U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

JAN 27 2005

FILE: LIN 03 098 55689 Office: NEBRASKA SERVICE CENTER Date:

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, Nebraska 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 petition seeking to extend the employment of its operations manager as a 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 in the State of Oregon that is engaged in the import and sale of Tibetan rugs. The petitioner claims that it is the affiliate of the beneficiary's foreign employer, located in Kathmandu, Nepal. The petitioner now seeks to employ the beneficiary for three years.

The director denied the petition determining that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel claims that the director erred in his denial of the petition based on his finding that the beneficiary is not a manager or an executive in the United States. Counsel states that as "the only managerial personnel" in the United States corporation, the beneficiary has made substantial progress in developing the petitioner's market in the United States, and has hired a designer, who is under the beneficiary's direct supervision. Counsel submits a letter and documentary evidence 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 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) 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 issue in the instant proceeding is whether the beneficiary would be employed by the United States entity under the extended petition 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-

(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) 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

(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), provides:

The term "executive capacity" means 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 filed the nonimmigrant petition on February 4, 2003, stating that it employed three workers, including the beneficiary, who would be functioning as the operation manager. In an attached letter from the petitioner, dated January 21, 2003, the petitioner outlined the following job duties of the beneficiary:

> Recruit, hire and promote sales representatives. Give assignments and determine sales territories of sales representatives. Review market analyses to determine customer needs, preferences, and volume potential to make adjustment in quantity, and variety of rugs and carpets to be imported. Meet with clients to negotiate, and close sales contracts, using discretion in determining volume, price, and other terms of contracts. Conduct market research in other States to expand markets of company products beyond the Pacific Northwest. Represent the company at trade shows and industrial conferences to promote company's products, and to enter into sales contracts with potential buyers. Serve as liaison between the US operations and the Nepal operations.

In a request for evidence issued by the director on March 19, 2003, the director requested that the petitioner provide a statement of the beneficiary's job duties from the previous year and those that the beneficiary would perform under the extended petition, and submit a description of the petitioner's personnel, including the number of employees and position held by each. The director also requested evidence of the financial status of the United States operation.

Counsel responded in a letter dated June 2, 2003. Counsel explained that "[a]s the only managerial staff in the United States, [the beneficiary] has been instrumental in the [sic] establishing and managing of the company's US operations." In response to the director's request for a description of the beneficiary's proposed job duties, counsel provided the same job description submitted by the petitioner in its January 21, 2003 letter, which is outlined above. Counsel stated that the petitioner's staff includes the beneficiary and a designer/sales representative, and noted that the petitioner plans to hire two additional sales representatives by the end of the year. As evidence of the financial status of the United States entity, counsel provided the petitioner's April 2003 checking account statement, which reflected an ending balance of approximately $8,500.

In his August 2, 2003 decision, the director determined that the petitioner had not demonstrated that the beneficiary would be employed under the extended petition in a primarily managerial or executive capacity. The director stated that the petitioner had not established that the beneficiary's tasks of conducting market research, attending trade shows, and training designers are primarily managerial or executive responsibilities. The director further stated that the petitioner has not shown that the beneficiary functions at a senior level within the organizational hierarchy, and did not establish that the beneficiary would be managing or directing the management of a department, subdivision, function, or component of the organization. The director

further noted that the petitioner employs one other worker, who the director states has not been shown to be a professional, managerial or supervisory employee. The director also noted that when asked to submit an additional explanation of the beneficiary's job duties, the petitioner submitted the same description as that already provided. Consequently, the director denied the petition.

In an appeal filed on August 22, 2003, counsel claims that the director erred in determining that the beneficiary's job duties are not managerial or executive. Counsel states "[d]uring the past year, the petitioner has made substantial progress developing its market in the United States through advertising on [sic] industry magazines, and attending trade shows." Counsel notes that the petitioner hired a designer, who has over fourteen years experience in the field of design, and who would be under the beneficiary's direct supervision. Counsel states that the beneficiary's presence in the United States is essential to the operation of the petitioning entity, as the beneficiary is the sole managerial employee of the organization.

Counsel submits a letter from the petitioner's vice-president, in which the vice-president explains the importance of the beneficiary's position as an "influential member" in the United States entity. The vice-president notes that the beneficiary has been responsible for recent market research, which resulted in the petitioner's selection of "the right form of medium in advertising and promoting our products." Counsel enclosed copies of the petitioner's magazine advertisements and documents reflecting the petitioner's participation in a Seattle, Washington interior show.

On review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. 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. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. There is no provision in Citizenship and Immigration Services (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.

Here, the petitioner has not demonstrated that following its first year of development the petitioning organization is capable of employing the beneficiary as a manager or an executive. Although the petitioner claimed on the nonimmigrant petition that it employed three workers, the record demonstrates that the beneficiary was the sole employee at the time of filing the petition in February 2003. The petitioner's second employee, a designer/sales representative was not hired until March 2003. While the AAO recognizes that a beneficiary, as the sole employee of an organization may possess a managerial or an executive title, the petitioner has not demonstrated that the beneficiary would be primarily performing managerial or executive tasks. 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).

Specifically, based on the petitioner's description of its business, the beneficiary would be performing such non-qualifying job duties as reviewing market analyses, determining the company's marketing strategy, meeting with clients, negotiating contracts, and representing the petitioner to the public at trade shows and conferences. As the sole employee, the beneficiary would clearly be responsible for the petitioner's marketing and sales, rather than managing or directing those in these positions. 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).

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). As noted above, the regulation at 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 CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, 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.

The AAO notes that although specifically requested by the director, the petitioner failed to provide an explanation of the beneficiary's proposed job duties other than the description already outlined in the petitioner's January 2003 letter. The petitioner's 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).

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the petitioner has demonstrated the claimed affiliate relationship between the beneficiary's foreign employer and the petitioning organization as required in the Act at § 101(a)(15)(L). The petitioner provided two certificates issued to [redacted] wife of [redacted] for 510 shares and [redacted] for 490 shares as evidence of the stock ownership in the United States corporation. The petitioner claimed that an affiliate relationship exists, as the beneficiary's foreign employer is wholly owned by [redacted]

The record does not contain conclusive evidence that the foreign entity is owned by [redacted] Counsel references a Department of Industries certificate as evidence of [redacted] ownership of the foreign entity. The certificate, however, identifies the proprietor of the petitioning organization as "Mrs. [redacted] and includes a notation that on August 23, 1999, "the firm is transferred in the name of Mr. [redacted] The record does not identify a relationship between the named owner, "Mr. [redacted] and the petitioner's shareholder, "Ms [redacted] 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). As the documentation does not establish an ownership interest in the foreign entity by Ms. Yankeet Nepali, the AAO cannot conclude that the two organizations possess a requisite qualifying 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).

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.