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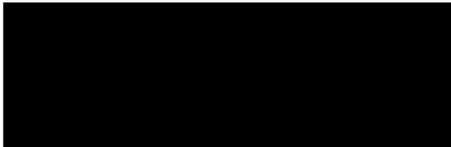
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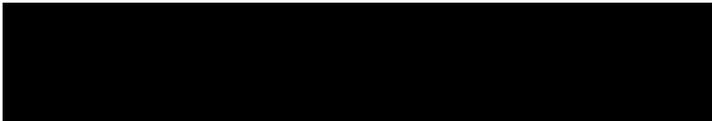


File: WAC 05 067 51865 Office: CALIFORNIA SERVICE CENTER Date: JUN 04 2007

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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president and treasurer 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).¹ The petitioner is a corporation organized in the State of California that is engaged in the wholesale and distribution of apparel.² The petitioner claims that it is the affiliate of Hakim Mani, located in H-Dey, Algeria. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and, subsequently, a two-year extension of his L-1 status. The petitioner now seeks to extend the beneficiary's stay for an additional three years.

On July 12, 2005, the director denied the petition concluding that the record does not demonstrate that the beneficiary would 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 it to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary's duties are primarily executive or managerial in nature, there is no requirement under the definition of executive regarding size or level of staffing, and the beneficiary was also performing activities consistent with that of a "functional manager." Counsel submitted a brief on appeal, but no further evidence was offered.

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.

¹ It is noted that throughout the record, the beneficiary is alternately referred to as the president and CEO and the president/marketing director.

² It should be noted that, according to California state corporate records, the petitioner's corporate status in California has been suspended. Although the reason for this suspension is unclear, it raises the issue of the company's continued existence as a legal entity in the United States.

- (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.

At issue in the present matter is whether the beneficiary would 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.

In a letter dated December 31, 2004 accompanying the initial petition, the petitioner described the beneficiary's job duties as follows:

[The beneficiary]'s role as president of [the U.S. entity] is a position involving executive functions. In this position, [the beneficiary] is on the company's board of directors, which makes and implements all corporate policies, and is head of operations, marketing and purchasing in the United States. [The beneficiary] is also responsible for the day-to-day operations of the company including developing and implementing marketing strategies, negotiating purchasing contracts, and product distribution.

On February 23, 2005, the director issued a request for further evidence (RFE). Specifically, the director requested the company's organization chart, which should include the current names of all executives, managers, supervisors, and number of employees within each department or subdivision. The petitioner was also asked to identify the beneficiary's position on the chart and provide the name, job title and description of job duties, educational level, and annual salary/wages for each employee under the beneficiary's supervision. The director also requested the company's payroll summary, Internal Revenue Service Forms W-2 and W-3, and federal and state quarterly wage reports for the previous four quarters. To demonstrate the beneficiary's executive capacity, the petitioner was asked to submit (1) a list of specific goals and policies that the beneficiary has established and discretionary decisions that he had made during the previous six months, (2) evidence that the beneficiary receives only general supervision from higher level executives and the board of directors or stockholders of the company, and (3) a specific day-to-day description of the duties the beneficiary has performed during the previous six months.

In a letter dated May 17, 2005 responding to the RFE, the petitioner indicated that there is only one employee aside from the beneficiary in the U.S. company. This individual is described variously as vice president, secretary, purchasing agent and representative, and shipment agent. The petitioner provided a description of job duties and educational level, although it is unclear whether they pertain to the subordinate employee or of the beneficiary. The petitioner explained that because both employees have elected to defer compensation until 2005, the petitioner could not provide the requested documentation of the employees' salaries and wages.

The petitioner described the specific goals the beneficiary has established in the previous six months as "developing markets and establishing the textile and apparel market in Algeria and the surrounding North African countries," and "bring[ing] traditional North American and central African clothing to consumers in America and [exporting] U.S. clothing into Algeria and neighboring countries." In terms of specific policies the beneficiary has set for the company, the petitioner simply stated that "[the beneficiary's] vision for the company is for it to provide the consumer with the highest quality of traditional apparel at an affordable price

with both quality and price-conscious consumer in mind." With respect to discretionary decisions the beneficiary has made, the petitioner pointed to the beneficiary's decision to move the company's offices from Los Angeles to Santa Barbara to reduce costs and gain easier access to distribution and supply channels. The petitioner stated the following with respect to the beneficiary's day-to-day duties for the past six months:

He develops and implements marketing strategies, negotiates purchasing contracts, oversees product distribution, and establishes and secures links with investors and suppliers in the United States. [The beneficiary] has also sought to establish long-term partnerships with the retail distributors in North Africa and the U.S., develop contacts with the boutiques in North Africa, and develop unique central distribution facilities in North Africa.

On July 12, 2005, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted that the petitioner did not provide the wage reports and tax statements filed on behalf of its employees as requested, nor did the petitioner explain its failure to do so. In addition, the director observed that the petitioner did not provide any independent documentation to confirm the employment of the vice president/secretary or any other employee working for the petitioner. The director further observed that without any other employee on staff, the beneficiary must be performing non-qualifying, day-to-day activities of the company's operations.

On appeal, counsel for the petitioner asserts that (1) the beneficiary's duties are primarily executive or managerial in nature, (2) there is no requirement under the definition of executive regarding size or level of staffing, and (3) the beneficiary was also performing activities consistent with that of a "functional manager." Counsel submits a brief in support of the appeal.

At the outset, the AAO notes that portions of counsel's brief are puzzling in that they appear to address findings and facts in a matter other than this one. For example, counsel attributes the following passages to the director's decision:

[The] petitioner did not establish that beneficiary is an executive because, among other reasons petitioner did not furnish a job offer in the form of the statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. . . .

* * *

In addition, the petitioner has not established that the nature of the petitioner's business would require a president to run this business. It is unreasonable to believe that the beneficiary, as CEO, with the organizational structure provided, would not be assisting with the day-to-day non-supervisory duties. The performance of those menial tasks precludes the beneficiary from being considered an executive.

Upon close examination, these passages do not appear anywhere in the director's decision in this instance, yet counsel uses a good part of his brief to challenge certain language therein. Counsel further claims that the

petitioner is a start-up "a little over one year old," whereas according to the petitioner, the company was formed in August 2002, and this petition is the second request for extension of L-1A status for this beneficiary. Counsel also claims that "the Service has not articulated the reasons for finding that [the beneficiary's subordinate] employees' positions are not so complex as to require individuals with the college degree [sic]." Again, no such finding appears in the director's decision, and furthermore, the beneficiary only has one subordinate employee whose educational level has not been revealed. Insofar as counsel's assertions address facts and findings that are not part of this case, the AAO will not take into consideration those assertions.

Upon review of the record, the AAO concurs with the director's conclusion that the record is insufficient to demonstrate that the beneficiary would be employed in the U.S. in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. In the initial petition, the petitioner states that the beneficiary "is on the company's board of directors, which makes and implements all corporate policies, and is head of operations, marketing and purchasing in the United States." The beneficiary is further described as being "responsible for the day-to-day operations of the company including developing and implementing marketing strategies, negotiating purchasing contracts, and product distribution." Even though the director requested more specific details regarding the beneficiary's duties, the petitioner's response contains no more than very general statements regarding the goals and policies of the company (essentially, to export and import apparel, and to provide high quality merchandise at an affordable price). In response to the director's request for a description of the beneficiary's day-to-day activities within the past six months, the petitioner simply reiterates its earlier job description for the beneficiary, stating that he "develops and implements marketing strategies, negotiates purchasing contracts, oversees product distributions, and establishes and secures links with investors and suppliers in the United States" as well as establish relationships with retailers in North Africa. 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's response has failed to address a critical question in this case: What does the beneficiary primarily do on a daily basis? 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).

The petitioner claims that the beneficiary has one subordinate employee, whose titles apparently include vice president, secretary, purchasing agent and representative, and shipment agent. Notwithstanding the many titles given to him, however, it is unclear based on the record what role this individual actually has in the organization and what his duties entail. In the "organizational chart" that the petitioner submitted in response

to the RFE, the beneficiary is listed as president and CEO, the vice president and secretary is listed as an employee under the beneficiary's supervision, and under both, the petitioner set forth the following job duties: "serves on the board of directors, makes and implements all corporate policies, acts as head of operations, develops marketing strategies, negotiates purchasing contracts, manages product distribution;" there is no other job description in the document. It is unclear whether this is a description of the beneficiary's job duties or those of the subordinate employee. If the latter is the case, then it would seem the subordinate employee has the exact same job duties as the president and CEO. On the other hand, if it is actually a restatement of the beneficiary's job's duties, then the petitioner has failed to provide a job description for the subordinate employee as requested. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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 AAO acknowledges that the petitioner did explain in its response to the RFE that no information regarding the employees' wages or salaries was available, because both employees have elected to defer receiving compensation until the expansion plan for the entity is completed in 2005. However, the petitioner did not offer any evidence documenting this arrangement, or any other evidence in lieu of payroll and wage reports to show that these individuals are actually employed by the company. Again, the 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 AAO notes that in the response to the RFE, the petitioner discussed the level of supervision the vice president receives from the beneficiary, stating that the vice president "is able to run operations by himself [and] does not require direct supervision from [the beneficiary]," that he "occasionally consults with [the beneficiary] on key decisions and expenditures, and that he "uses [the beneficiary's general company guidelines and policies to establish connections with foreign distributors and agents." Between these statements and the vague description of the beneficiary's job duties, the AAO cannot determine who is responsible for what tasks within the organization. The petitioner claims that the beneficiary is "responsible for the day-to-day operations of the company including developing and implementing marketing strategies, negotiating purchasing contracts, and product distribution." It is not evident from the record whether the beneficiary's sole subordinate employee performs the tasks relating to daily operations, marketing, purchasing and product distribution under the beneficiary's supervision, or whether the beneficiary himself performs these functions rather than "heads" or "oversees" them as the petitioner claimed. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing the marketing, contract negotiation and product distribution functions, the AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Finally, counsel claims on appeal that the beneficiary qualifies as a "functional manager." 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, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604. Counsel asserts that the beneficiary qualifies as a functional manager, but counsel has not specifically identified the function, nor has he provided evidence that the beneficiary manages an essential function. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In light of the foregoing, the AAO concludes that the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii).

Beyond the decision of the director, the AAO finds that the record is insufficient to establish that a qualifying relationship exists between the foreign and U.S. entities as required under 8 C.F.R. § 214.2(l)(3)(i). The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the U.S. and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

Here, the petitioner has provided conflicting information regarding the ownership and control of the U.S. entity. On the Form I-129, the petitioner claimed that the U.S. and foreign entities are affiliates because the beneficiary is the sole proprietor of the foreign entity and owns 70% of the U.S. company. However, the U.S. company's federal tax return for the year 2003 indicates that the beneficiary owns 100% of the company. The petitioner failed to clarify or reconcile these conflicting statements. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. See *Matter of Ho*, 19 I&N Dec. at 591-92. Moreover, aside from the disclosure in the U.S. company's 2003 tax return, the petitioner has submitted no documentation whatsoever to substantiate its claims regarding the ownership and control of either entity. Without full disclosure of all relevant documents, the Citizenship and Immigration Services is unable to determine the elements of ownership and control of the U.S. entity. Consequently, the claimed

qualifying relationship between the U.S. and foreign entities cannot be ascertained, and the petition must be denied for this additional reason.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.