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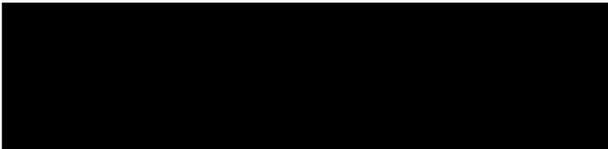
JUL 31 2008

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:



PHOTIC COPY

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 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 visa 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 is a corporation organized under the laws of the State of Florida and is allegedly engaged in the distribution, sale, and installation of custom kitchen furniture. 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 the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive. Counsel submits a brief and additional evidence, including substantial documentation concerning the petitioner's business operations occurring after the date of the filing of the instant petition on January 19, 2006.

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 primary 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.

The petitioner does not clarify in the initial petition whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. While counsel asserts on appeal that the beneficiary will be employed in an executive capacity, counsel does not clearly state that the beneficiary will not also be employed in a managerial capacity. Given the lack of clarity, the AAO will consider the petition as if the petitioner is claiming that the beneficiary will be employed in either an executive *or* a managerial capacity and will consider both classifications.

Counsel to the petitioner described the beneficiary's job duties in a letter dated January 9, 2006 as follows:

[The beneficiary] has and will perform the same duties as she has been performing for the UK Employer for more than [the] past three (3) years. In this regard, she has and will continue to be responsible for all aspect[s] with overseeing the day[-]to[-]day operation of the U.S. company. Specifically, the Beneficiary will be responsible for continued initial start up of the US operations inclusive of setting and implementing sales and marketing operations, short and long term company goals, policies, budgets and protocols. She will maintain her authority to hire and terminate employees for cause, as well as engage in contract negotiations on behalf of the company.

Counsel further explained that, due to the beneficiary's husband's inability to obtain an L-2 visa until November 2005, the petitioner was unable to "fully set up" the United States entity during its first year in operation. Although the original "new office" petition was approved for one year on February 10, 2005, and the beneficiary was issued an L-1 visa on April 18, 2005, the beneficiary "did not want to spend more capital to expand the company without her husband being able to live with her." Counsel further asserts that, now that the beneficiary's husband has arrived in the United States, the petitioner plans to open a showroom and commence conducting business. The petitioner apparently devoted 2005 to "setting up its operations for business, i.e. obtaining bigger office with a showcase space, obtaining occupational licenses, setting up sales tax payment account with the State of Florida, hiring services to pay taxes to IRS, etc."

On February 22, 2006, the director requested additional evidence. The director requested copies of the petitioner's wage reports and a detailed organizational chart for the petitioner.

In response, the petitioner submitted wage reports, which indicate that the petitioner did not employ anyone during the fourth quarter of 2005 or the first quarter of 2006. The petitioner also submitted a letter dated March 23, 2006 in which the petitioner offered further explanations for its inability to hire staff or to commence doing business in the United States. However, the petitioner did indicate that it "sold its first deal" in March 2006, several weeks after the filing of the instant petition and after the first anniversary of the approval of the original "new office" petition.

On April 21, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the beneficiary's duties are primarily those of an executive. Counsel also submitted additional evidence consisting primarily of documentation concerning the petitioner's business operations occurring after the date of the filing of the instant petition on January 19, 2006.

Upon review, the petitioner's assertions are not persuasive.

Title 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 Citizenship and Immigration Services (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. In the instant matter, the United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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.*

As a threshold matter, it must be noted that evidence of the petitioner's business operations, and the beneficiary's purported performance of managerial or executive duties, after the date of the filing of the petition is irrelevant to this proceeding. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, the evidence submitted by counsel on appeal, which concerns the beneficiary's duties and the petitioner's business activities after the filing of the instant petition, will not be considered by the AAO in adjudicating the instant appeal.

In view of the above, the petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will set and implement sales and

marketing operations and establish short and long term company goals, policies, budgets and protocols. However, the petitioner does not explain what sales and marketing operations will be set and implemented or what goals, policies, budgets, and protocols will be established. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes lofty duties does not establish that the beneficiary will actually perform managerial or executive duties. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, the petitioner did not provide a breakdown of how much time the beneficiary will devote to the duties ascribed to her. This is particularly important in this matter because the duties listed by the petitioner appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary will engage in sales and marketing operations. However, marketing and sales duties constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the record fails to identify any employees or contractors who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to both the sales and marketing duties and the operation of the business in general, it must be concluded that she will perform all of these tasks. As the petitioner has not established how much time the beneficiary will devote to such non-qualifying tasks, it cannot be confirmed that she will "primarily" be employed as a manager. 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).

While counsel on appeal asserts that the petitioner utilizes independent contractors, the record is devoid of any evidence that independent contractors were relieving the beneficiary of the need to perform non-qualifying administrative or operational tasks as of the date of the filing of the instant petition. Moreover, the prospective independent contractors described on appeal appear related primarily to the installation of the petitioner's product and not to the performance of sales, marketing, or those general administrative tasks inherent to the operation of the petitioner's business. Therefore, even if the petitioner's proposed utilization of independent contractors after the filing of the instant petition were not irrelevant to this proceeding (*see supra*), their utilization has not been shown to relieve the beneficiary of the need to primarily perform non-qualifying administrative or operational tasks.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the record, the petitioner has no employees other than the beneficiary. While the petitioner asserts that it has utilized independent contractors, the supervision or management of independent contractors will not permit a beneficiary to be classified as a managerial employee as a matter of law. See section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). The Act is quite clear that a managerial employee must manage *employees* in order to be classified as a manager for purposes of this visa

classification. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.¹

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, the beneficiary, the only employees of the petitioner, appears to be primarily performing the tasks necessary to produce a product or to provide a service. It has not been established that independent contractors are relieving, or will relieve, the beneficiary of the need to perform non-qualifying tasks. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

¹While the petitioner has not clearly argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary will primarily be engaged in performing non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties would be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

It is appropriate for 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).

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.²

Beyond the decision of the director, the petitioner has failed to establish that it has been "doing business" for the previous year or that it is a "qualifying organization" as defined in the regulations.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

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[.]

In this matter, the record reveals that the petitioner did not engage in the regular, systematic, and continuous provision of goods and/or services during its first year of operation. While the petitioner may have obtained certain licenses and engaged in other "set up" activities, it clearly did not engage in any business activity as defined in the regulations. The petitioner did not employ anyone or sell any products or services during its first year in operation. Moreover, as of the date of the filing of the petition, the petitioner was not engaging in the regular, systematic, and continuous provision of goods or services. As indicated in the letter dated March 23, 2006, the petitioner "sold its first deal" in March 2006, which is several weeks after the filing of the instant petition as well as several weeks after the first anniversary of the approval of the original "new office" petition.

Accordingly, as the petitioner has not established that it did any business during its first year in operation or was doing business at the time the instant petition was filed, the petitioner is ineligible for the benefit sought

²It is noted that counsel to the petitioner cited the unpublished opinion in *Matter of Irish Dairy Board*, A28-845-42 (AAO Nov. 16, 1989), in support of her contention that the beneficiary is primarily employed as an executive. In that decision, the AAO recognized that the sole employee of a petitioner could be employed primarily as a manager or executive provided he or she is primarily performing executive or managerial duties. However, counsel's reliance on this decision is misplaced. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Second, 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. Third as explained above, the petitioner has not established that the beneficiary is primarily employed in an executive or managerial capacity. This is paramount to the analysis, and a beneficiary may not be classified as a manager or an executive if he or she is not primarily performing managerial or executive duties regardless of the number of people employed by the petitioner. Therefore, as the petitioner has not established this essential element, the decision in *Matter of Irish Dairy Board* would be irrelevant even if it were binding or analogous.

