U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Citizenship
and Immigration
Services

[redacted]

D7

FILE: EAC 02 182 52328 Office: VERMONT SERVICE CENTER Date: AUG 10 2004

IN RE: Petitioner:
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)

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

The petitioner is engaged in the import, manufacturing, and distribution of textiles. The petitioner currently employs the beneficiary as vice-president, and seeks to extend the beneficiary's employment for an additional three years. The petitioner filed a nonimmigrant visa petition requesting the extension of the beneficiary's classification as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary has not been and would not be employed in the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary "has and continues to hold a executive/managerial position," and that Citizenship and Immigration Services (CIS) "failed to give full impact to the documents received." Counsel also claims that the petitioning organization employs "outside buying offices who are paid by the purchasers and outside contract [and] sales [representatives]." Although counsel states that a "more complete statement of [the beneficiary's] duties will follow," counsel has submitted no additional documentation in support of the appeal.

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 issue is whether the beneficiary has been employed and would be employed in the U.S. entity in a primarily managerial or executive capacity.

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.

On the petition for a nonimmigrant visa, the petitioner stated that the beneficiary was responsible for setting the policies of the U.S. entity, including the marketing, finance, and production policies, and for overseeing the daily management operations of the company. The director subsequently issued a lengthy notice of action dated June 16, 2002, requesting additional evidence. As the director's notice is part of the record, it will not be entirely repeated herein. The relevant portions include requests for: (1) an organizational chart of the U.S. company describing the managerial hierarchy, staffing levels, and each employee's job duties; (2) a list of all employees, their job titles, wages per week, and dates of employment; (3) a specific description of the beneficiary's job duties in the petitioning organization; (4) Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return for all employees for the last four quarters; and (5) the petitioner's payroll summary, and IRS Form W-2 and W-3.

In response, the petitioner provided the following description of the beneficiary's job duties: (1) merchandising and purchasing, including setting up the company's seasonal lines, finalizing prices, placing purchase orders, and verifying production status; (2) overseeing all sales people and sales offices used by the petitioner; (3) reviewing and paying the corporate bills; (4) working with an outside company to assign receivables, and reviewing payments and deductions; (5) coordinating inbound and outbound shipping; (6) running financial reports for the accountant; and, (7) pursuing joint venture or licensing opportunities for the petitioner. The petitioner also stated that the beneficiary has five subordinates who report directly to him: a manager of shipping and distribution, a receptionist and customer service clerk, a manager of the import division, a part-time sale representative, and a "head of sales" who is responsible for opening accounts.

In addition, the petitioner submitted Employer's Quarterly Federal Tax Returns for September 2001 through June 2002, and U.S. Corporation Income Tax Return for the years 1998, 1999, and 2000. The quarterly tax return for the period ending June 2002, during which the present petition was filed, identified five employees of the petitioning organization.

In his decision, the director determined that while the beneficiary's title denotes a position of authority in the U.S. entity, the beneficiary has not and would not be employed in a primarily managerial or executive capacity. The director stated that instead the beneficiary would be "engaged primarily in the non-managerial, day-to-day operations involved in producing a product or providing a service." The director also noted that the record contained several inconsistencies as to the number of individuals employed by the petitioner, and whether the petitioner employed any full-time salespeople to provide the services of the organization. The director consequently denied the petition.

On appeal, counsel claims that the beneficiary is employed in an "executive/managerial position," and that CIS failed to fully consider the evidence submitted. Counsel also disputes the directors finding that the beneficiary is performing a service of the petitioning organization, and asserts that "it cannot be argued that the [beneficiary] single handedly is responsible for the sales of over $4.5 million in garments." Counsel notes instead that the petitioner uses "outside buying offices" that are paid by the purchasers. As noted previously, counsel failed to submit the additional statement of the beneficiary's job duties claimed to be provided on appeal.

On review, the record fails to demonstrate that the beneficiary has been and 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* Furthermore, the petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the statutory definitions at section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A 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 if it is representing the beneficiary is both an executive and a manager.

In the present matter, the petitioner's brief summary of the beneficiary's job duties fails to demonstrate that the beneficiary's employment in the U.S. entity has been or would be primarily managerial, executive, or both. Although the director requested that the petitioner submit a detailed description of the beneficiary's job responsibilities, including the percentage of time spent on each job duty, the petitioner provided a short and vague

list of seven job duties, which failed to adequately explain the beneficiary's function in the U.S. organization. The actual duties themselves 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). Also, the job description lacks specificity as to the capacity in which the beneficiary is employed: managerial, executive, or both. *See* 8 C.F.R. § 214.2(l)(3)(ii) (a petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in an executive or managerial capacity or both).

While the brief job description fails to establish the beneficiary's employment in a primarily managerial or executive capacity, it reveals the beneficiary's performance of non-qualifying duties for the U.S. organization. Specifically, the petitioner stated in its response to the director's request for evidence that the beneficiary is responsible for placing and confirming orders, communicating with factories to finalize prices, performing "day-to-day activities in reviewing and paying the [petitioner's] bills," coordinating shipments, and running financial reports. The beneficiary's job responsibilities are not characteristic of those performed by a manager or executive. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(B) and (C). 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, counsel's assertion on appeal that the petitioner employs "outside buying offices" to perform the sales function of the U.S. entity is not persuasive. Counsel has furnished no documentation to establish the petitioner's use of "outside buying offices," or the existence of any contractual relationship between the organizations. Nor has counsel explained the function or responsibilities of these offices. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the evidence presented, the AAO concludes that the beneficiary has not been and would not 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.

Beyond the decision of the director, an additional issue is whether a qualifying relationship exists between the foreign and U.S. entities as required in the regulation at 8 C.F.R. § 214.2(l)(3)(i). The petitioner claimed on the nonimmigrant petition that it is a branch office of the foreign entity. The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). The instant record includes a certificate of incorporation, stock certificates, and corporate tax returns, reflecting that the petitioner is incorporated in the United States. As such, the petitioning organization cannot be deemed a branch of the foreign company. For this additional reason, the appeal will be dismissed.

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).

ORDER: The appeal is dismissed.