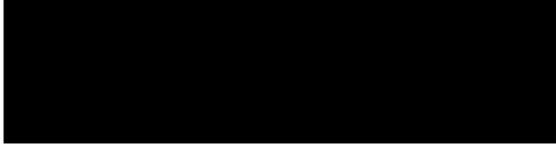


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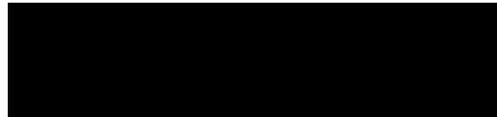
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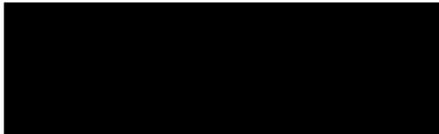
File: SRC 05 148 50053 Office: TEXAS SERVICE CENTER Date: **MAY 01 2007**

IN RE: Petitioner:  
Beneficiary:



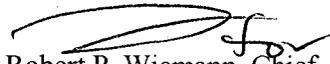
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of "manager – specialist sales" to open a new office 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 limited liability company organized under the laws of the State of Florida, claims to be engaged in the guitar business.<sup>1</sup>

The director denied the petition concluding that the petitioner failed to demonstrate (1) that the beneficiary has been employed abroad primarily in an executive or managerial capacity; or (2) that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that the beneficiary has been and will be employed primarily in an executive or managerial capacity. In support of the appeal, counsel submits a brief.

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.

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<sup>1</sup>According to Florida state corporate records, the petitioner's legal status in Florida was "administratively dissolved" on September 15, 2006. Therefore, since the limited liability company may not carry on any business except that necessary to wind up and liquidate its affairs, and the petitioner has not taken steps under Florida law to seek reinstatement, the company can no longer be considered a legal entity in the United States. See Fla. Stat. 607.1421 (2006). Therefore, this calls into question the petitioner's continued eligibility for the benefit sought.

- (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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

The first issue in this matter is whether the beneficiary had been employed abroad for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of

the organization;

- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner does not clarify whether the beneficiary is claiming to have been primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to have been employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The foreign entity described the beneficiary's job duties in a letter appended to the initial petition:

[The beneficiary's] duties working for [the foreign entity] have been in two focused areas of development. First as a Specialised Sales Manager for our [REDACTED] and secondly as a general manager of the business allowing me to concentrate on developing

the markets we usually trade in. As a manager [the beneficiary] has been responsible for the huge road shows we have completed over the last five years in which we demonstrated our products in various cities across the UK. He worked with some of the biggest names in the world on those shows.

On May 12, 2005, the director requested additional evidence. The director requested, *inter alia*, an organizational chart for the foreign entity and a description of the job duties of the beneficiary's subordinate employees.

In response, the petitioner provided an organizational chart portraying the beneficiary as directly or indirectly supervising a sales employee, two guitar demonstrators, an "engineer," and a "sales logistics" employee. The petitioner also provided position descriptions revealing that the guitar demonstrators, the sales logistics employee, and the engineer are not employees of the foreign entity, and that the sales employee sells t-shirts and other merchandise on a part-time basis at certain events. The record indicates that the beneficiary's subordinate workers are generally hired on an "as-needed" basis, and that their employment appears to relate to occasional guitar sales events. Other than these occasional independent contractors, the beneficiary does not appear to manage or supervise any subordinate employees. Moreover, the organizational chart includes only one other employee assigned to operating the retail store in the United Kingdom. This employee is not described as being subordinate to the beneficiary even though he is identified as being the "manager."

On November 3, 2005, the director denied the petition concluding that the petitioner failed to establish that the beneficiary has been employed abroad primarily in an executive or managerial capacity.

On appeal, counsel asserts that the beneficiary has been employed primarily as an executive or manager.

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

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(1)(3). 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's description of the beneficiary's job duties fails to establish that the beneficiary has acted in a "managerial" capacity overseas. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. While the petitioner claims that the beneficiary has been responsible for organizing road shows and managing the foreign entity's store, the record is devoid of any specifics regarding what, exactly, the beneficiary must do to organize these road shows or how much time he dedicates to this function *vis-à-vis* his duties to the retail operation. Given that the petitioner does not employ any subordinate staff dedicated to assist him with organizing the road shows and only employs one in-store sales assistant to assist the beneficiary in operating the retail store, it has not been established that a subordinate staff exists to relieve the beneficiary of the need to perform the non-qualifying administrative or operational tasks inherent in the duties ascribed to him. An employee who "primarily" performs the tasks necessary to produce a product or to

provide services, is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description does not establish that the beneficiary has actually been primarily performing managerial duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner has also failed to establish that the beneficiary has supervised and controlled the work of other supervisory, managerial, or professional employees, or has managed an essential function of the organization. While the foreign entity has provided an organizational chart and job descriptions for the beneficiary's subordinate staff, it does not appear that any of these staff members are actually employees of the petitioner. Rather, the record indicates that all of these subordinates are either hired on an as-needed basis or are self-employed independent contractors. In order for a beneficiary to be classified as a managerial employee based on the supervision and control of subordinate personnel, the petitioner must establish that the beneficiary is supervising and controlling *employees* and not independent contractors. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). Regardless of their employment status, the record is devoid of any evidence that the subordinate staff members are supervisory, managerial, or professional. At most, the beneficiary has been established to be a first-line supervisor of personnel, a provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.<sup>2</sup>

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<sup>2</sup>Moreover, the petitioner has not established that the beneficiary has managed an essential function of the foreign entity. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary has managed an essential function. As explained above, the petitioner's vague job description fails to document what proportion of the beneficiary's duties had been managerial functions, if any, and what proportion had been non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing his

Similarly, the petitioner has failed to establish that the beneficiary had been acting in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary had been acting primarily in an executive capacity. As explained above, the vague job description fails to clearly define what the beneficiary did on a day-to-day basis overseas or to explain how he has was relieved of the need to perform non-qualifying administrative or operational tasks given the absence of a full-time subordinate staff. Therefore, the petitioner has not established that the beneficiary has been employed primarily in an executive capacity.

Accordingly, the petitioner did not establish that the beneficiary had been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity as required by 8 C.F.R. § 214.2(l)(3)(v)(B), and for this reason the petition may not be approved.

The second issue in this proceeding is whether the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

In the letter dated April 28, 2005, counsel explained that the petitioner intends on opening a retail operation in Florida specializing in vintage guitars and that it desires to employ the beneficiary as its "manager—specialist sales" to open the new office in the United States. The beneficiary's duties were summarized as follows:

In this capacity, [the beneficiary] will be responsible for the day-to-day management of the store, and will use his extensive knowledge of the vintage Ibanez guitar market to properly manage inventory levels through the acquisition, trade, and sale of these rare collectibles. His managerial duties will include the handling of all imports and exports, the hiring of staff members, the scouting for and opening of new retail locations, and all other management functions until such time that the company can afford to expand its U.S. based management team. [The beneficiary] will additionally oversee the personalized search service that will allow customers to locate specific designs, finishes, or brands of guitars. He will also work to

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duties, the AAO cannot determine what proportion of his duties had been managerial, nor can it deduce whether the beneficiary had been 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).

promote and organize guitar demonstrations and other events similar to those that he directed while in the United Kingdom.

The petitioner also provided a "business development plan" outlining its proposed United States operation.

On August 3, 2005, the director requested additional evidence. The director requested, *inter alia*, that the petitioner "identify the proposed staffing level which should be realized by the US company by the end of the first-year start-up period."

In response, the petitioner indicated that by the end of its first year in operation it plans to employ one "general employee with trainee management potential" and, possibly, a part-time receptionist. The petitioner avers that the beneficiary's role as "manager" during the second year in operation "will be largely unchanged" from his role during the first year. By the end of the second year, the petitioner indicated that it plans to add two self-employed sales representatives to its organization.

On November 3, 2005, the director denied the petition concluding that, according to the petitioner's description of its business plan, the intended United States operation, within one year of the approval of the petition, will not support an executive or managerial position.

On appeal, counsel asserts that the intended United States operation will support a managerial or executive position.

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

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 order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The petitioner has failed to present evidence sufficient to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. The record does not establish that the petitioner's execution of its business plan will result, after one year, in the establishment of a business which will require the services of an executive or managerial employee. As indicated above, the petitioner intends on establishing a retail guitar business which will, after one year, employ the beneficiary, a part-time receptionist, and a third employee with "trainee management potential." The petitioner admits that the beneficiary's role after the first year in operation will remain largely unchanged once the business enters its second year. Therefore, the beneficiary will continue to be engaged in performing the day-to-day tasks necessary

to the operation of the business and will not be free to primarily focus on the broad goals and policies of the organization. Moreover, the proposed subordinate employees have not been established to be managerial, supervisory, or professional in nature. In view of the above, the record establishes that the beneficiary, after the first year in operation, will be performing the tasks necessary to provide a service, will be acting as a first-line supervisor, or will be a combination of both. An employee who "primarily" performs the tasks necessary to produce a product or to provide services, is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Accordingly, the petitioner has not established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

Beyond the decision of the director, the petitioner did not establish that sufficient physical premises to house the new office have been secured as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

In the initial petition, the petitioner provided a copy of a letter dated March 20, 2004 from Charles A. Savage III & Associates offering the use of 2157 NE 2<sup>nd</sup> St., Ocala, Florida to the petitioner. In that letter, the potential lessor indicated that the premises would be available beginning June 2005. In response to the first Request for Evidence, the petitioner provided a copy of a lease between the above lessor and the petitioner for space located in 2157 NE 2<sup>nd</sup> St., Ocala, Florida. The lease states that the petitioner's occupancy of the premises will begin on July 1, 2005. However, because the petition was filed on April 29, 2005, the petitioner failed to establish that it had secured sufficient physical premises to house the new office as of that date. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition, and, in a "new office" petition, it must show that it is ready to commence doing business immediately upon approval. 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). Therefore, because the petitioner had not secured physical premises to house the new office at the time the petition was filed, the petition may not be approved 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 is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.