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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 145 51753 Office: TEXAS SERVICE CENTER Date: AUG 04 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 is operating a "dollar store," in which it sells and distributes general merchandise. It presently employs the beneficiary as its general manager and seeks to extend the beneficiary's employment for three years. The petitioner filed a petition to extend the classification of the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary had not been employed abroad or in the United States in a qualifying capacity.

On appeal, counsel asserts that the beneficiary "more than qualifies as an L-1A Manager," rather than a first-line supervisor. Counsel also states that section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), prohibits Citizenship and Immigration Services (CIS) from focusing solely on the number of employees supervised, and notes that if staffing levels are considered, CIS must "take into account the reasonable needs of the organization or function in light of its overall purpose and stage of development."

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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) 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 management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issues are whether the beneficiary was and would be employed in a primarily managerial or executive capacity in the foreign and U.S. entities.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) 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;

(3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(4) 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), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

With regard to the beneficiary's employment abroad, the director noted in her decision that although the beneficiary is said to have spent 70% of her time managing and supervising executives and managers, there is insufficient evidence identifying the employees that were subordinate to the beneficiary. The director also noted that the petitioner provided a vague description of the beneficiary's job duties. The director concluded that the record is not persuasive in demonstrating the beneficiary was employed in the foreign company in a primarily managerial or executive capacity.

As petitioner's counsel did not address on appeal the issue of the beneficiary's employment abroad, the AAO is compelled to uphold the finding of the director. Although the petitioner responded to the request for evidence, the petitioner failed to submit the specific evidence requested by the director, which included identifying the employees managed by the beneficiary in the foreign company and indicating whether each was a managerial or professional employee. Pursuant to 8 C.F.R. § 214.2 (l)(3)(viii), the director may, in his or her discretion, request any additional evidence that he or she deems necessary to establish the criteria required for an individual petition. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2 (b)(14).

The AAO will next address the issue of whether the beneficiary would be employed under the extended petition for a new office in a primarily managerial or executive capacity.

In a letter submitted with the nonimmigrant petition, dated April 1, 2002, counsel provided the following job description for the beneficiary as general manager:

> [S]he is responsible for the internal operation, supervision and management of the company. She coordinates the work so as to run the business in an efficient and profitable manner. She has been a key to the success to [sic] the operation of the business, because of her expertise, knowledge and dedication. In this position, [the beneficiary] is responsible for the administration and management, along with the finances and marketing of the business. Further, she has been responsible for the hiring and training of personnel and develop[ing] the entity in the United States. Her years of management and executive level experience in this field has given her the latitude to make these decisions without having to consult with any other person or entity. Her position is at the executive level since [she] formulates policy and has the ultimate discretionary authority to make necessary changes in the structure of the business. Her functions with the organization are purely executive since she performs only those executive functions and leaves the daily tasks to the company employees.
>
> [The beneficiary] has also had the discretionary authority to seek the purchase of any existing business and/or enter into negotiations for such an entity. Her executive level position permits [her] to produce more assessment for the subsidiary and parent company.

Counsel submitted the following documentation in support of the claim that the beneficiary is employed in a qualifying capacity: (1) Internal Revenue Service Form 941, Employer's Quarterly Federal Tax Return, for the quarter ending December 31, 2001; (2) Form UCT-6, Employer's Quarterly Tax Report for the State of

Florida, which reflected three employees during the month of December 2001; and (3) a list of four employees, including the beneficiary, a sales manager, purchase manager, and salesperson.

In a request for evidence dated August 5, 2002, the director asked that the petitioner provide the following evidence: (1) a statement of the job duties performed by the beneficiary in the U.S. entity, indicating which employees the beneficiary oversees, and detailed information regarding the subordinates' titles, job duties and salaries; (2) federal and state quarterly tax returns for the first two quarters of the year 2002; and (3) a statement as to how the beneficiary qualifies as a manager and how the managerial duties are divided between the beneficiary and the petitioner's other shareholder, who is also employed by the U.S. entity.

In an October 28, 2002 response, counsel stated that as general manager for the U.S. entity, the beneficiary is responsible for the administration, operation and management of the business, and performs the following specific job duties:

- Manages the organization;
- Supervises and controls the work of other managerial employees;
- Establishes the goals and policies of the organization, component or function;
- Exercises wide latitude in discretionary decision-making;
- Selects the representation of the companies in the market;
- Carries out the international trips for the closing of important sales of the company;
- Selects the national and international suppliers those [sic] qualified for the supply of the materials and equipment;
- Attends the national and international specialized events such as fairs and congresses related to the business;
- Receives financial, sales, administrative, and technical reports from the supervisors of each department;
- Realization and subscription of commercial agreements and strategic alliances for the sale of the products and services of the business;
- Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization;
- Training of the managerial personnel of the business.

Counsel explained that the beneficiary and the petitioner's sales manager, who are both shareholders in the U.S. company, allocate their time as follows: managerial direction and supervision, 50%; financial planning, 20%; marketing, 20%; human resources, 5%; and public relations, 5%. Counsel further explained that the sales manager reports directly to the beneficiary, and is in charge of market analysis, research, and competitive strategies. In addition to the sales manager, counsel stated that the beneficiary manages the petitioner's sales person, who was hired in December 2001, and cashier, hired in January 2002.

In the decision dated December 12, 2002, the director noted several inconsistencies in the petitioner's federal and state quarterly tax returns pertaining to the number of individuals employed by the petitioner. The director indicated that the petitioner reported three employees on the petition, but stated that this number did not coincide with counsel's claim in the response to the request for evidence that the petitioner employed four employees at the time of filing the petition. The director therefore concluded that the petitioner had failed to identify the current employees of the U.S. company, and the roles performed by each. The director likewise concluded that the record was not persuasive in demonstrating that the petitioner employed subordinate employees to relieve the beneficiary from performing non-qualifying job duties. Accordingly, the director denied the petition.

On appeal, counsel asserts that the beneficiary is clearly a manager as she manages the organization, supervises the work of a sales manager, has authority over the personnel, and exercises discretion over the day-to-day operations of the business. Counsel claims that because the beneficiary manages a sales manager, the beneficiary is "second level management," and not merely a first-line supervisor. Counsel also refers to section 101(a)(44)(C) of the Act, and asserts that CIS may not rely solely on the number of individuals employed by the petitioner when determining the managerial or executive capacity of the beneficiary.

On review, the record does to conclusively establish that the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity. 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). A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner 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.* In the alternative, if a petitioner is representing the beneficiary is both a manager and executive, the petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The present record contains many inconsistencies regarding the capacity in which the beneficiary would be employed in the U.S. entity. Although the beneficiary's title of general manager implies a position of managerial capacity, counsel stated in the April 1, 2002 letter submitted with the petition that the beneficiary's functions are "purely executive." Counsel also stated in the letter that the beneficiary "is responsible for the [petitioner's] administration and management," and for hiring personnel, which are job duties typical of a manager. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). The list of the beneficiary's job duties submitted by counsel in response to the director's request for evidence also identify, and essentially restate, the criteria for establishing managerial capacity. Finally, on appeal, counsel states that the beneficiary would be employed as a manager, rather than in a "purely executive" capacity as previously claimed. Counsel fails to clarify the capacity in which the beneficiary would primarily be employed. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the current record, the beneficiary would not be employed in a primarily managerial capacity. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, counsel stated in his April 2002 letter that the beneficiary is responsible for the company's administration, management, finances and marketing. Counsel further stated in response to the director's request for evidence that the beneficiary spends 50% of her time on "managerial direction and supervision," and the remaining time performing financial planning, marketing, human resources, and public relations. Counsel's time allocation indicates that the beneficiary is clearly spending fifty percent of her time

performing non-managerial job duties. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, the record contains inconsistencies regarding the number of individuals employed by the petitioner, and is unclear as to whether, in fact, any subordinate employees would relieve the beneficiary from performing the above-mentioned non-qualifying job duties. As noted by the director, the petitioner indicated on the petition that it employed three people. Counsel subsequently stated in the October 2002 letter that the petitioner has four employees, all of whom were employed at the time of filing the petition on April 10, 2002. The petitioner's federal and state quarterly tax returns, however, are not consistent with counsel's claim. For example, the petitioner's cashier was omitted from two of the petitioner's federal and state quarterly tax returns for the periods ending March and June 2002. The petitioner subsequently revised the quarterly tax returns and submitted them to the Internal Revenue Service and the State of Florida after the director requested these documents. Although counsel provided the revised documents, counsel neglected to explain the omission or corrections. Again, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho* at 591-92. 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.

Counsel correctly notes on appeal that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). 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). 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 previously discussed, the many inconsistencies in the record support a conclusion that the reasonable needs of the petitioning organization are not met by the beneficiary and three employees, whose employment the petitioner has not yet conclusively established. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

For the foregoing reasons, the AAO cannot conclude that the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.