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**U.S. Citizenship
and Immigration
Services**

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File: WAC 03 039 54479 Office: CALIFORNIA SERVICE CENTER Date: **SEP 07 2007**

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, 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 visa petition seeking to extend the employment of its "executive sales and marketing manager" 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 limited liability company organized under the laws of the State of California and is allegedly a manufacturer, distributor, and importer of cabinets. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the petitioner is "doing business" as defined in the regulations.

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 director made several erroneous factual determinations and that the beneficiary's duties are primarily those of an executive or function manager.

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 first issue in the present matter is whether 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 petitioner does not clarify in the initial petition whether the beneficiary is claiming to be 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 be 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 petitioner described the beneficiary's job duties in the Form I-129 as follows: "Chief executive manager of marketing and distribution company, organize office and sell products within the United States, Canada and Mexico." The petitioner also submitted copies of advertisements and marketing materials including a "spotlight" on the petitioner's business in which the beneficiary is described as the petitioner's "head designer."

On February 3, 2003, the director requested additional evidence. The director requested, *inter alia*, the disclosure of the total number of employees in the United States, an organizational chart for the petitioner identifying all employees under the supervision of the beneficiary by title and name, payroll records, and evidence that the beneficiary supervises and controls the work of other supervisory, managerial, or professional employees, or manages an essential function of the organization.

In response, the petitioner submitted, *inter alia*, a letter dated March 27, 2003 in which it describes the beneficiary as its "sales manager." The petitioner further explained that it has "relied upon independent contractors for most of its work in its initial stages of organization" and that it hired an office manager after the filing of the instant petition. While the petitioner did not provide a more detailed description of the beneficiary's job duties, it did further describe the beneficiary as having become "extremely sophisticated in the area of marketing and public relations."

The petitioner also submitted an organizational chart which includes both the foreign and United States operations. This chart reveals that the beneficiary was the petitioner's only employee when the instant petition was filed. While the petitioner also submitted copies of 2002 Forms 1099-MISC for six individuals (excluding the petitioner's counsel) indicating that the petitioner utilized six contractors during 2002, the

petitioner did not reveal what services, exactly, these independent contractors provided to the beneficiary, whether these contractors will continue to provide services in the future, or how the contractors relieve the beneficiary of the need to perform those non-qualifying tasks inherent in the petitioner's business.

On June 26, 2003, the director denied the petition. The director concluded, *inter alia*, that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the director made several erroneous factual determinations and that the beneficiary's duties are primarily those of an executive or function manager.

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

Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. 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 will do on a day-to-day basis. For example, the petitioner states that the beneficiary will organize the office and sell products and that she has become adept in the areas of "marketing and public relations." The petitioner also submitted evidence in which the beneficiary is described as its "head designer." However, the petitioner does not explain what, exactly, the beneficiary does on a day-to-day basis to organize the office, to sell and design products, or to engage in marketing or public relations. Given that the beneficiary appears to be the petitioner's only employee, it is vital that the petitioner specifically describe how the beneficiary will manage these duties rather than perform the non-qualifying tasks associated with the duties. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes overly broad duties does not establish that the beneficiary will actually perform 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).

Likewise, the petitioner did not provide a breakdown of how much time the beneficiary will devote to the duties ascribed to her. This is particularly important in this matter because the duties listed by the petitioner appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the record indicates that the beneficiary will engage in sales, product design, marketing, and office organization. However, such duties constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the record fails to identify any employees or contractors who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to the sales, marketing, and design duties as well as to the organization of the business in general, it must be concluded that she will perform these tasks. As the petitioner has not established how much time the beneficiary will devote to such non-qualifying tasks, it cannot be confirmed that she will be "primarily" employed as a manager. 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 petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart and payroll records, the beneficiary appears to supervise no employees. She appears to be the petitioner's only employee. While the petitioner did provide evidence that it employs independent contractors, the supervision or management of independent contractors will not permit a beneficiary to be classified as a managerial employee as a matter of law. See section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). Regardless, the petitioner has not established that these independent contractors have any supervisory or managerial responsibilities or are "professionals." In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees or independent contractors, the 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. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.¹

Also, while counsel argues on appeal that the beneficiary will manage an essential function of the organization, the record does not support this position. 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

¹It is noted that, on appeal, counsel to the petitioner asserts that the petitioner has hired employees in addition to the beneficiary after the filing of the instant petition. However, the hiring of staff after the filing of the instant petition is irrelevant to the analysis. 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).

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 will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as the record fails to identify any employees or contractors who will relieve the beneficiary of the need to perform the non-qualifying tasks related to her "function," it must be concluded that she will perform these tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties would be managerial, nor can it deduce whether the beneficiary will primarily perform 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). Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary will act 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 will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, the beneficiary appears to be primarily performing tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in approving a visa for a multinational manager or executive. See § 101(a)(44)(C) of the Act. 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). Moreover, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). 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. Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.²

The second issue in the present matter is whether the petitioner has established that it is "doing business" as defined in the regulations and, thus, still has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

Evidence that the United States and the foreign entity are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section[.]

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." "Doing business" is defined in part as the "regular, systematic, and continuous provision of goods and/or services" and does not include "the mere presence of an agent or office of the [foreign entity] in the United States." Also, because this petitioner concerns the extension of a "new office" petition, the petitioner must also establish that it

²It is noted that, on appeal, counsel asserts that the director made several factual errors in the underlying decision. The director apparently stated that the petitioner "has been in existence for more than five years" even though the decision further acknowledges that it was established in 2001. The director also allegedly attributed members of the foreign entity's staff to the petitioner. Upon review of the record, the AAO agrees generally that the director made these two factual errors. However, it is clear that these errors were harmless and were entirely immaterial to the director's ultimate determination that the petitioner failed to establish that the beneficiary will be employed primarily in an executive or managerial capacity. First, the petitioner's exact year of establishment is irrelevant. The petitioner needs to establish that the beneficiary will be employed as an executive or manager so long as the petitioner was established and has been doing business in the United States more than one year prior to the filing of the instant petition or unless it is filing a "new office" extension petition. Second, the attribution of additional contractors or employees to the petitioner by the director was not used as a basis to deny the petition. Therefore, while the AAO will withdraw these erroneous observations, they were immaterial to the director's decision to deny the petition. Moreover, it must be noted that the petitioner's decision to report employment, establishment, and income data for the Israeli employer, and not for the petitioner, in Part 5 of the Form I-129 was likely a primary cause of this alleged confusion by the director.

has been doing business for the previous year. 8 C.F.R. § 214.2(l)(14)(ii)(B).

In this matter, the petitioner described its business in a letter dated March 27, 2003. According to the petitioner, after the petitioner's representatives meet with prospective customers and designs are chosen, an order is transmitted to the foreign entity. The foreign entity then prepares the product and ships it to the United States for installation by the customer. Also, as described above, the beneficiary is the petitioner's sole employee.

On June 26, 2003, the director denied the petition concluding that the petitioner is not "doing business" as defined in the regulations. Rather, the petitioner is acting as a sales agent for the foreign entity.

On appeal, counsel asserts that the petitioner is "doing business" as defined in the regulations. Counsel argues that the petitioner is marketing the foreign entity's product in the United States and that a petitioner may qualify for the benefit sought even if it is providing services to a company abroad.

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

As correctly determined by the director, the petitioner's description of its business operation establishes that it is acting as a mere sales agent for the foreign entity. It has not been established that the petitioner is providing any goods or services. To the contrary, the foreign entity is providing the goods and services to its customers through its sales agent in the United States. Therefore, as the petitioner has not established that it is "doing business" as defined in the regulations, the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary had been employed abroad in an executive or managerial capacity prior to the approval of the original "new office" petition. See 8 C.F.R. § 214.2(l)(3)(iv) and § 214.2(l)(3)(v)(B). The petitioner described the beneficiary's duties abroad in a letter dated November 12, 2002. As this letter is in the record, the job description will not be repeated here. Generally, the beneficiary is described as being engaged in managing and marketing as well as product design. However, marketing and design duties are not managerial or executive in nature, and the beneficiary's vague job description fails to reveal how much time the beneficiary devoted to these non-qualifying tasks. Likewise, the petitioner failed to adequately describe the beneficiary's purported 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, *aff'd*, 905 F.2d 41. 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.

Accordingly, as the petitioner failed to establish that the beneficiary had been employed abroad in a managerial or executive capacity, the petition may not be approved for this additional reason.

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ.*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act, 8 U.S.C. § 1361.

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 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.