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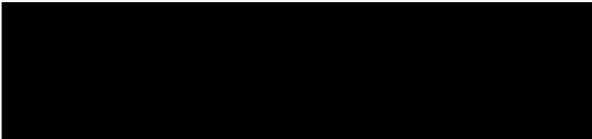
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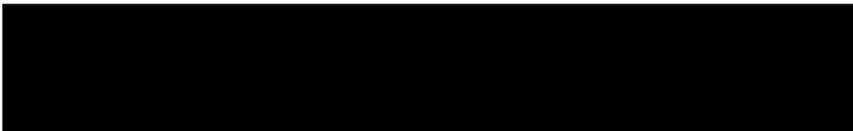
File: WAC 04 056 52002 Office: CALIFORNIA SERVICE CENTER Date: JUN 04 2007

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)

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 marketing 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, a California corporation, states that it is engaged in the import and marketing of gold jewelry and raw diamonds. It appears that the petitioner claims to have a qualifying relationship with Gurpreet Exports of India. The beneficiary was initially granted a one-year period of stay in L-1A status in order to open a new office in the United States, and now the petitioner seeks to extend the beneficiary's status for two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a 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 for the petitioner asserts that the director erred by concluding that the beneficiary is the sole employee of the U.S. operation. Counsel contends that the beneficiary is employed in a managerial capacity and is responsible for the supervision and training of three to four employees. Counsel submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within 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 sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial capacity. The petitioner does not claim that the beneficiary will be employed in an 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.

The petitioner filed the nonimmigrant petition on December 17, 2003. On the Form I-129 petition, the petitioner indicated the beneficiary's job title as "Import cum Marketing Manager" of the three-person company, and stated the non-technical description of his position as: "some clerical work." The petitioner did not submit an L Classification supplement or supporting evidence in support of its claim that the beneficiary would be employed in a managerial capacity.

Accordingly, on January 29, 2004, the director issued a request for additional evidence. In part, the director instructed the petitioner to submit: (1) a detailed description of the duties the beneficiary performs on an everyday basis; (2) an organizational chart for the U.S. company clearly identifying the beneficiary's position and listing all employees under the beneficiary's supervision by name and job title; (3) a brief job description, educational level, and annual salaries for all employees under the beneficiary's supervision; (4) copies of the U.S. company's California Forms DE-6, Quarterly Wage and Withholding Report, for the last three quarters; (5) copies of the company's IRS Forms 941, Employer's Quarterly Federal Tax Return, for the last three quarters; and (6) copies of the petitioner's payroll summary, Forms W-2 and Form W-3 as evidence of wages paid to employees.

The petitioner, through counsel, submitted a response received on April 22, 2004. The petitioner's response included a letter dated April 5, 2004, in which the beneficiary is identified as the "Marketing Manager and Chief Designer (Product)," with the following job duties:

- 1) Jewelry Designing and placement of orders.
- 2) Marketing and Sales including sales strategies.
- 3) Networking with the buyers and maintenance of customer data-base.
- 4) Delivery follow-up and customer satisfaction.
- 5) Maintaining record of Bills Receivable and Bills Payable.
- 6) Quality checking of all inventory.
- 7) Jewelry repairs if any.
- 8) Maintaining record of petty office expenses and travelling expenses.
- 9) Depositing checks and routine banking operations.

The petitioner submitted an organizational chart indicating that the beneficiary supervises a designer trainee/sales representative and a mail order/inventory employee. The chart shows that the beneficiary reports to the president and chief executive of the company, whose duties are described as "market studies/trends/selection of items to be imported." According to the organizational chart, the petitioner intends to hire two additional sales people during the second and third quarters of 2004. The petitioner

submitted the requested state quarterly wage reports, quarterly federal tax returns, and Forms W-2 and W-3 for 2003, all of which show the beneficiary as the only employee of the company at the time of filing. The petitioner submitted evidence of wages paid to the beneficiary's claimed subordinates as of March 2004.

The petitioner indicated that the beneficiary's duties under the extended petition would be to continue "to create and implement strategic marketing plan, using established market and competitive research techniques and analysis; he will continue to develop objectives, programs, and procedures for marketing activities."

The director denied the petition on June 10, 2004, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the beneficiary was the petitioner's only employee at the end of the first year of operations, and noted that "when a company has no employee[s], it become[s] questionable as to whether the operator of the business is engaged primarily in managerial or executive duties." The director therefore determined that the beneficiary is involved in all of the day-to-day duties of the petitioner's jewelry business, rather than primarily performing duties at the managerial or executive level. The director also found no evidence that the beneficiary exercises any significant authority over the generalized policy of the company.

The petitioner filed the instant appeal on July 12, 2004. On appeal, counsel for the petitioner asserts that the director erred in concluding that the beneficiary is the sole employee of the petitioning company, and as such, is not performing primarily managerial duties. Counsel asserts that the beneficiary has "actively trained" the petitioner's minority stockholder, [REDACTED], and [REDACTED]'s spouse, "in understanding, selection, and marketing of the firm's products." Counsel asserts that [REDACTED] has income from other sources and therefore no wages were paid to either him or his wife. Counsel states that as of the second quarter of 2004, the beneficiary supervises and trains two employees in addition to [REDACTED] and his wife.

In an appellate brief dated August 7, 2004, counsel asserts that the beneficiary now supervises a sales supervisor and two sales representatives, and will supervise a team of six to eight people, including an office manager, a design coordinator, and two sales agents, within the next year. The petitioner submits an updated organizational chart indicating the petitioner's current and proposed staffing levels; a copy of the company's Form DE-6, Quarterly Wage and Withholding Report for the second quarter of 2004 confirming the employment of the two employees previously identified as trainee designer/sales representative and mail order/inventory employee (both of whom are now described as sales representatives); and job descriptions for the beneficiary, the sales supervisor hired on August 1, 2004, and the two sales employees. The petitioner describes the beneficiary's job duties as follows:

- a) Jewelry designing and placement of Orders.
- b) Set sales targets of the company and individual sales targets for every sales [representative]
- c) Define sales strategies and formulate company policies to accomplish sales targets.
- d) Select areas for marketing the company line of jewelry products.
- e) Hire and establish a team of sales personnel required to achieve the goals set forth.
- f) Train the junior staff in respect of designing trends and marketing of existing products.

- g) Exercise full authority and discretion to add new designs to the product line and/or discontinue any of the existing designs if required.
- h) Exercise full authority and discretion to add new designs to the product line and/or discontinue any of the existing designs if required.
- i) Delegate authority and induce responsibility in each of the sub-ordinate [sic] in the marketing division to reach the goals of the company.
- j) Report the company progress to the CEO and discuss any changes required in company policies.
- k) Take decisions regarding advertising and publicity if required after consulting with the CEO.
- l) Keep a track [sic] of bills receivables and a check on expenses.
- m) Networking with the buyers and supervise the sub-ordinate staff to ensure customer satisfaction.
- n) Organise [sic] the participation in jewelry exhibitions if/when required.
- o) Banking transactions and handling of import documents.

Counsel asserts that the evidence submitted establishes that the beneficiary "meets the well-established principles of management." On November 21, 2005, counsel submitted additional evidence in support of the appeal, included an updated organizational chart depicting eight employees, an income and expense statement for the first ten months of 2005; and a copy of the petitioner's 2004 IRS Form 1120, U.S. Corporation Income Tax Return.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary's duties for the petitioner will be primarily managerial or executive. 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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Preliminarily, the AAO notes that the job description submitted for the beneficiary on appeal includes many duties that were not included in the position description submitted in response to the director's request for evidence, including responsibility for hiring employees, supervising a sales staff, formulating company policies, making decisions regarding advertising, and exercising discretionary authority over products. The job description also eliminates some of the duties previously ascribed to the beneficiary in the petitioner's previous job description, including responsible for delivery follow-up, jewelry repairs, and quality checking of all inventory. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N

Dec. 248, 249 (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 only position description to be considered in this proceeding is the description submitted in response to the director's request for evidence.

The petitioner's description of the beneficiary's duties as marketing manager and chief designer of the U.S. company does not include duties that could be considered managerial in nature. The petitioner stated that the beneficiary designs jewelry, repairs jewelry, places orders for jewelry, networks with buyers, maintains a customer database, follows up on delivery and customer satisfaction, maintains accounts payable and receivable, tracks routine expenses, checks all inventory for quality, performs marketing and sales, and performs the company's routine banking operations. These duties do not fall under the high-level responsibilities contemplated by the statutory definition of managerial capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). Although the beneficiary has been given the title of marketing manager, the record does not establish that he performs managerial duties related to marketing or any other function of the petitioner's business. Rather, based on the petitioner's representations, at the time of filing the beneficiary was personally responsible for virtually every routine duty inherent to operating a jewelry import and wholesale business, including sales, marketing, purchasing, bookkeeping, customer service, inventory, and product design and quality control. The actual duties themselves 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). An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

As discussed above, while it appears that the petitioner hired two employees subsequent to the filing of the petition, and the petitioner claims to employ a total of eight employees as of November 2005, the AAO again emphasizes that 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).

Counsel also claims that the beneficiary has always provided supervision and training to the petitioner's CEO and his spouse, who are not on the payroll but nevertheless are claimed to work for the business. The AAO notes that the beneficiary's job description, as initially represented by the petitioner, did not include any responsibility for supervising or training any other employees, much less supervising the CEO of the company who is indicated as the beneficiary's supervisor on the petitioner's organizational chart. 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). While there is some evidence in the record that the president and CEO, who is also claimed to be a shareholder of the petitioner, is involved in the operation of the U.S. company, the record does not support a conclusion that the beneficiary actually supervises this individual. Although counsel now claims that the beneficiary supervises the CEO's spouse, counsel does not identify her name, her job title, or the duties she performs, and again, the petitioner did not initially indicate that the beneficiary performs any

supervisory functions. 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)). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in 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 petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Further, in this matter, it is not necessary to consider the petitioner's staffing levels in order to make a determination regarding the beneficiary's employment capacity, as the description of the beneficiary's duties submitted at the time of filing indicates that his duties are primarily, or even exclusively, non-managerial tasks. It is evident from the record that any managerial duties performed by the beneficiary at the time of filing were incidental to his responsibility for performing the day-to-day services of the company. Again, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

Accordingly, based on the foregoing discussion, the AAO concurs that the petitioner did not establish that the beneficiary would be employed in a managerial or executive capacity under the extended petition, as the record does not establish that he would perform primarily managerial duties relating to supervision of managerial, professional or supervisory employees, or relating to an essential function of the organization. Consequently, the appeal will be dismissed.

Beyond the decision of the director, the AAO finds insufficient evidence to establish that the petitioner and the foreign entity maintain a qualifying relationship, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *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). In the context of this visa petition, 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.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The record does not contain evidence of the ownership and control of either the petitioner or the foreign entity, nor has the petitioner explained the relationship between the U.S. and foreign entities. As noted above, the AAO is unable to locate an L Classification supplement to Form I-129 in the record, and it is not clear that this form was filed. On appeal, counsel states that [REDACTED], located in New Delhi, India, previously employed the beneficiary and the record contains an employment certificate from this company, dated March 5, 2002, confirming the beneficiary's role as general manager of the company beginning in April 1998. The letter is signed by "[REDACTED]" as proprietor, but there is no further evidence of the ownership of the company, nor any evidence that the company continues to do business in India. The record also contains a copy of the petitioner's articles of incorporation, but no copies of stock certificates, stock transfer ledgers, or other evidence of the ownership of the U.S. company. Although the petitioner has submitted copies of its 2003 and 2004 corporate tax returns, no information regarding the ownership of the company can be gleaned from these documents. Finally, on appeal, the petitioner states that its chief executive officer [REDACTED] is a minority stockholder in the company, but there is no evidence submitted in support of this claim.

Based on the minimal evidence submitted, the AAO cannot conclude that the petitioner currently has a qualifying relationship with the foreign entity, [REDACTED]. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. For this additional reason, the petition cannot be approved.

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 and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.