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

U.S. Citizenship and Immigration Services

[redacted]

APR 05 2005

File: SRC-04-059-50371 Office: TEXAS 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)

IN 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 filed this nonimmigrant petition seeking to extend the employment of its President/General Manager 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 corporation organized in the State of Texas that operates as an importer of automobile parts. The petitioner claims that it is the subsidiary of [redacted], located in India. 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 the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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, counsel for the petitioner asserts that the beneficiary is employed in an executive capacity. Counsel further asserts that the petitioner has been given only six months to open its new office, and Citizenship and Immigration Services (CIS) should allow more time. In support of these assertions, counsel submits a statement on Form I-290B.

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 primary 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 filed on December 22, 2003, on Form I-129 the petitioner stated the following:

> American buyers have asked us to warehouse parts and ship to them from the warehouse here instead of from India. Also, it is easier to purchase items for reshipment if we have a place to warehouse them before we ship. [The beneficiary will] [l]ocate buyers for [the petitioner's] products, even to the extent of working with buyers to manufacture items to their specifications.

In an attached letter, the petitioner provided the following:

> The petition was approved in February, 2003, valid to January 24, 2004. But, the [beneficiary] was not in the country at the time and in fact did not move [to the United States] . . . until June, 2003.
>
> Accordingly, we have only six month's worth of experience, that is, the company has been in business and doing business for only six months.

On January 2, 2004, the director requested additional evidence. Specifically, the director requested: (1) an indication of who does the shipping and handling for the petitioner; (2) copies of the petitioner's State Employer's Quarterly Tax Returns for 2003; (3) an organizational chart for the petitioner; (4) evidence of the petitioner's staffing, including position titles and duties of all employees; and (5) a description of the beneficiary's duties for the past year including an indication of the percentage of time she spent performing each duty.

In a response dated February 4, 2004, the petitioner submitted: (1) a letter addressing the director's questions; (2) an organizational chart; (3) tearsheets for employment advertisements placed by the petitioner; (4) a statement from the petitioner's corporate counsel attesting that the petitioner has no salaried employees in the United States; (5) a copy of a letter from [redacted] reflecting that the petitioner has entered into an agreement for communications services; and (5) copies of emails between the beneficiary and the petitioner's clients evidencing the petitioner's business activities.

In the attached letter, the petitioner stated the following:

> [The beneficiary] gives the buyers of the goods a special letter authorizing the buyers to act for our company concerning the shipping and bills of lading, with reference to the specific bill of lading numbers. We also authorize them to act for our company concerning customs information. We add the invoices and packing list to the authorization. The buyer then gives the authorization letter to their own broker or agent to obtain the goods and clear them through U.S. Customs.
>
> * * *
>
> You asked what have [the beneficiary's] duties been for the past year. They are as follows:

DUTIES	PERCENTAGE
Oversee the shipments coming in and arrange with clients to obtain the goods and clear customs.	30%
Locating new buyers and customers for our goods and visiting them at their sites at various locations (so far in Texas and Illinois). Working with brokers to purchase (we are selling) and establish transmission repairs and sales franchises.	40%
Setting up the office, looking for warehouse space, recruit salespeople and negotiate wages and commissions.	25%
Miscellaneous administration, authorization letters etc.	5%

On February 24, 2004, the director denied the petition. 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 "as the sole employee, [the beneficiary's] primary assignment cannot be supervising a subordinate staff of professional, managerial, or supervisory personnel," and that "[t]he regulations defining qualifying organizations specifically excludes the mere presence of an agent or office of the organization."

On appeal, counsel for the petitioner asserts that the beneficiary is employed in an executive capacity. Counsel further asserts that the petitioner has been given only six months to open its new office, and Citizenship and Immigration Services (CIS) should allow more time. Specifically, on Form I-290B counsel states that:

> [The beneficiary] has only had 6 months worth of start-up time. The request made, which has been denied, was originally for another period to continue the start-up process. It takes time to get organized. She was denied the extension because she isn't working in a "managerial" capacity. But the evidence shows that while the corporation was set up in December 2002, she did not come to the U.S. and pursue the business activities until June 2003.
>
> [The beneficiary] is in the process of hiring subordinate employees. The newspaper ads have been submitted. When [the director's] denial states that "beneficiary is the only employee," it eliminates and overlooks the fact that she is the only employee so far. Yet she only began work in June. You hardly gave her a chance.

Counsel claims that the director failed to adequately consider whether the beneficiary's duties meet the definition of "executive capacity." Counsel references copies of previously submitted emails as evidence of the beneficiary's executive tasks.

When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). Upon examining the director's decision, the AAO notes that the reasons given for the denial are conclusory with few specific references to the evidence entered into the record. As raised by counsel, the director's decision does not reveal whether the director considered the beneficiary's duties in light of the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. As the AAO's review is conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and eligibility. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Upon review, counsel'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.* 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.

In the instant matter, the petitioner has provided a job description that indicates the percentage of time the beneficiary devotes to her respective duties. The job description shows that the majority of the beneficiary's tasks are non-managerial and non-executive duties. For example, "[overseeing] the shipments coming in and arrang[ing] with clients to obtain the goods and clear customs" are 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). Without further explanation, "[l]ocating new buyers and customers for [the petitioner's] goods and visiting them at their sites at various locations" appear to be routine sales functions not within the purview of an executive or manager. *See* sections

101(a)(44)(A) and (B) of the Act. As the petitioner's documentation reflects that the beneficiary spends a combined 70 percent of her time on these tasks, the evidence of record shows that she is not employed in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The petitioner clearly states that the beneficiary is its sole employee. 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). 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). 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. 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.

The petitioner operates as an importer of automobile parts. 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 from customers about merchandise, managing a checking account and paying bills, answering telephones, marketing the petitioner's products, and conducting sales transactions. As the beneficiary is the sole employee of the petitioner, it is clear that she must perform all of these non-qualifying tasks. In fact, the petitioner has submitted copies of numerous emails between the beneficiary and the petitioner's customers reflecting that the beneficiary is engaged in extensive sales and customer support activities. 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).

Counsel asserts that the petitioner has been given only six months to open its new office, and CIS should allow more time. Yet, CIS previously approved a petition (SRC-02-246-50847) allowing the beneficiary to enter the United States from January 24, 2003 to January 24, 2004 in order to open a new office on behalf of the petitioner. Although this petition was approved on February 28, 2003, counsel claims that the beneficiary did not enter the United States until June 2003. However, the petitioner has provided no explanation or documentation to indicate why the beneficiary entered the United States approximately four months after she received approval for L-1A status. As noted above, 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 not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional employees in the future. 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).

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3). For this 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). The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) requires the petitioner to submit "[e]vidence that the United States and foreign entities are still qualifying organizations." On the initial petition, the petitioner indicated that it is the subsidiary of the beneficiary's foreign employer. Yet, the petitioner has failed to provide any evidence to show the ownership of it or the foreign entity. 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). 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. The petitioner has not met this burden.

ORDER: The appeal is dismissed.