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**U.S. Citizenship
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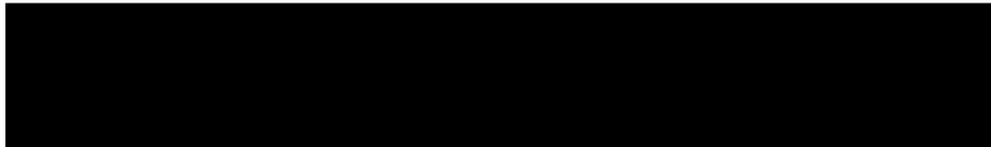


FILE: EAC 04 053 50395 OFFICE: VERMONT SERVICE CENTER Date: JUL 02 2007

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, Vermont 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 employ the beneficiary in the position of manager 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 Maryland and claims to be engaged in the retail of rugs, furniture, tapestries, and leather goods.¹ The petitioner states that it is an affiliate of [REDACTED] the beneficiary's overseas employer, located in India. The director denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity; and 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying capacity as a manager, executive, or specialized knowledge worker.

On appeal, counsel disputes the director's conclusion and provides additional information addressing the grounds of ineligibility cited by the director.

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 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 and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulations at 8 C.F.R. § 214.2(l)(3) state 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.

¹ It should be noted that the petitioner's actual incorporated name in the United States is [REDACTED]. According to the Maryland Department of Assessment and Taxation, the petitioner's status has been forfeited, meaning that its existence has been ended by the State for some delinquency. Therefore, regardless of whether the petitioner's delinquency in Maryland can be easily remedied or not, it raises the critical issue of the company's continued existence as a legal entity in the United States.

- (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.

The two primary issues in this proceeding call for an analysis of the beneficiary's employment capacity. The first issue is whether the petitioner has established that it would employ the beneficiary in a managerial or executive capacity. The second issue is whether the beneficiary was employed abroad in a qualifying capacity as a manager, executive, or specialized knowledge worker.

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.

In support of the Form I-129, the petitioner provided a letter dated November 24, 2003, which contained the following information regarding the beneficiary's proposed employment:

[The beneficiary] will be responsible for formulating the merchandise and assembling customer order[s] for delivery. Establish operational procedures for verification of incoming and outgoing shipments, handling and disposition of merchandise, and keeping of warehouse inventory. Coordinate activities of distribution warehouse with activities of sales, record control, and purchasing departments to ensure availability of merchandise. Direct reclamation of damaged merchandise.

With regard to the beneficiary's employment abroad, the petitioner stated that the beneficiary formulated merchandise policies and coordinated merchandise activity in the retail operation. The petitioner stated that the beneficiary's responsibilities included determining merchandise pricing based on the company's budget and profit goals, determining the amount of merchandise to be stocked, and directed the company's buyers in purchasing inventory for resale.

On January 29, 2004, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE). The petitioner was asked to provide, in part, the names and job titles of the five employees claimed in the petition and copies of the petitioner's two most recently filed tax returns.

Although a response was provided, the petitioner failed to provide the requested names and job titles of the employees claimed in the Form I-129. 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 petitioner did, however, provide its 2001 tax return, which shows that \$14,000 was paid in officer compensation and \$5,600 was paid in salaries and wages, and its 2002 tax return, which shows that \$9,680 was paid in officer compensation and only \$1,400 was paid in salaries and wages. The petitioner also submitted its quarterly tax return, Form 941, for the fourth quarter of 2003, which shows that the petitioner paid \$9,000 in wages. Neither the petitioner nor the submitted documentation identifies the recipient(s) of the 2003 wages.

Based on the documentation submitted and the petitioner's failure to disclose relevant information about its staffing, the director determined that the petitioner would not employ the beneficiary in a qualifying managerial or executive capacity. The director also commented on the lack of information about the beneficiary's employment abroad and concluded that the petitioner has not provided sufficient evidence to establish that the beneficiary's position abroad was within a qualifying managerial or executive capacity or a capacity involving specialized knowledge.

On appeal, counsel supplements the record with the following list of job responsibilities attributed to the beneficiary's employment abroad:

He was responsible for formulating merchandising policies and coordinating merchandising activities in our retail stores. His duties included determining markup and markdown percentages necessary to ensure profits, [sic] based on estimated budget, profit goals and average rate of stock turnover. He determined the amount of merchandise to be stocked and directed company buyers in the purchase of supplies for resale. He was also responsible for planning sales promotions, reviewing bills of lading for incoming merchandise and customer

orders in order to plan work activities. He assigned duties to workers: verifying amounts and storage of incoming merchandise and packaging customer orders for delivery. He established operating procedures for the verification of incoming and outgoing shipments, handling and disposition of merchandise and kept the warehouse inventory. He coordinated activities of the distribution warehouse with the activities of sale, record control and purchasing departments to ensure the availability of merchandise. He also directed reclamation of damaged merchandise.

With regard to the beneficiary's prospective employment, counsel states that Part 5 of the petitioner's Form I-129 mistakenly indicated that the petitioner has five employees. Counsel states that the petitioner has only one employee. However, that employee's name, position title, and job duties have not been provided. Counsel also provides no explanation for the petitioner's failure to correct the purported error prior to the director's adverse decision, which specifically brought into question the claimed staffing structure and the petitioner's ability to sustain the beneficiary in a position primarily involving qualifying managerial or executive tasks. Even if the AAO were to accept counsel's amendment of a claim initially made in the Form I-129, the new claim further undermines the likelihood that the petitioner is adequately staffed to relieve the beneficiary from having to primarily engage in daily operational tasks.

Based on the petitioner's discussion of the responsibilities associated with running its retail operation, workers are needed to handle incoming inventory shipments, ship the outgoing customer orders, maintain a record of inventory in the warehouse, and seek customers to whom the petitioner could sell its inventory of goods. However, the petitioner does not explain who would carry out these non-qualifying tasks that are essential to the petitioner's daily operation. Even if the petitioner employed one other individual, aside from the beneficiary, at the time the Form I-140 was filed, the record does not establish that the petitioner would be able to meet its daily needs by employing the beneficiary in a position where he would primarily perform duties of a managerial or executive nature. The petitioner lacks sufficient support personnel to ensure that the beneficiary would be relieved from having to primarily perform non-qualifying operational tasks on a daily basis. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

With regard to the beneficiary's employment abroad, counsel has supplemented the record with a broad list of responsibilities attributed to the beneficiary's position. However, these responsibilities fail to specify the actual job duties the beneficiary performed on a daily basis. 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). Thus, aside from broadly stating the beneficiary's job responsibilities, the petitioner must explain the means by which the beneficiary meets those responsibilities, which requires a detailed account of tasks that comprised the beneficiary's daily routine abroad. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Furthermore, the petitioner has provided no information about the foreign entity's organizational structure or the support personnel that may have been in place at the time to assist with carrying out the company's daily operational tasks. With the current lack of specifics regarding the beneficiary's actual daily job duties and the foreign employer's staffing levels, the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Additionally, the AAO cannot conclude that the beneficiary was employed abroad as a specialized knowledge worker. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) states:

Specialized Knowledge means special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

The plain meaning of the term "specialized knowledge" is knowledge or expertise beyond the ordinary in a particular field, process, or function. In light of the petitioner's failure to adequately described the job duties performed by the beneficiary during his employment abroad, the AAO cannot conclude that the beneficiary's foreign employment involved knowledge or expertise beyond what is commonly held in his field.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 214.2(l)(3)(i) requires that the petitioner provide evidence that it and the entity that employed the beneficiary abroad are qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G). Despite the director's finding that the petitioner provided sufficient evidence to establish that the claimed qualifying relationship exists, further review of the record contradicts such a finding due to various inconsistencies regarding the issue of the petitioner's ownership and the identity of the employer. In the petitioner's support letter dated November 24, 2003, the petitioner stated that the beneficiary was employed at [REDACTED], which it claimed is an affiliate of the petitioner by virtue of both companies' controlling interest belonging to [REDACTED], the common parent of the beneficiary's foreign and prospective U.S. employer. However, the pay stubs that were submitted to establish the beneficiary's employment abroad were issued by [REDACTED] not [REDACTED]. Whether such employment could have been qualifying or not, this inconsistency regarding the beneficiary's actual employer casts doubt on the veracity of the petitioner's claims. 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). In the present matter, the petitioner has provided no explanation for what the AAO deems to be a serious inconsistency regarding the beneficiary's employment abroad.

Additionally, with regard to the petitioner's ownership, the supporting documentation does not maintain a consistent claim. In the same support letter discussed above, the petitioner indicated that [REDACTED] owns 52% of the petitioner's shares, while [REDACTED] owns the remaining 48%. However, Schedule E of the petitioner's 2001 and 2002 tax returns indicate that [REDACTED] owns 50% of the petitioning entity. Still another claim is made in Schedule K of each of the tax returns, which indicate that [REDACTED] owns 51% of the petitioning entity. Neither tax return's Schedule L indicates that any money was contributed by the petitioner's owners in exchange for their respective ownership interests, whatever they may be; and no stock ledger has been provided to suggest that stock certificates were issued to actually convey the ownership interests. Thus, not only is the record entirely unclear as to which entity actually employed the beneficiary abroad, but even if the AAO were to assume that the [REDACTED] was the overseas employer, the documentation establishing the petitioner's ownership is inconsistent and therefore unreliable. *See id.*

Second, the petitioner's filing of Form I-129 was not in the capacity of a new office. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). Therefore, the underlying implication is that the petitioner has been doing business as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G) for longer than one year. *See id.* However, in the present matter in which the petitioner claims to operate a retail operation, the record lacks sufficient documentation to enable the AAO to conclude that the petitioner has been engaged in the purchase and sale of merchandise on a regular, systematic, and continuous basis since December 2002, one year prior to the date the petition was filed. 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)).

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). Therefore, based on the additional grounds of ineligibility as discussed above, this petition cannot be approved.

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.