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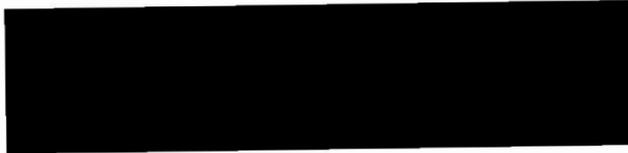
U.S. Department of Homeland Security  
20 Massachusetts Ave. N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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Services

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JUL 03 2008

File: EAC 05 800 28795 Office: VERMONT SERVICE CENTER Date:

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

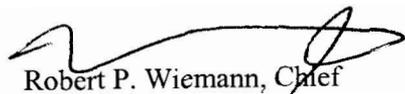
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

The petitioner claims to be a fabrics and garment merchant and seeks to extend the employment of its chief executive officer in the United States as an 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 New York corporation, claims to be the subsidiary of Palki International, Ltd., located in Dhaka, Bangladesh. 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 for an additional two years.

The director denied the petition, finding that the petitioner had not demonstrated that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted that the petitioner's current organizational structure and proposed business plan would not be able to support the employment of the beneficiary in a primarily managerial or executive capacity. The director noted that the beneficiary was the petitioner's sole employee and that there was insufficient evidence to show he was employed as a function manager.

On appeal, the petitioner asserts that the beneficiary was in fact acting in a primarily executive capacity, and submits a brief and additional evidence in support of this contention.

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.

This primary issue in this 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.

In a letter of support dated July 7, 2005, the petitioner alleged that the beneficiary is employed in the United States as its chief executive officer, and provided the following overview of his duties:

[The beneficiary] has been the Chairman, Chief Executive Officer of [the foreign entity] since its incorporation in 1995. Within the last three years he has been intricately involved in expanding [the company's] fabric and textile business in North America. His responsibilities have been to direct other employees in marketing and selling [the company's] merchandise to the North American Consumers; increasing company revenues through developing new products; and negotiating contracts with international distributors.

[The beneficiary's] current and proposed duties will be to continue to be [employed] in an executive capacity with the petitioner as a Chief Executive Officer. He will continue to develop and oversee [the petitioner's] corporate strategy so as to increase corporate revenues and to expand operations through the United States and Canada. Initially he will provide an avenue for trade between [the foreign entity] in Bangladesh and the North American Headquarters in New York City. He will continue to develop contacts with multinational companies as well as continue to introduce [the company's] products to the retail and wholesale markets in North America.

[The beneficiary] has a Masters Degree in Political Science and Bachelor's Degree from Dhaka University. He obtained his Higher Secondary College Degree from Notre Dame College in Dhaka, Bangladesh. He has received numerous professional certifications within the United States and Bangladesh, and continues to attend various trade conferences.

The director found this evidence insufficient to warrant approval of the petition and consequently issued a request for evidence on July 21, 2005. The director requested a definitive statement describing the beneficiary's duties for the past year as well as the duties he would perform if the petition was extended. In

addition, the director required a statement discussing the manner in which the beneficiary would be relieved from performing the day-to-day functions of the company, as well as an overview of the company's staffing.

In response, the petitioner provided submitted a letter dated August 10, 2005 which addressed the director's requests. The petitioner stated that currently, the beneficiary was the petitioner's sole employee, but further claimed that the petitioner would continue its expansion and continue to add more members to its operation as larger contracts were executed. With regard to the request for more details regarding the beneficiary's duties, the petitioner stated:

Evidence of duties performed by the beneficiary in the past year include marketing and selling [the company's] [m]erchandise to the North American Consumers; increasing company revenues through developing new products; and negotiating contracts with international distributors. This is best demonstrated by the contracts with vendors in the US and Canada and the numerous invoices that are enclosed herein. [The beneficiary] will continue to perform these duties if the petition is extended. Currently, the day-to-day operations, including production, are handled in Bangladesh, through . . . the parent company.

On August 23, 2006, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States. Specifically, the director noted that the beneficiary was the petitioner's sole employee, yet was not acting as a function manager. The director concluded by finding that the business had not grown as anticipated.

On appeal, counsel for the petitioner alleges that the director's decision was erroneous, and contends that the beneficiary is in fact working in a qualifying capacity. Counsel asserts that the production for the company takes place in Bangladesh and that the beneficiary oversees the employees working in that area. Based on this fact, counsel concludes that the beneficiary is thus eligible for the benefit sought.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the fact that he has no subordinate employees under his supervision in the United States, the petitioner has failed to establish that it will employ the beneficiary in a capacity that is primarily managerial or executive in nature. In addition, the AAO notes that while being the sole employee of a company is not necessarily fatal to a petition, the petitioner has failed to demonstrate that the beneficiary is primarily overseeing an essential function of the petitioner.

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). In this case, the petitioner vaguely described the beneficiary's duties but failed to provide a specific overview of how he will refrain from performing non-qualifying tasks. Despite the director's specific request for a definitive overview of the beneficiary's actual duties for the past year and in the future, the petitioner provided only brief, generic statements including marketing and selling merchandise and negotiating contracts. The AAO notes that the statements provided give no insight on the nature of the beneficiary's daily tasks or his day-to-day duties. 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).

Moreover, it appears that the majority of the beneficiary's duties include marketing and selling the company's products, duties which are not traditionally considered managerial or executive in nature. There is no sales staff or marketing department present in the United States, and it thus stands to reason that all contracts negotiated in the past year, and all invoices drawn up, were done solely by the beneficiary. 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).

The petitioner claims in the petition and on appeal that the company's production staff is based in Bangladesh, and since the beneficiary supervises this department, he consequently is a manager or executive as defined by the regulations. There are two problems with this contention. First, the absence of personnel in the United States indicates that the beneficiary is solely responsible for performing all day-to-day tasks. In particular, the vast array of invoices demonstrating goods sold by the petitioner during the previous year coupled with the absence of sales or marketing personnel indicates that the beneficiary himself has been performing the tasks necessary to provide the petitioner's goods and services. As stated above, these duties are not deemed managerial or executive in nature.

Second, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has no staff in the United States except for the beneficiary, and relies upon the parent company in Bangladesh to produce the goods that will be sold in the United States by the beneficiary. Since there is no one else in the United States to sell and market these products, it is clear that the beneficiary is engaged in non-qualifying duties, and thus the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner claims that the beneficiary performs managerial duties, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as sales, marketing, and negotiating contracts, do not fall directly under traditional managerial duties as defined in the

statute. 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 or executive, nor can it deduce whether the beneficiary is primarily performing 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).

The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitutes significant components of the duties performed on a day-to-day basis. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that it is eligible for an extension of the initial one-year "new office" validity period for another reason not addressed in the denial. As previously noted, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not submitted evidence that the United States entity has been doing business for the previous year as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H). The record indicates that the petitioner was established in 2004. The petitioner, therefore, is required to demonstrate that it has been doing business continually for the year preceding the filing of the instant extension.

The petitioner submitted a number of invoices and documents showing that it has been selling its goods on a regular basis. However, the majority of invoices submitted indicate the sale and delivery of CDs and DVDs. Since the petitioner claims throughout these proceedings that it is engaged in the sale of fabrics and garments, the invoices demonstrating the sale of audio and visual products raises questions regarding the legitimacy of the petitioner's business. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Moreover, it does not appear that a qualifying relationship exists between the petitioner and the foreign entity. The petitioner claims that the U.S. entity is 100% owned by Palki International, Ltd. In support of this contention, the petitioner submitted a copy of a share certificate which indicates that Palki International owned 200 shares of the petitioner. According to the petitioner's certificate of incorporation, also included in the record, 200 shares were authorized. However, the petitioner's Form 1120, U.S. Corporation Income Tax Return, indicates on Schedule E, Compensation of Officers, that the beneficiary owns 10000%<sup>1</sup> of the company's common stock. 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. *Id.* at 591-92.

This would not necessarily be fatal to the qualifying relationship if the beneficiary owned a majority interest in the foreign entity. However, according to the foreign entity's certificate of incorporation contained in the record, the beneficiary merely owns 1666 of the 5000 shares authorized. Therefore, if the beneficiary was in fact the sole owner of the U.S. petitioner, an affiliate relationship would not exist. However, since the

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<sup>1</sup> It appears that the figure 10000% is a typographical error intended to represent 100%.

petitioner has failed to clarify with certainty the exact owner of the U.S. entity, the AAO is precluded from determining whether a qualifying relationship in fact exists. 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). For this additional reason, the petition may not be approved.

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).

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.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.