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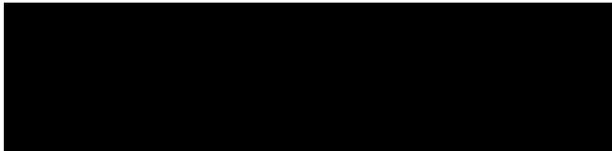
D-7

File: EAC 05 057 51051 Office: VERMONT SERVICE CENTER Date: MAR 07 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

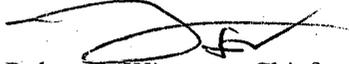
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to temporarily employ the beneficiary as its general manager in the United States 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 corporation organized in the Commonwealth of Puerto Rico, operates retail establishments specializing in the import and sale of textiles. It claims to be the subsidiary of [REDACTED], located in El Ilanito, Venezuela. The director denied the petition concluding that the petitioner did not establish 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 the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director erred by concluding that the beneficiary would merely be acting as a first-line supervisor in the United States. Specifically, counsel for the petitioner asserts that despite the small size of the petitioning entity, the beneficiary will in fact be employed in a primarily managerial capacity. In support of these assertions, counsel submits a brief and additional evidence.

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.

This primary issue in this 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.

In the initial petition, the petitioner briefly describes the beneficiary's proposed duties on the L Supplement to the Form I-129. Specifically, the petitioner indicates that the beneficiary's duties in the United States will be the same as they were abroad, and refers to the description provided for his foreign employment. The description indicates that the beneficiary was "managing[,] directing and supervising the sales department, including authorizing sales and purchases, [and] overseeing the import and export of merchandise." The petitioner continued to state that the beneficiary would perform these same duties in the United States, but in

addition, he would "oversee the operations of two textile retail establishments and supervise and manage [the] company's employees and policies."

The petitioner also provided a letter of support dated December 16, 2004. The letter provided the following additional description of the beneficiary's proposed duties in the United States:

[The petitioner] is dedicated primarily to the import and sales of textile products from South America. As the General Manager of [the petitioner], [the beneficiary] will be primarily in charge of supervising and managing the company's employees and policies in the two retail establishments; overseeing and authorizing all purchases, hiring, and training decisions, as well as overseeing its expansion into a successful chain of retail establishments in Puerto Rico and the Caribbean.

On November 19, 2004, the director requested additional evidence with regard to the beneficiary's managerial and/or executive capacity. Specifically, the director requested a complete description of the beneficiary's proposed duties, as well as the number of subordinate supervisors the beneficiary would oversee. Additionally, the director requested more details regarding the nature of the beneficiary's managerial capacity, including the degree of discretionary authority he would exercise over day-to-day procedures as well as more details pertaining to the time he would allot to qualifying and non-qualifying duties. In a response dated February 14, 2005, the petitioner, through counsel, submitted a response to the director's request. With regard to the beneficiary's role in the U.S. entity, the petitioner stated:

As general manager[, the beneficiary] will have a variety of managerial duties. Specifically, his responsibilities will entail:

1. Supervising, coordinating and directing activities of employees responsible for the proper function of the stores;
2. Administering and supervising general management affairs of the stores;
3. Formulating and/or approving the policies and overall operations;
4. Overseeing the hiring and training of qualified staff;
5. Overseeing inventory (purchase, storage, distribution, and payment);
6. Negotiating contracts, including rent, publicity, insurance, bank and credit[;]
7. Reviewing analysis of activities, costs, and operations to determine progress toward objectives;
8. Traveling to South America to visit factories and participate in trade shows;
9. Preparing reports of business transactions and maintain expense accounts;
10. Meeting with accountant;
11. Approving budgetary items for advertising and promotional purposes;
12. Meeting with store managers for periodic updates and evaluations of the daily operations.

Counsel further stated that initially, the beneficiary would be responsible for overseeing two retail establishments, each of which had its own staff and store manager who would report directly to him. With

regard to the organizational structure of these locations, counsel continued by stating that each location had sales persons, a bank runner, and a delivery man working on the payroll.

Finally, counsel stated the following:

Most of [the beneficiary's] day is dedicated to the managerial functions mentioned above. From time to time, however, he may have to assist his employees in other non-executive functions. Because the business is relatively small, if any employee is absent, [the beneficiary] would need to cover for them. Furthermore, in the busy seasons, such as Christmas and Mother's Day, he may have to take over more of the store manager's duties, allowing them to assist the sales personnel. In general, however, [the beneficiary] would focus over 90% of his time in managerial functions. The remaining 10% would be dedicated, as needed, to assisting the store managers in completing their responsibilities.

The director issued a second request for evidence on March 7, 2005. In this request, the director requested additional evidence pertaining to the U.S. business location and the nature of its business transactions. An organizational chart for the U.S. entity was requested, as well as additional information pertaining to the duties of the beneficiary's subordinate staff.

The petitioner responded on April 19, 2005. Although the same description of duties was submitted for the beneficiary, an additional list of duties pertaining to the store managers was submitted. It listed their duties as including the receiving and displaying of merchandise, totaling purchases, and ensuring utility bills were current.

On May 18, 2005 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States. Specifically, the director concluded that the beneficiary appeared to be merely a first line supervisor who frequently shared the duties of his subordinate staff members. On appeal, counsel argues that by virtue of the beneficiary's supervision of two store managers, he in fact is functioning in a primarily managerial capacity and that the two store managers are in fact the first-line supervisors in this matter. Counsel continues by stating that by virtue of their stated duties, which include opening and closing the stores daily, arranging work schedules, and overseeing sales staff, they are supervisory employees and thus elevate the beneficiary to a qualifying managerial capacity. Finally, counsel seeks to refute the director's reliance on the small staffing size of the U.S. organization by pointing out the nature of the staffing of each store of the petitioner and their individual ability to function within such a structure.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the organizational structure and duties of his subordinate staff members, it appears that the petitioner has failed to establish that it will employ the beneficiary in a capacity that is primarily managerial.

While the beneficiary is the intended general manager of the company, there is insufficient evidence to show that he will be acting primarily in a managerial or executive capacity during his U.S. employment. 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). In this case, the petitioner fails to sufficiently document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. While the AAO notes that in response to the request for evidence, the petitioner claimed that 90% of the beneficiary's time is spent on managerial tasks whereas the remaining 10% is devoted to non-qualifying tasks, the record does not support this statement.

First, the initial description of the beneficiary's duties include both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "traveling to South America to visit factories and participate in trade shows," "negotiating contracts, including rent, publicity, insurance, bank and credit," and "overseeing inventory (purchase, storage, distribution, and payment)" do not fall directly under traditional managerial duties as defined in the statute. Additionally, another one of the beneficiary's stated duties is to meet with the petitioner's accountant. However, the petitioner simultaneously claims that the beneficiary is responsible for "preparing reports of business transactions and maintain[ing] expense accounts," which appear to be duties traditionally delegated to a company accountant or financial officer. For this reason, the AAO cannot determine whether the beneficiary is primarily performing 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).

These discrepancies, coupled with the claim that the beneficiary must fill in for employees who are out sick or otherwise absent, suggest that the beneficiary's role is much more pronounced than the petitioner indicates. For example, the petitioner claims that during the busy seasons, the beneficiary may be required to take over the store managers' duties. Since the petitioner indicates that the store managers are required to open and close the stores, total purchases, and otherwise maintain an active role in the management of the stores' retail services. 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. 593, 604 (Comm. 1988).

Counsel attempts to refute the allegation that the beneficiary performs the tasks necessary to provide the services of the petitioner but does so unconvincingly. While the beneficiary's active participation and performance of the job duties of his subordinates may be infrequent, there is no definitive evidence to support the claim that only 10% of his time is devoted to such tasks. Furthermore, the fact the petitioner, through counsel, acknowledges that this is in fact a routine occurrence when necessary is an admission that the beneficiary must engage in non-qualifying duties. Considering this factor along with the aforementioned non-qualifying duties, such as negotiating contracts and attendance at trade shows, it stands to reason that the beneficiary will not be employed in a primarily managerial capacity in the United States.

Counsel's final assertion is that the petitioner's small size was detrimental to the outcome of the petition. With regard to the petitioner's employees, counsel correctly observes that, when staffing levels are used as a determining factor in denying a visa to a multinational manager or executive, the reasonable needs of the organization in relation to its overall purpose and stage of development must be considered and addressed. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, there is no indication in this matter that the reasonable needs of the organization were not considered by the director. On the contrary, it appears the

reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act.

In addition, it is important for Citizenship and Immigration Services (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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

As stated above, there are numerous duties attributed to the beneficiary that are not traditionally managerial in nature. These duties are in addition to his obligation to substitute for absent employees at lower levels within the petitioning enterprise. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In this case, however, the petitioner indicated on the Form I-129 that the beneficiary *would not* be coming to the United States to open a new office. Therefore, a presumption exists that the U.S. entity should be sufficiently operational and established, thus obviating the need for a manager or executive to engage in non-qualifying tasks. Clearly this is not the case in the instant matter, as demonstrated by the beneficiary's hands-on duties and definitive obligation to fill in for absent subordinate employees due to the small size of the petitioner and the lack of other employees to relieve the beneficiary from engaging in such actions. The AAO is therefore precluded from determining that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

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.