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**U.S. Citizenship
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FILE: WAC 07 146 52027 Office: CALIFORNIA SERVICE CENTER Date: **NOV 06 2007**

IN RE: Petitioner:
Beneficiary:



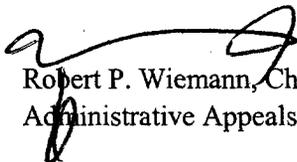
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 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 import and wholesale of cosmetics and other products. The petitioner claims that it is a subsidiary of S.G. Korea Co. Ltd., located in Korea. The beneficiary was initially approved for a one-year period in L-1A classification in order to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's status for two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

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 facts on record are sufficient to meet the petitioner's burden of proof to establish that the beneficiary will be employed in a primarily managerial capacity. Counsel contends that the volume of business conducted and the number of employees hired within the first year of operations warrant the extension of the beneficiary's L-1A status. Counsel submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial 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 April 16, 2007. In a letter dated April 13, 2007, the petitioner indicated that the beneficiary has been employed as president, "a position involving executive functions." The petitioner indicated that the beneficiary "is responsible for the developing and overseeing of all U.S. operations, including setting corporate policies, developing strategies for marketing, fiscal and personnel matters." The petitioner emphasized that the company employs six professionals and achieved gross sales of \$1.67 million in 2006.

The director issued a request for additional evidence on June 20, 2007, in which she instructed the petitioner to submit the following: (1) a detailed, specific description of the beneficiary's duties, and the percentage of time he devotes to each duty; (2) an organizational chart for the U.S. company which includes the names and job titles of all employees; (3) information regarding subordinate employees, including their job duties, educational level, annual salary/wages and immigration status; and (4) copies of the petitioner's California Form DE-6, Employer's Quarterly Report for the last four quarters.

In a response dated July 9, 2007, counsel for the petitioner stated that the beneficiary has functioned in a primarily managerial capacity during the first year of operations and currently oversees five employees. Counsel provided information regarding the names, job titles, educational level and salary of the beneficiary's subordinate employees, and the dates on which they were hired, but included little information regarding their job duties. The petitioner also submitted an organizational chart depicting the company's structure. The employees, as identified on the organizational chart, include a marketing director/general manager, a sales manager, a sales associate, a marketing associate, and an administrative secretary. Based on the petitioner's California Form DE-6 for the second quarter of 2007, all employees work on a full-time basis.

Counsel for the petitioner further explained the petitioner's organizational structure as follows:

The corporate structure at [the petitioner] is basic yet effective. It is a four-tier system, similar both in appearance and functionality to the Parent Company.

The top tier consists of the President whose decisions are penultimate pronouncements regarding the direction of [the petitioner]. The second tier is occupied by the general manager of [the petitioner] who ensures the ultimate wishes of the CEO. The general manager's responsibility is to oversee all matters of the company relating to marketing, sales

and general procedures. The third tier consists of marketing and sales managers who oversee their respective branches in [the petitioning company]. The marketing manager's role includes consultation, domestic advertising and international trade between Korea and the U.S. regarding the company's product. The sales manager primarily focuses on the management of product inventories, organizational and procedural issues, supervision of sales associates and lesser executive decisions. Two sales associates and a marketing associate represent the fourth tier, focusing on day to day sales of the products manufactured, customer service issues, and basic advertising.¹

Counsel stated that the "high volume of professional and managerial employees hired in this short period of time, combined with substantial cash flow proves [the petitioner] properly functioned under the Beneficiary in its probationary period." The petitioner provided resumes for its sales associate, marketing director/general manager, sales manager and marketing associate. The record indicates that the sales associate has a bachelor's degree in theatre and experience in sales and marketing; the marketing director has an associate's degree in electronic communication and extensive marketing experience in the petitioner's industry, the sales manager was enrolled in university-level business management and marketing programs, but it is unclear whether she graduated; and the marketing associate has an educational background in pharmacy.

With respect to the beneficiary's position, counsel further described his role as follows:

Currently, as the paramount executive of [the petitioner], Beneficiary has a monopoly over the development and oversight of every U.S. operation. Such duties include establishing and enforcing corporate policies, developing and delegating strategies for marketing, and management and delegation of fiscal matters.

Furthermore, Beneficiary due to his penultimate executive status has complete, unadulterated discretion to hire any additional employees and fire any of his six subordinates. Beneficiary's annual salary is approximately \$120,000.00 USD, a salary befitting a manager of his rank. Within [the petitioner], Beneficiary has no superior, no peer.

Moreover, the business future of [the petitioner] is luminescent. A second subsidiary of the Parent Company, Beautique, Inc. (hereinafter "Beautique") was incorporated by the laws of the state of California in January of 2007. The primarily [sic] purpose of Beautique is to act as a retail branch of both Parent company and [the petitioner]. Currently, Beautique under the leadership of Beneficiary is in a preliminary opening stage, attempting to hire its first management and retail employees. This expansion was planned by Beneficiary in his role as President of [the petitioner], and he is currently also functioning as the President and CEO of Beautique.

The petitioner provided the articles of incorporation, seller's permit, and Statement of Information for Beautique, Inc., and copies of recruitment advertisements placed on behalf of the company for the positions of "Accounting" and "Marketing & Sales," during the months of April, May and June 2006.

¹ The AAO notes that the petitioner's organizational chart identifies only one sales associate and one marketing associate.

The director denied the petition on July 17, 2007, concluding that the petitioner had failed to establish that the beneficiary would be employed in a managerial or executive capacity under the extended petition. The director acknowledged the evidence submitted with respect to the beneficiary's subordinates, and concluded that "it appears that the beneficiary has been and/or will be performing many aspects of the day-to-day operations of the business." The director found insufficient evidence to establish that the beneficiary would be functioning at a senior level within an organizational hierarchy, primarily supervising a subordinate staff of managerial, supervisory or professional employees, or managing an essential function of the company.

On appeal, counsel for the petitioner asserts that the director's decision consisted of conclusory statements and provided an unclear basis for the denial of the petition. Counsel contends that the facts on record clearly establish that the beneficiary is functioning in a managerial capacity and not performing the "day-to-day operations," as concluded by the director. Counsel suggests that when considering the extension of a petition involving a new office, the director should consider whether the petitioner demonstrated significant growth in cash flow and in the number of employees. Counsel states that the petitioner's growth during the first year of operations supports the beneficiary in a managerial position, and also supports two lower-level managers.

Counsel also further explains the petitioner's business activities, noting that the company initially served solely as an importer of foreign nail products, selling raw materials for beauty products to manufacturers and retailers. Counsel notes that the introduction of the Beautique retail department has brought an "overwhelmingly positive response." The petitioner submits reference letters from two of the petitioner's clients, who attest to the success of the U.S. company and the beneficiary's leadership role. Counsel further notes that the petitioner recently hired a customer service and support employee "at the complete discretion of Beneficiary."

Counsel's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in a managerial or executive capacity under the extended petition. However, as a preliminary matter, the AAO notes that when denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i).

Upon review of the director's decision, the reasons given for the denial are conclusory with few specific references to the evidence entered into the record or why such evidence failed to establish the petitioner's and beneficiary's eligibility for the benefit sought. As the AAO's review is conducted on a *de novo* basis the AAO will herein address the petitioner's evidence & eligibility. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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 petitioner initially provided a vague and nonspecific description of the beneficiary's duties that failed to demonstrate what the beneficiary does on a day-to-day basis. Initially, the petitioner merely indicated that the beneficiary's position include "developing and overseeing of all U.S. operations, including setting corporate policies, developing strategies for marketing, fiscal and personnel matters." The petitioner did not, however,

identify any specific tasks to be performed by the beneficiary as part of his responsibility for the overall management of the business, nor were the beneficiary's policies or strategies explained or defined. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The definitions of executive and managerial capacity have two separate requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While the initial description suggested that the beneficiary exercises the appropriate level of authority over the U.S. company, it provided no meaningful information regarding his actual duties or the amount of time he is required to devote to managerial or executive functions.

Therefore, upon review of the job description submitted, the director requested additional evidence that would assist in a determination as to whether the beneficiary performs primarily managerial or executive duties. The director specifically requested a detailed position description, a list of specific duties, and the percentage of time spent in each of the listed duties. The petitioner acknowledged the director's request, but declined to add any meaningful detail to the initial job description provided for the beneficiary. Counsel's statements that the beneficiary has "a monopoly over the development and oversight," "penultimate executive status," "complete unadulterated discretion," over the company, and "exclusively executive and managerial duties," confirm the beneficiary's authority over the company, but add no insight into what he actually does on a day-to-day basis. Counsel also added that the beneficiary is also serving as president and chief executive officer of a second company, but offered no explanation as to the beneficiary's specific duties or functions with respect to Beautique, Inc. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The evidence requested regarding the beneficiary's and his subordinates' specific job duties is absolutely critical to a determination of whether the beneficiary will serve in a primarily managerial or executive capacity. See 8 C.F.R. § 214.2(l)(3)(ii). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Therefore, while the petitioner has broadly addressed the beneficiary's claimed executive level of authority within the organization, the record is devoid of any evidence that would suggest what duties he actually performs on a daily basis and what proportion of those duties are qualifying duties. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. The word "primarily" is defined as "at first," principally, or "chiefly." *Webster's II New College Dictionary* 877

(2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also be "principally" or "chiefly" performing managerial or executive duties. The regulations require that USCIS determine that the beneficiary is primarily engaged in a managerial or executive capacity. To make such a determination it is necessary to require a detailed description of the beneficiary's duties and the time the beneficiary devotes to these duties. The AAO cannot accept counsel's unsupported assertion that the beneficiary's duties are all managerial or executive in nature in lieu of the required detailed position description. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Although the beneficiary is not required to supervise personnel, if it is claimed that his managerial 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.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. Based on the evidence submitted, only one employee, the sales associate, has been established to possess a bachelor's degree. However, the petitioner has not established that a bachelor's degree in theatre is required to engage in the day-to-day sales of cosmetic products. The AAO acknowledges that two of the petitioner's lower-level employees are claimed to be supervisors or managers, however, the petitioner has provided minimal information regarding their job duties and areas of responsibility, and has not indicated the amount of time the beneficiary would devote to supervising subordinate employees. The minimal evidence submitted regarding the beneficiary's duties and those performed by his subordinate employees prohibits a finding that he is primarily engaged in the supervision of supervisory or managerial personnel.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position.

Although the director appeared to base her decision partially on the size of the enterprise and the number of staff, it is not clear whether the director considered the reasonable needs of the enterprise. 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.

At the time of filing, the petitioner was a two-year-old import and wholesale company that claimed to have a gross annual income of nearly \$1.7 million. The firm employed the beneficiary as president, a marketing director, a sales manager, a sales associate, a marketing associate, and a secretary. The analysis of this issue is complicated by the petitioner's failure to fully explain how the operation of the retail business known as "Beautique" is integrated into the petitioner's operations. The petitioner did not mention the formation of this company at the time of filing. When responding to the request for evidence in July 2007, counsel suggested that the retail business was not yet operational, but noted that the beneficiary would be responsible for managing the business and leading it through its preliminary stages of hiring employees. On appeal, counsel suggests that the Beautique has been operational and quite successful, and submits evidence that the company was doing business at least since April 2007. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

If the petitioner's five lower-level employees are in fact responsible for both the petitioner's import and wholesale business and a retail business, it is questionable whether they are able to relieve the beneficiary from performing non-managerial functions associated with both companies. Moreover, the AAO notes that, with the exception of the secretary who performs general clerical functions, all of the employees are claimed to be engaged in sales and marketing tasks. It is unclear who is responsible for purchasing, import, logistics, distribution, shipping, and routine financial functions that would reasonably be essential to an import, wholesale and retail business. The AAO will not speculate as to who performs these tasks and will not assume that the beneficiary is relieved from performing non-qualifying duties associated with these functions. The AAO acknowledges the significant growth achieved by the petitioner during the first year of operations in regard to sales and number of employees. However, the petitioner must still establish that the beneficiary performs primarily managerial or executive duties, and that someone other than the beneficiary performs the majority of the non-managerial duties associated with the business. The petitioner has not met this burden.

The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). Therefore, counsel's argument that the beneficiary is in charge of a business with substantial staffing and income is insufficient to establish the beneficiary's employment in a qualifying capacity. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Here, the actual duties performed by the beneficiary cannot be determined as a result of the petitioner's failure to submit a meaningful response to the director's request for a comprehensive description of his duties. Again, 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.

The AAO acknowledges the petitioner's assertions that the U.S. company and the related entity, Beautique, Inc., anticipated hiring additional employees and expanding their business operations in the future, and notes that one additional employee appears to have been hired after the petition was filed. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

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.