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U.S. Citizenship
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Services

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File: WAC 04 167 50730 Office: CALIFORNIA SERVICE CENTER Date:

SEP 10 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 managing director 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 California and is allegedly a retailer. 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.¹

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.

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 erred and that the beneficiary's duties are primarily those of an executive or manager. Counsel submits a brief and additional evidence.

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

¹According to California state corporate records, the petitioner's corporate status in California has been "suspended." Therefore, since the corporation has lost all rights and powers to transact business, the company can no longer be considered a legal entity in the United States. Therefore, if this appeal were not being dismissed for the reasons set forth herein, this would call into question the petitioner's continued eligibility for the benefit sought. It is further noted that, according to California state corporate records, the petitioner's name is actually Omworld Lifestyles, Inc., and not Om World Lifestyles, Inc.

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 primary 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 petitioner may not claim that a beneficiary will 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 definition for manager.

The beneficiary's proposed job duties were described in a letter dated April 20, 2004 as follows:

[The beneficiary] will focus on sales and promotional activities and managing day[-]to[-]day operations to improve the sales at the Store. With the overall improvement in the operational activities, the US operation is expected to stabilize with sustainable revenue to support his executive position.

The petitioner claimed in the Form I-129 to have five employees. However, the petitioner did not identify or specifically describe these employees or provide any evidence supporting this claim.

On June 3, 2004, the director denied the petition. The director concluded that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties are primarily those of an executive or manager. In support, counsel submits a brief and additional evidence concerning the petitioner's business activities, claimed employees, and organizational structure. Counsel submitted the petitioner's federal and state wage

reports for last three quarters of 2003 and the first quarter of 2004. The instant petition was filed on May 21, 2004. The most recent wage reports for the petitioner's two claimed retail locations indicate that the petitioner employed a total of 34 people at some point during the first quarter of 2004. However, the wage reports submitted are not signed or certified, and employees were paid a little as \$10.00 in wages during this quarter.

Counsel also submitted an organizational chart for the petitioner placing the beneficiary at the top of the organization managing a multi-tiered organization with four levels of managers and supervisors separating him from the retail sales associates. The chart lists a total of 19 employees including the beneficiary. However, some of the employees listed on the organizational chart do not appear on the most recent wage reports and vice versa. For example, the organizational chart identifies Murali Nair as the petitioner's general manager and chief financial officer even though this person is not identified in the wage reports.

Finally, counsel did not provide a more detailed description of the beneficiary's job duties or those of his subordinate employees.

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 beneficiary is not performing qualifying duties within one year of petition approval, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not established that the United States operation has reached the point that it can employ the beneficiary in a predominantly managerial or executive position. The fact that the petitioner expects the United States operation to "stabilize with sustainable revenue to support [the beneficiary's] executive position" is not relevant to the analysis. The petitioner must establish that the beneficiary will perform managerial or executive duties upon approval of the petition and not at some later date. 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).

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 petitioner may not claim that the beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, 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 manage day-to-day operations. However, the petitioner did not explain what, exactly, the beneficiary will do in carrying out this

duty. 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). It is further noted that, even though the petitioner had an opportunity on appeal to supplement the record with a more specific description of the beneficiary's duties, the petitioner has chosen not to avail itself of this opportunity.

Likewise, the petitioner did not provide a breakdown of how much time the beneficiary will devote to the duties ascribed to him. This is particularly important in this matter because some of 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 petitioner states that the beneficiary will "focus on sales and promotional activities." However, marketing and sales duties constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the petitioner has not established how much time the beneficiary will devote to non-qualifying sales and marketing tasks, it cannot be confirmed that he 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).

Importantly, the petitioner has failed to establish that the beneficiary will be relieved of the need to perform non-qualifying duties by subordinate employees or that he will supervise and control the work of subordinates. The record is entirely unclear regarding the number of people actually employed by the petitioner. As indicated above, the petitioner claimed in the Form I-129 to employ five people. However, on appeal, the petitioner submitted unsigned and uncertified federal and state wage reports indicating that, at some point in the quarter preceding the filing of the petition, the petitioner employed a total of 34 people. Furthermore, the organizational chart submitted on appeal indicates that the petitioner employs 19 people and includes at least one employee who is not listed in the wage reports. Overall, the record is so rife with unresolved inconsistencies regarding the number and type of workers employed by the petitioner that the AAO cannot confirm that the beneficiary will supervise and control the work of any employees. Furthermore, due to these unresolved inconsistencies, the AAO cannot confirm that the petitioner has the organizational complexity necessary to support a managerial or executive employee or that the petitioner will employ a subordinate staff capable of relieving the beneficiary of performing non-qualifying administrative or operational tasks. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Regardless, the record is not persuasive in establishing 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, the petitioner claims that the beneficiary will directly or indirectly supervise a staff of 18 employees at two retail locations. However, the petitioner has not established that any of these 18 employees will be truly engaged in performing supervisory or managerial duties. Other than non-probative job titles, the record is devoid of any descriptions of the subordinate employees. In view of the above, the beneficiary would appear to be, at most, a first-line supervisor of non-professional employees, 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. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner did not establish the skill level or educational background required to perform the duties of the subordinate employees, the petitioner has not established that the beneficiary will manage professional employees.² Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.³

²In evaluating whether the beneficiary will manage professional employees, the AAO must also 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).

³While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties will be managerial, if any, and what proportion will be non-managerial. Also, as explained above, the record establishes that the beneficiary will be, at most, a first-line manager of non-professional employees and/or will be engaged in performing non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his 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).

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 act 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, it appears that the beneficiary will be employed, at most, as a first-line supervisor and will perform 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.

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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* As indicated above, the record in this matter is so rife with inconsistencies regarding the number and type of workers employed by the petitioner that the AAO cannot conclude with any certainty that there will be employees available to perform the non-qualifying tasks of the business.

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.

Beyond the decision of the director, the petitioner has failed to establish that the petitioner has a qualifying relationship with the foreign employer.

Title 8 C.F.R. § 214.2(l)(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." An "affiliate" is defined in pertinent part as "[o]ne of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). "Doing business" is defined in pertinent part as "the regular, systematic, and continuous provision of goods and/or services." 8 C.F.R. § 214.2(l)(1)(ii)(H).

In this matter, the petitioner, a corporation, asserts in the Form I-129 that the beneficiary and his spouse each own 50% of the petitioner. The petitioner also asserts in the Form I-129 that the beneficiary was employed abroad by

"Atlas Impex Manufacturers Ltd. and Atlas World Ltd.," both of Hong Kong. However, it is asserted in a letter dated April 20, 2004 that the beneficiary is the principal owner of both foreign employers, the petitioner, and a company called "OMWorld Lifestyles Ltd.," also of Hong Kong. His spouse's interest is not mentioned in the letter and the petitioner offers no corroborating evidence establishing the ownership or control of any of the foreign entities. Once again, 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. It is further noted that the petitioner's attempt to incorporate by reference evidence submitted in support of a different petition is not appropriate and such evidence will not be considered by the AAO. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

Furthermore, the record is not persuasive in establishing that the foreign employer and the petitioner were both "doing business" as defined in the regulations. The evidence submitted does not establish that either entity was engaged in the regular, systematic, and continuous provision of goods or services at the time the petition was filed.

Accordingly, the petitioner has not established that it and the foreign entity are qualifying organizations. For this additional reason, the petition may not be approved.

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 the 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.