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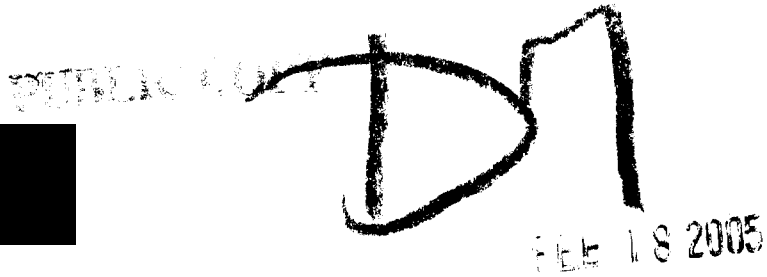
Washington, DC 20529

invasion of person's privacy

U.S. Citizenship and Immigration Services



FEB 18 2005

FILE: SRC-03-172-50500 Office: TEXAS SERVICE CENTER Date:

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)

ON 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, 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 appeal will be dismissed.

The petitioner filed this nonimmigrant 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 limited liability company organized in the State of Georgia that operates as a retailer of international handicrafts and related goods. The petitioner claims that it is a branch of Yapsas Yer Karolari Yapi Sanayi Ve Ticaret A.S., located in Izmir, Turkey. 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 that: (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) the petitioner has been actively doing business continuously for one year.

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, the petitioner asserts that the beneficiary is currently employed in a primarily executive position, and that the company has been doing business since her entry in September 2002. In support of these assertions, the petitioner submits a one-page statement.

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 management 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.

In the initial petition, the petitioner described the beneficiary's job duties as follows:

> As Managing Director at the [petitioner], [the beneficiary] is responsible for the execution of [the] company's business strategy utilizing her background in management to locate new avenues for [the petitioner] in the world market. [The beneficiary's] primary function for the [petitioner] is to plan, direct, and control the management of the company, establish goals and policies, and exercise wide latitude in discretionary decision-making. She plans business objectives and develops organizational policies to coordinate functions and operations between division [sic] and departments, and establishes responsibilities and procedures to attain objectives.
>
> She is also responsible to recruit, train and supervise the U.S. staff, to establish adequate client base to ensure future financial success for the office, and to review activity reports and financial statements to determine progress and status in attaining objectives. [The beneficiary] will receive only general supervision from the company's board of directors. The major functions of the company are the sourcing of clients, merchandising and promoting its products.
>
> The objectives and policies set by [the beneficiary] will be executed by the 2 employees of [the petitioner], as well as independent contractors. [The beneficiary] will not perform day-to-day functions of [the petitioner].

On July 11, 2003, the director requested additional evidence. In part, the director requested: (1) copies of the petitioner's Employer's State Quarterly Tax Returns with all attachments for 2002 and March 2003; (2) a current copy of the petitioner's organizational chart; (3) a definitive statement describing the beneficiary's employment capacity in the United States, including the number of employers who report directly to her and their duties, titles, and educational backgrounds; and (4) if the beneficiary does not supervise subordinates, an indication of the essential function she manages.

In a response submitted on October 3, 2003, the petitioner provided: (1) a statement describing the beneficiary's duties that provides almost exactly the information submitted with the initial petition; and (2) previously submitted evidence.

On October 21, 2003, the director denied the petition. In part, the director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive

capacity. Specifically, the director stated that "[t]he petitioner has not established that the beneficiary will not engage in the day to day operations of the business. The beneficiary will have to engage in day to day business given the current structure of the company and given the current employees . . . ."

On appeal, the petitioner asserts that the beneficiary is currently employed in a primarily executive position. In an attached statement, the petitioner states that:

> [The beneficiary] has established this company and is no longer involved in day-to-day operations however she is responsible and needed for planning business objectives and the opening of new avenues for the future success of [the petitioner]. She will perform only executive decisions pertaining to the [petitioner], such as decision making and the hiring and training of employees as needed in the company, as well as her knowledge in global marketing of products to be executed to managers for future training of new employees.

(Emphasis in original). The petitioner provided no new evidence to support these assertions.

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

In the instant case, the petitioner asserts that the beneficiary is primarily engaged in both managerial duties and executive duties. Therefore, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act.

The beneficiary's job description submitted by the petitioner was vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the petitioner provides that the beneficiary will "plan, direct, and control the management of the company, establish goals and policies, and exercise wide latitude in discretionary decision-making." Rather than state specific tasks that the beneficiary will perform, this statement merely quotes the statutory definition of executive capacity provided in section 101(a)(44)(B) of the Act. The petitioner states that the beneficiary "plans business objectives and develops organizational policies to coordinate functions and operations between division [sic] and departments." However, the petitioner has failed to identify its different departments, or to explain what associated tasks are required in order to coordinate between them. The petitioner provides that the beneficiary "will receive only general supervision from the company's board of directors," which is a paraphrase of section 101(a)(44)(B)(iv) of the Act. 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). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job description does not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

The petitioner suggests that the beneficiary will manage subordinate staff members. Specifically, the petitioner states that "[t]he objectives and policies set by [the beneficiary] will be executed by the 2 employees of [the petitioner], as well as independent contractors." The petitioner also states that the beneficiary is "responsible to recruit, train and supervise the U.S. staff." The petitioner has provided no evidence that it utilizes the services of independent contractors. 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). Further, the evidence in the record does not support that the petitioner employs individuals in addition to the beneficiary and the beneficiary's equal partner. For example, the petitioner's 2002 Form 1065, U.S. Return for Partnership Income, reflects that no salaries or wages were paid during that year. Thus, it is evident that the two employees to which the petitioner refers are in fact the beneficiary and the beneficiary's equal partner, and all tasks associated with the petitioner's operations must be performed by the beneficiary and the beneficiary's partner. In is also noted that, as the beneficiary and her partner are equal partners and both hold managerial titles, the record does not show that the beneficiary has supervisory authority over her partner. Accordingly, the petitioner has not established that the beneficiary manages subordinate employees. *See* section 101(a)(44)(A)(ii) of the Act.

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 Citizenship and Immigration Services (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). As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The petitioner operates as a retailer of international handicrafts and related goods. Thus, it is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive tasks such as placing orders for goods, answering questions about merchandise from customers, tracking the petitioner's inventory, managing a checking account and paying bills, answering telephones, receiving deliveries, conducting sales transactions using a cash register, and providing custodial services. As stated above, the beneficiary is one of only two employees of the petitioner, both of which have managerial titles. The petitioner has failed to explain how its reasonable needs will be met by two employees acting in a managerial or executive capacity. Thus, the reasonable needs of the petitioner suggest that the beneficiary must spend a significant amount of time performing the tasks necessary to provide the petitioner's services. 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). The petitioner has failed to establish that these non-managerial and non-executive tasks do not constitute the majority of the beneficiary's time. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner indicates that it requires more time to develop its operations. However,

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). Furthermore, 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 not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has shown that it has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

The regulation at 8 C.F.R. § 214.2(l)(ii)(H) defines the term "doing business" as:

> [T]he regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In the petition, the petitioner submitted evidence of its business activity including: (1) a letter from Dollywood, dated May 5, 2003, thanking it for participating in a Festival of Nations event; (2) spreadsheets showing sales activity in March and April of 2003, with gross sales totaling approximately $3,000 for that period; (3) a lease dated March 11, 2003; (4) an invoice, dated October 16, 2002, showing items sold by the petitioner totaling $332.50; (5) two undated bills of lading showing goods delivered to the petitioner; (6) an invoice for a lease payment dated August 23, 2002; (7) three invoices reflecting goods purchased by the petitioner, two dated July 28, 2002, and one dated August 16, 2002; (8) a certificate of liability insurance, dated March 24, 2003; and (9) a copy of the petitioner's 2002 Form 1065, U.S. Return for Partnership Income.

In the July 11, 2003 request for evidence, the director requested evidence that the petitioner has been doing business for one year, such as bank statements, payroll records, invoices, sales records, bills of sale, shipping receipts, and orders of goods and services.

In response, the petitioner submitted documents related to its business activity that occurred after June 4, 2003, the date of filing the initial petition.

In denying the petition, the director found that the petitioner failed to establish that it has been actively doing business continuously for one year.

In the statement submitted with the appeal, the petitioner asserts that it has been doing business since the beneficiary's entry into the United States on September 11, 2002. The petitioner states that it "has had only 10 months and not 12 months" in which to conduct business, due to the beneficiary's entry in September 2002 instead of July 2002. The petitioner indicates that "[it] has in fact been actively doing business for the entire time that [the beneficiary] has been [in the United States], relocating twice during said time due to growth in

products imported, office space, warehousing, showroom needs[,] etc." The petitioner provided no new evidence of its business activities.
Upon review, the petitioner's assertions are not persuasive. At the time the petitioner seeks an extension of the new office petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. On appeal, the petitioner submits numerous documents pertaining to its business activity that occurred after June 4, 2003, the date of filing the petition. As stated above, 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. at 248. Thus, evidence of the petitioner's business activity that occurred after June 4, 2003 is not probative of the petitioner's eligibility as of the filing date.

The petitioner's 2002 Form 1065, U.S. Return for Partnership Income, reflects that it generated $333 in gross receipts during that year. As this document addresses activity that occurred during the first six months of the one-year period in question, it reflects that the petitioner was not engaged in "the regular, systematic, and continuous provision of goods and/or services" during that time. *See* 8 C.F.R. § 214.2(l)(ii)(H). The petitioner provided three invoices that show that it purchased goods in July and August 2002. While these documents reflect that the petitioner began preparation to commence business during that period, the record contains no evidence to show that it actually sold goods on a regular basis until March 2003, three months before the petition was filed. The fact that the beneficiary entered the United States approximately two months after she was approved for L-1A status does not relieve the petitioner's burden to show that it has been doing business for the previous year. *See* 8 C.F.R. § 214.2(l)(14)(ii)(B).

Based on the foregoing, the petitioner has failed to establish that it has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it has a qualifying corporate relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). On the initial petition, the petitioner indicated that it is the branch of the beneficiary's foreign employer. The petitioner submitted its 2002 Form 1065, U.S. Return for Partnership Income, which shows that the beneficiary and one other individual are equal partners in the organization, each owning a 50 percent share. The petitioner provided no documentation to reflect that it is a branch of the foreign entity, or that the foreign entity has an ownership interest in it. The petitioner submitted a document titled "Annual Meeting of Board of Directors" dated October 26, 2001, reflecting that the foreign entity is owned by nine individuals in varying proportions. The beneficiary is listed as a shareholder, owning 10 percent of the foreign entity's outstanding shares. The petitioner's second partner is not listed as a shareholder of the foreign entity. Accordingly, the petitioner and the foreign entity are not affiliates due to common ownership and control, and the record is insufficient to show a qualifying corporate relationship. 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).

CIS approved a prior petition that the petitioner filed on behalf of the beneficiary. The director's decision in the present matter does not indicate whether she reviewed the prior approval of the previous nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same documentation and alleged corporate relationship contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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. The petitioner has not met this burden.

ORDER: The appeal is dismissed.