

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



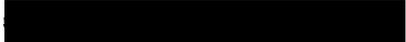
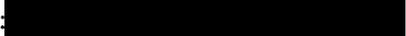
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D7

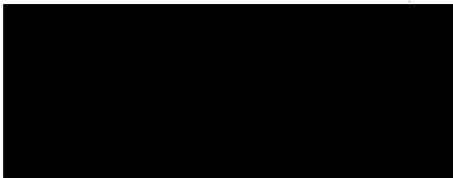


FILE: SRC 03 035 52763 Office: TEXAS SERVICE CENTER Date: **AUG 15 2005**

IN RE: Petitioner: 
Beneficiary: 

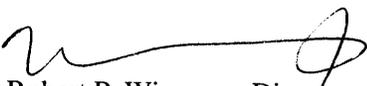
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2000 and claims to be in the import and export, retail sales, consulting, and marketing business. The petitioner claims that the U.S. entity is a subsidiary of SOI Enterprises 54, located in Karachi, Pakistan. The petitioner declares five employees with a gross annual income of \$567,265.50. The petitioner seeks to extend its authorization to employ the beneficiary temporarily as director and president of the U.S. entity for a period of two years, at a yearly salary of \$36,000.00.

The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will continue to be managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer, or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- 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 managerial or executive capacity; and
- E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity will be primarily managerial or executive in nature.

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) 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), 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 described the beneficiary's duties in the petition as: "Has been serving as director/president of U.S. subsidiary. Is overall in charge of the company's operation. Hires, trains, supervises, and fires managers who, in turn, perform the same functions with respect to lower echelon employees."

In a letter dated November 15, 2002, the petitioner described the beneficiary's duties as follows:

As the president of [the U.S. entity] in Sugar Land, Texas, [the beneficiary] is authorized to initiate and carry out all import business conducted in the U.S. He will direct the management of the company and establish its policies and goals regarding business direction and growth. [The beneficiary] maintains contact with existing clients overseas and explores and establishes business relationships with potential buyers in local markets in the U.S. He formulates business strategies and financial goals, and directs and oversees all activities of the company. [The beneficiary] exercises wide latitude in discretionary decision-making, and receives only general supervision from directors in Karachi. He spends about 60% of his time in supervisory duties, 20% in assessing new projects and business opportunities and the rest in miscellaneous functions.

The petitioner stated that the U.S. entity employed a manager in its mortgage department who was in charge of consultation and marketing of home mortgages. The petitioner stated that the U.S. company also employed clerical staff, and an import manager who was in charge of the import of furniture and other items.

In response to the director's request for additional evidence, the petitioner described the beneficiary's duties in part as:

[The beneficiary] would directly supervise the mortgage operation.

...

[The beneficiary] also supervises the manager of our 'furniture and accessories import division' who supervises one clerk. In addition, he supervises the manager of the vehicle audio division who, in turn, supervises an installer and commissioned sales personnel. The commissioned sales personnel do not appear on our payroll since they are 'contract' workers.

The petitioner submitted an organizational chart depicting the U.S. entity's hierarchy. The chart listed the beneficiary as director and president. The chart also listed employees under the beneficiary's direction to include: an installer and commissioned sales personnel in the vehicle audio division; a clerical position in the furniture and accessories import division; and loan officers and loan processors in the financial mortgage division. The petitioner submitted copies of the U.S. entity's IRS Form 941, Employer's Quarterly Federal Tax Return for all four quarters in 2002; and the company's IRS Form 940-EZ, Employment (FUTA) Tax Return summary for 2002.

The director denied the petition determining that the evidence submitted was insufficient to establish that the beneficiary would be employed by the U.S. entity primarily in an executive capacity. The director noted that the U.S. entity employed five persons and paid only \$33,750.00 in total salaries and less than \$568,000 in gross annual income.

On appeal, counsel disagrees with the director's decision and asserts that the evidence submitted clearly establishes that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity. Counsel contends that the evidence submitted demonstrates that the beneficiary will be performing managerial or executive duties as the director and president of the U.S. entity. Counsel also contends that there are no regulatory requirements that call for a company to have a certain amount in payroll or gross sales in order to qualify for L-1 intracompany transferee status.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. When examining the managerial or executive capacity of the beneficiary, the AAO will look first to the petitioner's description of the beneficiary's 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.* In this matter, the petitioner has failed to demonstrate whether the beneficiary's duties are primarily managerial or primarily executive. For example, on the one hand the petitioner states that the beneficiary directs the management of the company, exercises wide latitude in discretionary decision-making, and only receives general supervision from directors. On the other hand, the petitioner states that the beneficiary supervises subordinates.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In this matter, there is insufficient evidence to show that the beneficiary will perform the high-level responsibilities as defined, or that he will primarily perform those duties rather than spending the majority of his time performing day-to-day functions of the organization.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include managing the company, establishing its policies and goals, formulating business strategies, and exploring and establishing business relationships. The petitioner did not, however, define the beneficiary's goals, policies, or clarify how the beneficiary is to explore and establish business relationships. 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). 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).

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as directing the entire operation of the organization, establishing goals and policies of the organization, and exercising sole discretionary decision making authority. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Although the petitioner asserts that the beneficiary will be managing a subordinate staff, the record does not establish that the subordinate staff will be composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. In the instant matter, the petitioner asserts that the beneficiary will spend about 60% of his time performing supervisory duties. The petitioner also contends that the beneficiary will supervise the mortgage division, and the managers of the vehicle audio division and furniture and accessories import division. However, there has been no evidence presented to demonstrate that the persons to be managed are supervisory, professional, or managerial employees. It is noted that the petitioner asserts that "[the beneficiary] hires, trains, supervises, and fires managers who, in turn, perform the same functions with respect to lower echelon employees." A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Based upon the evidence in the record it appears that the beneficiary will be primarily supervising a staff of non-professional employees; therefore, the beneficiary cannot be deemed to be primarily acting in an executive or managerial capacity.

Although the petitioner contends that it employs commissioned sales personnel who don't appear on the payroll because they are "contract workers," it has neither presented evidence to document the existence of these employees nor shown how they will be supervised by their superiors. Nor has the petitioner identified whether the contract employees are employed on a full-time or part-time basis. Additionally, the petitioner has not explained how the services of the contracted employees will obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, *supra*.

In summary, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Although not directly addressed by the director, the minimal documentation of the foreign entity's business operations raises the issue of whether there remains a qualifying relationship between the U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has not demonstrated that a qualifying relationship still exists between the U.S. entity and a foreign entity and that the foreign entity will continue doing business during the alien's stay in the United States. Consequently, it cannot be concluded that the foreign entity continues to have a qualifying relationship with the U.S. entity. For this additional reason, the petition will not be approved.

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 sustained that burden.

ORDER: The appeal is dismissed.