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U.S. Citizenship
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Services



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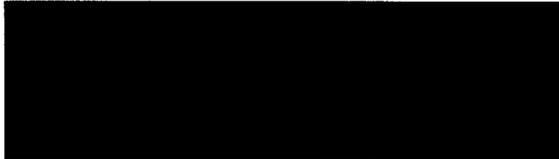
File: SRC 03 220 50442 Office: TEXAS SERVICE CENTER Date:

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)

IN 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 director granted a motion to reopen/reconsider, and affirmed the denial. 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 vice president 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 claims to be the subsidiary of [REDACTED] located in Seoul, Korea, and is engaged in the wholesale business. 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 had been and will continue to be employed in the United States in a primarily managerial or executive capacity.

The petitioner simultaneously filed an appeal and a motion to reopen and/or reconsider in response to the denial. The director granted the motion and affirmed the denial. The appeal was subsequently forwarded to the AAO. On appeal, counsel contends that the director erroneously denied the petition, and asserts that the nature of the beneficiary's position complies with the regulatory definition of executive capacity. Additionally, counsel asserts that the director's reliance on the small number of employees retained by the U.S. entity was erroneous and prejudicial to the petitioner. Counsel submits a brief and additional evidence in support of these contentions.

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(I)(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 (I)(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, counsel submitted a letter from the U.S. petitioner, dated June 25, 2003, outlining the beneficiary's duties while employed in the United States. Specifically, the petitioner alleged that the beneficiary's duties were executive in nature, and described her duties as follows:

[The beneficiary] has been authorized with wide discretionary decision-making powers regarding the goals and policies of the company's marketing decisions, and the direction and operations of the company's marketing and sales operations. Furthermore, she will be in-charge of interviewing and hiring the sales and marketing support staff. [The beneficiary] determines the demand for the company's products in the United States and South America and identifies potential customers and oversees the monitoring trends that indicate the need for the company's products in the United States and South America. She also has full authority to negotiate and enter into contracts, make decisions regarding sales and marketing of our products in the United States and South America. She reports directly to the president of our company. [The beneficiary] has extensive knowledge and experience as she directed the management of the Sales Department, as well as the finance department at [the foreign employer].

The petitioner further stated that the U.S. entity "is still a new start up company" and that it wished to retain the beneficiary's services for an additional three years to ensure that the business expands to the Western Hemisphere.

On August 20, 2003, the director requested additional evidence establishing that the beneficiary was employed in a capacity that was primarily managerial or executive in nature. Additionally, the director requested evidence of the staffing levels of the U.S. entity, including the position titles, duties, and

educational levels of all other employees, and evidence that the U.S. entity had been doing business as defined by the regulations during the previous year.

On September 19, 2003, the petitioner submitted various evidence in response to the director's request. With regard to the beneficiary's employment in a primarily managerial or executive capacity, the petitioner re-submitted the petitioner's letter dated June 25, 2003 which outlined the beneficiary's duties. In response to the director's query regarding the staffing levels of the U.S. entity, the petitioner submitted a one-page document which listed three employees: [REDACTED] president; the beneficiary, vice president; and [REDACTED] director. Finally, the petitioner submitted tax documents, balance sheets, shipping receipts, and other relevant documentation in support of the premise that the U.S. entity was doing business.

On October 2, 2003, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director found that the evidence failed to establish that the beneficiary would be engaged *primarily* in managerial or executive tasks. Noting that the three employees of the U.S. entity all held managerial or executive titles, the director concluded that it was reasonable to presume that the beneficiary was consequently required to perform a number of the day-to-day tasks essential to the operation of the business. In addition, the director noted that the petitioner's description of the beneficiary's duties indicated that she would be participating in the day-to-day operations of the business.

Counsel for the petitioner subsequently submitted a motion to reopen and/or reconsider on November 4, 2003. In the motion, counsel provided evidence that the U.S. entity, as of October 28, 2003, had retained the services of three additional employees to perform the lower-level tasks of the organization. In addition, counsel contended that the beneficiary regularly supervised and interacted with an accountant who was retained as an independent contractor.

On November 26, 2004, the director affirmed the denial. In the decision, the director noted that despite the retention of additional staff members by the U.S. entity on October 28, 2003, the petitioner had failed to demonstrate that the petitioner supported the employment of the beneficiary in a capacity that was primarily managerial or executive in nature within the relevant time frame, which was September 22, 2002 to September 22, 2003. The director noted that the petitioner had not established this crucial element of eligibility at the time of the filing of the petition, and therefore the original decision was upheld.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous, and states that the beneficiary's duties are in fact primarily executive in nature. Counsel restates the definition of "executive capacity" as it pertains to the beneficiary's stated duties, and further concludes that the small staffing of the U.S. entity did not warrant a finding that the beneficiary was not primarily engaged in managerial or executive activities. Counsel provides evidence of new employees retained by the petitioner, and resubmits the descriptions of the beneficiary's duties previously submitted prior to adjudication.

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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

Prior to adjudication of the petition, the petitioner contended that the beneficiary had been employed in a capacity that was primarily executive in nature. In support of these contentions, the petitioner submitted an updated description of the beneficiary's duties in response to the request for evidence. These duties included negotiating with buyers, directing distribution, and identifying potential customers.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary has not been and will not be employed in a primarily managerial or executive capacity. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner claims that the beneficiary's duties are exclusively executive, yet the list of duties provided in response to the director's request for evidence includes a significant number of non-executive tasks. For example, the petitioner states that the beneficiary determines the demand for the U.S. company's product and negotiates with buyers. Clearly, the beneficiary is performing client-related services that will create a basis for marketing the petitioner's product in the United States. In addition, the beneficiary is described as directing the company's marketing and sales operations, but the petitioner does not have anyone on its staff to actually perform routine marketing and sales functions other than the beneficiary. 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).

In the appeal brief, counsel summarizes the regulatory definition of "executive capacity" in an attempt to demonstrate the executive nature of the beneficiary's duties. Counsel concludes that her duties are of an executive nature, and refers to the previously submitted statements from the petitioner outlining these duties. Although in this case the petitioner and counsel conclude that the beneficiary is employed in a capacity that is primarily executive, there is no independent evidence to support this claim. In fact, counsel's restatement of the duties on appeal appears to heavily paraphrase the regulatory definition of "executive capacity." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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.). The actual duties themselves reveal the true nature of the employment. *Fedin Bros.*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990). As discussed above, the record contains insufficient evidence to support the assertion that the beneficiary is primarily employed in an executive or managerial capacity.

Since it does not appear from the beneficiary's duties that she will be functioning in a primarily executive capacity, the AAO will alternatively look for the beneficiary's qualifications in a managerial capacity. The petitioner does not claim that the beneficiary supervises other employees. Consequently, the AAO will look again to the definition of managerial capacity to evaluate the characteristics of the beneficiary's duties.

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 case, counsel continually asserts that the beneficiary's position and duties associated therewith meet the regulatory definitions. In addition, counsel and the petitioner rely on the beneficiary's title of vice president as a conclusory measure from which to determine that she is performing high level responsibilities. However, the second part of the test has not been satisfied. The record demonstrates that the beneficiary and the "director" are the only employees working at the U.S. entity. While the petitioner states that it also employs a president, wage reports and payroll records clearly establish that the only two persons employed in the U.S. entity are the beneficiary and the part-time director. The director's position is described as "client management of South American countries," and the translation of correspondence from Spanish to Korean.

Though the director requested a thorough description of all employee positions, the petitioner responded by providing only an abbreviated description of the duties of the beneficiary and the director. This minimal information does not address who performs the day-to-day tasks of the organization, but rather states that both persons perform only specialized duties. It is unrealistic to conclude that the beneficiary, as one of only two employees of the organization, does not perform any low level or administrative tasks essential to the operation of the business. Counsel correctly observes that 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Based on the current record, the AAO is unable to determine whether the claimed managerial and/or executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although the director requested a concise description of the beneficiary's duties, the petitioner's description of her job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Counsel's assertions on appeal lack supporting evidence establishing these percentages. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).¹

¹ The AAO acknowledges the receipt of an expert opinion, dated May 19, 2004, in support of the appeal. The opinion, prepared by [REDACTED] a management consultant, is provided in support of the contention that the beneficiary is employed in a primarily executive capacity. While the opinions expressed by Mr.

The AAO notes that counsel relies heavily on *Mars Jewelers, Inc. v. Immigration and Naturalization Service*, 702 F. Supp. 1570 (N.D. Ga. 1988), in support of the premise that the director erred in examining the size of the petitioning entity in reaching the decision. However, counsel fails to recognize or discuss the subsequent holding in *Systronics*, which, as discussed above, permits CIS to examine an entity's size in relation to the reasonable needs of the entity. Consequently, counsel's reliance on *Mars Jewelers* is misplaced and will not be considered for purposes of this analysis.

Finally, counsel submits new evidence that the petitioner has since hired three additional employees to perform the necessary operational tasks of the organization. This evidence is unacceptable for two reasons. First, 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). Second, 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. The petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

As stated 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations 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. The term "doing business" is defined in the regulations as "the 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." 8 C.F.R. § 214.2(l)(1)(ii). In this case, the beneficiary, in her capacity as vice president, provided a statement dated September 10, 2003 attesting to the nature of the petitioner's business. The statement provides that the U.S. entity is merely entering into contracts for purchase orders from "Western Hemisphere" customers and subsequently relaying these orders to the foreign entity. This type of transaction does not satisfy the definition of "doing business," and the petitioner has failed to provide additional evidence, such as invoices or other documents, that would demonstrate that the petitioner validly provided other forms of goods and/or services. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has failed to establish that a qualifying relationship exists between the foreign entity and the U.S. entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has submitted a copy of a stock certificate and page 6 of the Minutes of the Organizational Meeting (undated and

Goodfriend are certainly respected, they are not persuasive in this matter as they do not address the context of the beneficiary's duties in light of the applicable regulations governing this visa petition. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

unsigned) as evidence of the foreign entity's ownership of the U.S. entity. Schedule K of the petitioner's 2002 IRS Form 1120, U.S. Corporation Income Tax Return, indicates that the company is wholly owned by [REDACTED]. Although the petitioner claims on the L Supplement to Form I-129 [REDACTED] owns the foreign entity, this assertion is not supported by any documentary evidence of the foreign company's ownership. Furthermore, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the complete minutes of relevant annual shareholder meetings must be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. The petitioner has failed to provide sufficient evidence establishing the ownership composition of the U.S. and foreign entities. For this additional reason the petition may not be approved.

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.