and an attachment detailing duties of the president as evidence.

In response to the petitioner's Motion to Reopen, the director concluded that the initial grounds for denial of the petition had not been overcome, and proceeded to order that the previous decision be affirmed.

On appeal, counsel disagrees with the director's decision and asserts that based upon the evidence submitted with the petitioner's motion to reopen, there is now a clear showing that two additional employees with educational degrees have been hired by the U.S. entity, and that they have served to relieve the beneficiary from performing the services of the corporation.

Counsel's assertions are not persuasive. After the director provided the opportunity to submit additional documentation on this issue, the petitioner failed to submit the requested evidence. On appeal, counsel relies on evidence that was not in existence at the time the petition was filed, or at the time the initial decision to

deny the petition was made by the director. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). CIS cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to the legal requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998).

The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part: “An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed.” Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The petitioner’s new evidence will not be considered and the record as it does not demonstrate eligibility as of the time of filing.

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). On review of the record, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

The vague position description is insufficient to establish that the beneficiary’s past or proposed job duties are managerial or executive in nature. The record contains a description of the beneficiary’s job duties that essentially paraphrases the essential elements of the statutory definitions of manager and executive. *See* sec. 101(a)(44)(A) and (B) of the Act, 8 U.S.C. 1101(a). Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, the petitioner has not provided persuasive evidence to establish that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company, at a senior level of the organization hierarchy. The record does not demonstrate that the U.S. entity possesses the organizational complexity to support a managerial or executive position. The record does not support a finding that the petitioner will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. The record reflects that the beneficiary will continue to perform the day-to-day services of the organization. Position title alone is insufficient to establish that the beneficiary will be functioning primarily in a managerial or executive capacity.

It is specifically noted that the beneficiary was initially described as responsible for the “marketing of goods” and “book[ing] the order of distributors.” Despite the director’s request, the petitioner failed to submit a breakdown of the number of hours devoted to the job duties on a weekly basis until after the director denied the petition. It is further noted that the second description submitted on motion departed from the original

description in that it did not mention the beneficiary's previously described duty of "marketing goods" and "booking orders." 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).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's original description of the beneficiary's job duties did not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Beyond the decision of the director, the petitioner has not established that the petitioner and the foreign entity maintain a qualifying relationship. The record contains minimal and conflicting documentary information regarding the extent of ownership and control between the parent's and the petitioner's business operations, thus raising the issue of whether there is a qualifying relationship between the U.S. entity and the foreign entity pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(G). Despite the petitioner's claim that the foreign company owns 100 percent of the petitioner's stock, the petitioner's 2000 IRS Form 1120, U.S. Corporation Income Tax Return, Schedule E, states that the beneficiary in fact owns 100 percent of the common stock. Based on the current record, the AAO cannot determine the actual ownership structure of the claimed parent and subsidiary companies. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

In addition, there is no evidence to establish that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States pursuant to 8 C.F.R. § 214.2(1)(3)(vii).

For these additional reasons the appeal must be denied. 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).

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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed and the petition hereby denied.