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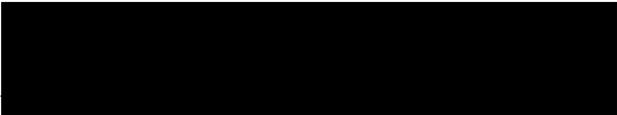


D-7

File: SRC 05 093 52041 Office: TEXAS SERVICE CENTER Date:

MAR 07 2007

IN RE: Petitioner:  
Beneficiary:



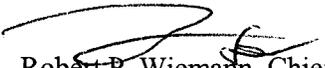
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Texas 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 U.S. petitioner, a corporation organized in the State of North Carolina, is engaged in the manufacture of art frames, artwork, furniture, lighting, and decorative merchandise. It claims to be the subsidiary of [REDACTED] located in Fujian, China. 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 filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was erroneous and submits a brief in support of this contention.

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) provides 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 issue in this matter is whether the beneficiary will be employed in the United States 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 February 2, 2005, the petitioner outlined the nature of the beneficiary's proposed position in the United States. Specifically, the petitioner explained that the purpose of the transfer was for the beneficiary to become the general manager of the U.S. entity, and that she would simultaneously be assuming the duties performed by the vice-president/marketing manager who had been terminated for cause in December 2004. The petitioner stated that it currently employed two persons on a full-time basis as sales associates and that it also employed two part-time employees to assist with project management and accounting. With regard to her specific duties, the petitioner stated:

[The beneficiary] will be responsible for overseeing the overall operation and management of the U.S. subsidiary in all matters relating to administration, finance, marketing and sales, and personnel resources. [The beneficiary] will implement the company's management plans and financial budget; execute policies and procedures; set marketing goals; oversee the marketing and sale of [the petitioner's] products, including the analysis of economic trends; negotiate contracts with customers; and oversee the hiring and management of additional U.S. employees.

An additional description of the position was submitted, in the form of a memorandum dated August 10, 2004, from the president of the foreign entity. The director found this additional evidence to be insufficient, and subsequently requested additional evidence pertaining to the beneficiary's proposed employment in the United States on February 24, 2005. Specifically, an organizational chart outlining the U.S. hierarchy was requested, as well as more details pertaining to the beneficiary's position as well as the positions of her subordinates. Quarterly tax returns were also requested to verify the actual number of staff currently on the petitioner's payroll.

In a response dated May 5, 2005, the petitioner clarified that the beneficiary's principal duties consisted of the following:

1. Executive Management (30%)
  - Oversee overall company operations and management of employees
  - Plan and develop company policies and goals
  - Identify methods and implement strategies to maximize management and quality of service
  - Coordinate activities of company personnel to maximize efficiency
  - Hire and supervise employees with assistance of Marketing Manager
  - Develop and implement marketing strategies for new and existing customers
2. Sales Management (30%)
  - Supervise and direct sales personnel
  - Negotiate and review all contracts and sales agreements
  - Analyze sales and inventory requirements with sales personnel
  - Ensure timely follow up of customer requests through sales personnel reports
  - Establish potential customer file through industry contacts
  - Visit customers on site to enhance relationships
3. Finance (10%)
  - Oversee company's budget and financial transactions
  - Control company costs and cash flow
  - Review budget and accounting reports with external accountant and bookkeeper
4. Marketing Activity (20%)
  - Develop and implement marketing strategies for new and existing customers
  - Oversee new accounts and develop client relationships

- Determine different channels for marketing product and increasing customer base for company
  - Direct and coordinate promotion of company products to North American buyers
  - Analyze U.S. market and consumer trends to maximize company and product efficiency
  - Represent company at domestic and international trade furniture markets and other exhibitions to promote company and products
5. New Product Development (10%)
- Study and analyze new product development related-issues, including costs, style, color, and materials
  - Work closely with suppliers to ensure product quality meets customer requirements

The petitioner also submitted an organizational chart, which indicated that the beneficiary would oversee two sales associates, namely, [REDACTED] and [REDACTED]. The organizational chart also indicated that the beneficiary would oversee the marketing manager, whose position was currently vacant. Also identified on the chart were independent contractors in the areas of accounting and project management; however, no specific persons were identified as filling these positions. Finally, the petitioner's most recent quarterly tax return, for the quarter ending March 31, 2005, indicated that two persons (most likely the sales personnel, were employed by the petitioner during that period.

The director denied the petition, concluding that it appeared from the description of the beneficiary's duties contained in the record, coupled with the organizational structure of the petitioner, that the beneficiary would perform more non-qualifying duties than actual managerial duties. The director specifically noted that the proposed organizational structure of the U.S. entity, with only two sales associates and no professional subordinates, did not support the premise that the beneficiary would enter employment with the United States entity in a primarily managerial or executive capacity.

On appeal, counsel makes strenuous arguments, and addresses in detail several reasons as to why he believes the director's decision was erroneous. Specifically, counsel asserts that the beneficiary would be managing an essential function of the petitioner, which was not addressed by the record. In addition, counsel asserts that the evidence clearly established that the majority of the beneficiary's time would be devoted to qualifying duties, and further contended that the director's reliance on the staffing levels of the petitioner was unfairly prejudicial. Finally, counsel asserts that the director overlooked evidence that would have been beneficial to the petitioner's case.

While counsel makes some valid assertions on appeal, the AAO concurs with the director's determination. 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.*

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.

In this matter, the petitioner alleges that the beneficiary will oversee a marketing manager in addition to two salespersons, and that additional staff will be hired in the future. The record at the time of filing, however, indicates that the only staff members employed by the petitioner were the two sales associates. The petitioner clearly admits that its former marketing manager was released in December of 2004. However, it seems that the duties of the beneficiary are intertwined with those of the marketing manager, since the duties of the beneficiary include hiring and supervising employees "with the assistance of the marketing manager." Additionally, the petitioner's February 2, 2005 letter clearly indicates that despite the beneficiary's transfer to the U.S. to serve as the general manager of the petitioner, she would simultaneously be assuming the duties performed by the vice-president/marketing manager. At least 20% of the beneficiary's stated duties are marketing functions, and with the absence of a marketing manager at the time of the petition's filing, it is unclear how the beneficiary can successfully ensure all marketing tasks are handled efficiently while simultaneously engaging primarily in managerial and executive tasks.

Since the beneficiary only has two subordinate employees, who serve as sales representatives, it stands to reason that the remainder of the tasks identified in the description of duties provided by the petitioner, as well as administrative, clerical, and other such duties not delegated to any specific person, would fall on the shoulders of the beneficiary. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as general manager and two sales representatives. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Another problem with the beneficiary's duties is the fact that a significant portion of her time is dedicated to the supervision of subordinates. Although the beneficiary is not required to supervise personnel, if it is

claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

There is no discussion of the level of education required to perform the duties of sales representatives. As a result, the petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. It is noted that the petitioner continually relies on the beneficiary's future supervision of a marketing manager, and the AAO notes that, as of the filing of the appeal in this matter, that position has not been filled. While it is arguable that that person's position is managerial or supervisory in nature, the fact remains that he was not on the petitioner's payroll at the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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).

Furthermore, counsel raises the claim that the beneficiary is a function manager for the first time on appeal. Counsel bases this assertion on the claim that the beneficiary should reasonably be expected to perform some non-qualifying tasks, particularly in light of the circumstances surrounding the petitioner's staffing issues. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. § 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial.

In the present matter, although the petitioner documents what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial, it appears that a majority of the duties listed are in fact *non-qualifying duties*. For example, nearly 30% of the beneficiary's time is devoted to performing sales activities, despite the fact that the only other employees in the company are sales representatives. An additional 20% or more is devoted to marketing activities, as well as an additional 10% devoted to new product development. Traditionally, such tasks are reserved for lower level employees who interact with customers on a daily basis. However, the petitioner is clearly claiming that approximately 60% of the beneficiary's duties focus on the sales and marketing aspects of the business, which are not qualifying duties and do not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing executive and managerial duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce 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).

While counsel alleges that the director disregarded evidence favorable to the petitioner, the AAO concludes that the record is decisive in establishing that the beneficiary's time would be devoted primarily to lower-level tasks, most likely the result of the absence of additional staff members, such as the marketing manager, to relieve her from performing such tasks. 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). In this case, the beneficiary's primary focus on the sales and marketing aspects of the company, including product development, suggest that the beneficiary is primarily involved in the services crucial to the continued growth and prosperity of the business. For this reason, it cannot be determined that the beneficiary is primarily employed in a managerial or executive capacity.

On appeal, counsel asserts that the director's decision on this issue was erroneous and that the record contains ample information to establish the beneficiary's qualifications. In addition, counsel asserts that despite the director's findings, the beneficiary will in fact oversee an accountant, and will also oversee a warehouse manager who has initiated the employment process as evidenced by a copy of her Form I-9, Employment Eligibility Verification, dated April 1, 2005. Counsel further contends that despite the director's findings, there are in fact other employees working for the petitioner at the other United States offices. Counsel further claims that the U.S. petitioner should be treated as a new office as this is the petitioner's newest worksite in the United States. The AAO disagrees.

There are two major problems with counsel's arguments. First, although the petitioner claims for the first time on appeal that the petitioner should be treated as a new office, it is evident that, based on the petitioner's claim on Form I-129 that it has been operating its business since 2003, this is not the case. Therefore, the staffing levels of the office in which the beneficiary will work are particularly relevant for purposes of this matter. As required by section 101(a)(44)(C) of the Act, 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.

Although counsel on appeal alleges that the petitioner's staff has grown, and Forms I-9 are submitted evidencing the steps taken to hire these employees, the fact remains that these persons were not employed by the petitioner at the time of the petition's filing. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The director determined that the petitioner lacked the organizational complexity to support the beneficiary in a primarily managerial or executive capacity. Specifically, the director noted that absent evidence to the contrary, the beneficiary would be required to perform all administrative, clerical, and non-qualifying duties based on the nature of the business and the lack of other staff members. While the petitioner claims that a warehouse manager has since been hired to assist the beneficiary, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See id.*; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition, which has not been established here. 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.