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U.S. Citizenship
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Services

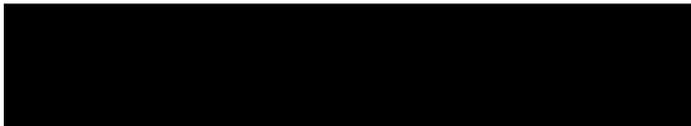
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File: EAC-03-224-51145 Office: VERMONT SERVICE CENTER Date: **SEP 06 2007**

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)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to qualify 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 is a corporation organized under the laws of the State of Maryland and is engaged in the business of importing and selling textiles. The petitioner claims that it is the subsidiary of [REDACTED], located in New Delhi, India.

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, reasoning that the petition did not have sufficient staff to relieve the beneficiary from having to primarily perform the duties related to producing a product or service and that the petitioner had not grown to a level sufficient to support a managerial or executive 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 for the petitioner asserts that the director's decision was based on misunderstood facts. The petitioner indicated that it would submit a brief and additional evidence within thirty days. No brief or evidence was ever received, however, and the record will be considered complete.

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 issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity. The petitioner has represented that the beneficiary has been traveling to the United States under a B-1 visa, and is seeking admission as an L-1A non-immigrant to obtain longer periods of stay.

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

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and

- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] shall continue to participate in trade shows personally and [pursue] the activities of the [c]ompany on a daily basis instead of controlling its affairs from overseas. A more permanent presence of the owner is also required to [pursue] the [petitioner's] growth more vigorously and also to perform all the legal and statutory responsibilities of the [c]ompany.

On September 2, 2003, the director sent a request for additional evidence (RFE) to the petitioner. Specifically, the director requested a detailed description and hourly breakdown of the beneficiary's activities, organizational charts, a detailed description of the beneficiary's duties abroad, and a statement with specific details about the foreign organization.

In response, the petitioner submitted a letter and additional evidence, including pictures, tax returns, documents of the foreign organization and catalogues.

On July 7, 2004, the director denied the petition. The director determined that the petitioner had not established that the beneficiary would be acting primarily in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's decision was based on incorrectly understood facts.

Upon review, counsel'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(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 must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial and rely on partial sections of the two statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The definitions of executive and managerial capacity have two main parts. 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).

The initial description of the beneficiary's duties are not sufficient to make a determination that the beneficiary will be acting primarily in a managerial or executive capacity. A description such as "pursue the

activities of the company" and "pursue growth" are not probative and have not been demonstrated to constitute managerial and executive duties. Further, the pursuit of growth would involve performing the routine tasks and duties associated with providing the product or service. As the beneficiary is the sole employee of the petitioner the AAO must presume that it is the beneficiary that will perform the duties and not manage them. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

In the response to the director's RFE, the petitioner asserts that the beneficiary will represent the company at trade shows and will have the authority to spend the petitioner's money and engage in the sale and purchase of materials. The petitioner asserts that contractors perform the contracts negotiated by the beneficiary, but it provides no support or documentary evidence of the "contractors," despite the director's specific request, or any evidence that such a need for contractors even exists. The petitioner also mischaracterizes the director's reasoning as requiring the beneficiary to manufacture clothes. The director's reasoning highlighted the fact that the routine tasks necessary to provide a product or service for the petitioner is to import leather clothing for wholesale trade, which would include negotiating contracts and buying and selling on behalf of the company with other businesses. The director's decision was not based on any requirement to manufacture clothes, but on the fact that the structure of the organization did not support the ability to perform the asserted business operations.

The petitioner provides an elaborate organizational chart but there is little documentary corroboration that the contractors or "sales representatives" referenced actually exist, much less function in a capacity that would constitute doing business on behalf of the petitioner. The director specifically requested information about alleged contractors or other employees. The petitioner did not adequately respond to the director's RFE in that it failed to provide additional detail with supporting documentary evidence. 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)). 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). In this case the petitioner failed to adequately respond to the director's request for documentary evidence of employees, and such unavailability of evidence supporting the existence of employees to relieve the beneficiary from primarily performing the routine duties necessary to provide the product or provide the service creates a presumption of ineligibility.

The petitioner asserts that the hourly breakdown of the beneficiary's weekly duties while in the U.S. include:

- Attending trade shows: 13 hours
- Follow up with sales reps and independently to [sic] identify potential customers and fix up appointments with them: 14 hours
- Planning and identification of new areas of growth for the company: 13 hours

This description is not probative of a managerial or executive status, but it does establish that the beneficiary is performing in sales duties. Selling a company's product or service directly to customers (wholesale or retail) has not been demonstrated to constitute a managerial or executive duty and in fact is a routine function necessary to provide the product or service of this petitioner. Attending trade shows and "planning and identification of new areas of growth" have not been demonstrated to constitute managerial or executive duties, and in this case have not even been clearly explained. In responding to the director's request for a detailed description of the beneficiary's duties the petitioner responded:

[The beneficiary's] duties have been banking, [t]ax returns of [the petitioner], participation in trade shows, visiting clients, negotiating with important clients to procure business, participate in forums & meetings of western industry and trade. He would be hiring employees to do non technical jobs such as clearing imports, customer calls, packing & shipping of [m]erchandise, collection of checks and payments. Other important functions are looking for plant & machinery and source of raw material for export to India.

This description does not establish that the beneficiary's duties satisfy the criteria outlined by 8 U.S.C. § 1101(a)(44)(A) or 8 U.S.C. § 1101(a)(44)(B), and in fact further illustrate that the beneficiary would be present in the United States primarily to locate customers for its overseas product. Otherwise the description is vague and lack detail. 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 has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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).

On appeal the petitioner asserts that the director misunderstood the facts of the case. However, the petitioner merely reasserts that the beneficiary will "look for export opportunities" and that exporting machinery over the last few years now requires personal attention of the beneficiary. The facts as they are characterized by the petitioner do not overcome the deficiencies in the petition. The petitioner asserts that the director misunderstood that the beneficiary was already the president of the company and was not seeking residence in the United States. However, this bears no relevance to the director's conclusion that the beneficiary would not be primarily acting in a managerial or executive capacity. The petitioner asserts that the beneficiary would be looking for export opportunities but, as stated before, this constitutes a sales function which has not been demonstrated to be a managerial or executive duty. Searching for customers to purchase the petitioner's product would still be the performance of the routine tasks necessary to provide the product or service of this petitioner. Further, the beneficiary's proposed duties, as described, would not be considered doing business, and illustrate that the beneficiary's position with the petitioner is merely that of an agent. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). Thus, it is not clear that the beneficiary's duties would constitute doing business for the petitioner.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and

employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason the petition must be denied.

Beyond the decision of the director, another issue in this matter is whether the petitioning organization has a qualifying relationship with the foreign entity. Although not addressed by the director, 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 petitioner has represented that the beneficiary has been entering the United States to conduct business on behalf of the petitioner under a B-1 visa, but asserts that the most recent visitation under the B-1 classification was too short. If given more time, asserts the petitioner, the beneficiary could expand the petitioner's business operations. However, the L-1 classification has separate requirements concerning the nature of the beneficiary's work activities. An L-1 classification requires that a beneficiary work primarily in a managerial or executive capacity and that both the foreign organization and the petitioner conduct business. In this case, the beneficiary would primarily act as an agent or office of the foreign organization. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) requires that a qualifying organization:

Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee.

The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). In this case the fact that the beneficiary will primarily be engaged in selling the foreign organization's product indicates that the beneficiary would be a mere agent for the foreign organization. As a mere office or agent the petitioner would not be doing business as defined under the L-1 regulations and, thus, the petitioner is not a qualifying organization and there is no qualifying relationship. Not only do the beneficiary's duties not satisfy the L-1's managerial and executive capacity requirements, the regulations specifically prohibit this classification for a mere agent or office of a petitioner.

In addition, CIS precedent decisions recognize that stock certificates alone do not fully represent whether a stockholder or stockholders maintain ownership and control of a corporate entity. *See Matter of Siemens*

Medical Systems, Inc., 19 I&N Dec. 362, 363 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. at 293. The petitioner must submit evidence to establish the exact number of shares issued and outstanding. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. For example, if a petitioner submits a single stock certificate, as in this case, and no other evidence regarding ownership, CIS is unable to determine whether that single certificate reflects the total number of shares issued and outstanding or whether there are more share certificates that might represent a majority ownership interest. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

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 at 1043, *aff'd.*, 345 F.3d 683; see also *Dor v. INS*, 891 F.2d at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd.*, 345 F.3d 683.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed and the petition hereby denied.