

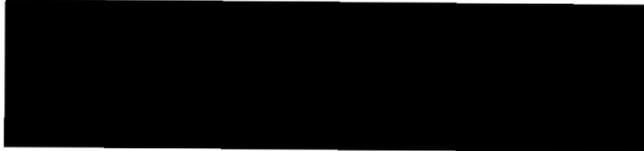


U.S. Citizenship
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File: WAC 99 104 50299 Office: CALIFORNIA SERVICE CENTER Date: **MAY 15 2007**

IN RE: Petitioner: 
Beneficiary: 

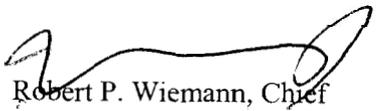
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


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 vice president 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 purchase and export of U.S.-made sporting goods. The petitioner claims that it is an affiliate of [REDACTED], located in Japan. The petitioner has employed the beneficiary since April 1996 and now seeks to extend the beneficiary's L-1A status for three 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 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 although the beneficiary is the sole employee of the U.S. company, the petitioner utilizes a number of independent contractors to perform the "daily routine duties" of the business. Counsel asserts that the beneficiary performs primarily managerial duties. 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 sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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

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

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

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

The nonimmigrant petition was filed on February 25, 1999. The petitioner indicated that the beneficiary would serve as the petitioner's vice president, and stated that the U.S. company has one employee. In a letter dated February 16, 1999, the petitioner described the beneficiary's duties as follows:

Since his entry into the U.S., [the beneficiary], as Vice President, has been, and will continue to be responsible for directing management of the corporation and its operations and establishing goals and policies of the company in the United States. [The beneficiary] is also responsible for export of water sport and clothing products to Japan. He conducts long-range and short-term strategic planning and develops business plan[s].

In addition, [the beneficiary] is responsible for all marketing aspects of the company. He has the authority to hire and fire personnel and other authority over personnel actions and will have discretionary authority over day to day operations of the company.

The petitioner submitted an organizational chart for the U.S. entity, which depicts two employees, the company president, and the beneficiary, whose position is identified as: "Vice President, Buyer & Sales Secretary, Promotion." The petitioner also provided a partial copy of its 1997 IRS Form 1120, U.S. Corporation Income Tax Return, for the fiscal year ended on March 31, 1998. The petitioner's tax return reflects \$18,563 paid as compensation to officers, and no salaries or wages .

The director denied the petition on April 14, 1999, 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 petitioner provided insufficient detail regarding the beneficiary's actual duties, and noted that some of the duties described had not been demonstrated to be managerial or executive in nature. The director determined that, without a supporting staff, it is questionable whether the beneficiary would perform primarily managerial duties. The director further noted that the beneficiary would not be managing a subordinate staff of professional, managerial or supervisory employees, or functioning at a senior level within an organizational hierarchy.

The petitioner filed the instant appeal on May 13, 1999. On appeal, counsel for the petitioner asserts that, although the U.S. company is a one-person office, the company utilizes independent contractors to perform "the necessary functions for the daily operation of [the petitioning company]." Counsel indicates that the petitioner's independent contractors include: (1) an office clerk who performs clerical work related to document preparation and translation; (2) an export specialist who contacts shipping companies, prepares shipping documents and invoices, keeps records, and ensures compliance with shipping regulations; (3) a purchaser, who contacts wholesalers for the purchase of products, prepares order forms, and checks quality and quantity of items upon receipt; (4) a technical computer consultant, who consults on computer-related problems, created a web site, and set up a bookkeeping computer application; and (5) a planner, who gathers information regarding water and winter sports products, prepares reports on the findings, and submits reports to the beneficiary for review.

Counsel also provides the following "complete and comprehensive job duties" performed by the beneficiary in his role as vice president:

- Coordinating independent contractors, such as export specialists, purchasers, and consultants and overseeing their activities;

- Hiring and firing qualified personnel within his sole discretion, keeping in mind the effective operation and profit attaining in regard to expansion of the export business;
- Using his independent discretion and authority in identifying new products to export and distribute to Japan. In selecting new products, [the beneficiary] makes final decisions upon discussing with directors of a parent company in Japan based on the research in Japanese market and ensures that [the petitioner] receives profits to accomplish the established company's goals;
- Developing strong relationships with officials of business connections [The beneficiary's] responsibilities are to direct negotiation of sales which may be long term business dealings and to contact top management of the above mentioned companies and prospective business connections to ensure the strong, stable, long business relationships;
Responsible for decision-making of all marketing aspect[s] of the company;
 - i) based on the findings regarding current market conditions in water sports and clothing accessory business, [the beneficiary] formulates policies to promote sales;
 - ii) to accommodate goals of company [the beneficiary] determines customer needs, volume potential, and price schedules, and develops purchasing campaigns by reviewing the market condition;
- Analyzing the economic flow of the company and controls budget
- Conducting the long-range and short-term strategic planning and development of a business plan; and,
- Traveling to Japan to attend director's meetings of [the foreign entity] to report the business of [the petitioner].

The petitioner asserts that the beneficiary's position involves "significant authority over generalized policy" and again emphasized that independent contractors carry out non-managerial tasks such as shipping products, ordering and purchasing products, and reconciling invoices.

In support of the appeal, the petitioner submits an independent contractor agreement between the petitioner and the employee identified as an "office clerk," stating that the employee would work eight to ten hours per week, beginning on July 1, 1997. The petitioner submitted copies of five checks issued to this individual, dated October through December 1997, and May and June 1998, for amounts ranging from \$175 to \$300.

The petitioner also submits an independent contractor agreement between the petitioner and the individual identified as an "export specialist," stating that the employee would work eight to ten hours per week beginning on September 1, 1998. The petitioner provided a copy of one check issued to this individual on October 30, 1998, in the amount of \$250.

Finally the petitioner submits: (1) copies of three checks issued to the individual identified as a "purchaser" in 1997; (2) a copy of a check issued to [REDACTED] in October 1996, for "videos for Japan," which appears to be endorsed by the individual identified as "purchaser"; and (3) copies of 11 checks issued to the individual identified as "computer consultant" during the months of May, June and July 1998.

Upon review, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. 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 show 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). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the performance of non-managerial or non-executive duties.

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the petitioning company as its vice president, the petitioner has failed to show that the beneficiary's actual duties will be primarily managerial or executive in nature. The petitioner initially stated that the beneficiary's duties include "directing the management of the corporation," and "establishing goals and polices of the company," as well as having authority to "hire and fire personnel" and exercising "discretionary authority over day to day operations of the company." The petitioner merely recited portions of the statutory definitions of managerial and executive capacity. See sections 101(a)(44)(A)(iii) and (iv) and §§ 101(a)(44)(B)(i) and (ii) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The initial job description submitted also suggested that the beneficiary would be responsible for non-managerial duties associated with the petitioner's day-to-day operations. For example, the petitioner indicated that the beneficiary is "responsible for export of water sport and clothing products to Japan" and "responsible for all marketing aspects of the company." The petitioner did not state that the beneficiary supervised the performance of these non-managerial functions through subordinate employees or outside contractors. In addition, the petitioner's organizational chart appears to indicate that the beneficiary is the company's buyer, in addition to his role as vice president, and that he also performs duties related to sales and promotion. The petitioner stated that the company has only one employee, and it was therefore reasonable for the director to assume that the beneficiary himself would be responsible for the day-to-day activities related to purchasing goods, performing market research, promotion and sales, and exporting products, as well as administrative, clerical and financial tasks associated with operating the business. Collectively, this brought into question how much of the beneficiary's time could actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

On appeal, counsel for the petitioner attempts to clarify the nature of the beneficiary's duties, and asserts that all daily, routine duties related to shipping, ordering, purchasing products, and related paperwork are performed by contracted employees. Counsel notes the beneficiary's responsibility for coordinating independent contractors, hiring and firing personnel, "using independent discretion and authority in identifying new products to export," developing relationships with "business connections," directing "negotiation of sales," formulating sales policies and "purchasing campaigns" based on market conditions, "analyzing the economic flow of the company," and "strategic planning." As discussed further below, the petitioner did not establish that the company had any employees or utilized the services of contractors at the time of filing; therefore the petitioner has not established that the beneficiary would be primarily "coordinating" contractors and hiring/firing personnel. Moreover, the petitioner has not articulated how the beneficiary's responsibilities for identifying new products and negotiating sales qualify as managerial or executive in nature. The petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary.

Furthermore, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. Upon review of the totality of the record in the instant matter, including evidence submitted on appeal, the petitioner has not established that the beneficiary's duties with respect to the petitioner's purchasing, marketing, sales, export and financial functions are primarily managerial in nature.

The petitioner has submitted documentation on appeal that is intended to corroborate the company's employment of independent contractors to perform various routine functions of the petitioning organization. However, the evidence fails to demonstrate that any of the claimed staff were providing services to the petitioner at the time the instant petition was filed in February 1999. For example, a copy of a single check issued to the export specialist four months prior to the filing of the petition is simply insufficient to establish that this individual relieves the beneficiary from performing non-qualifying duties associated with shipping products from the United States to Japan. Furthermore, even if this individual were still providing services for the petitioner at the time of filing, according to the terms of the contract submitted, the export specialist would work no more than ten hours per week. Similarly, the petitioner provided no recent evidence of payments to the purchaser, no independent contractor agreement or other evidence to corroborate its ongoing employment of this individual, nor any recent evidence of payments to the part-time office clerk, who was also apparently only contracted to work no more than ten hours per week. Finally, there is no evidence of any payments to the "planner" who is claimed to perform the petitioner's product and market research 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel's assertion that the petitioner utilizes independent contractors to perform the non-managerial, day-to-day activities of the business is not adequately supported. Probative evidence of the petitioner's use of contractors would have included, at a minimum, evidence of recent and regular payments to these individuals, contemporaneous with the filing of the petition.

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, U.S. Citizenship and Immigration Services

(USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, it is appropriate for 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). 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. at 165.

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.

There may be certain situations in which a beneficiary who is the sole employee of a company may qualify as a manager or executive. It is the petitioner's obligation to establish however, through independent documentary evidence, that someone other than the beneficiary performs the majority of the day-to-day non-managerial and non-executive tasks associated with operating the petitioning entity. The petitioner has failed to meet this burden. Based on the evidence submitted, the petitioner would reasonably require the beneficiary, as its sole employee, to perform the majority of the day-to-day activities associated with operating an export company, including purchasing, market and product research, promotion, shipping and administrative and financial tasks. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

The AAO acknowledges that CIS previously approved two L-1A nonimmigrant petitions filed on the beneficiary's behalf. However, each nonimmigrant petition has a separate record of proceeding with a separate burden of proof; each individual petition must stand on its own merits. *See* 8 C.F.R. § 103.8(d). The prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's and beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the prior approval would constitute material and gross error on the part of the director. Due to the lack of evidence of eligibility in the present record, the

AAO finds that the director was justified in departing from the previous approvals by denying the present extension petition.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.