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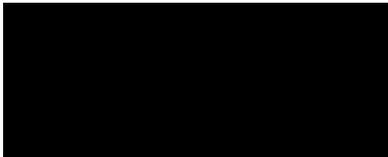
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FILE: EAC 01 235 55369 Office: VERMONT SERVICE CENTER Date: **NOV 28 2005**

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 Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The Administrative Appeals Office (AAO) summarily dismissed the subsequently filed appeal. The matter is now before the AAO on motion to reopen. The motion will be granted and the previous decision of the AAO will be affirmed.

The petitioner states that it is engaged in trading fabrics, garments and 22 karat gold jewelry. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager 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, a New York corporation, claims to be a subsidiary of Monika Overseas, located in Delhi, India. The beneficiary was initially granted a one-year period of stay in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend her stay for a three-year period.

The director denied the petition on January 21, 2001, concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. On August 4, 2003, the AAO summarily dismissed the petitioner's appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v), as the petitioner failed to identify any erroneous conclusion of law or statement of fact for the appeal.

On motion, counsel asserts that the director's decision was based on presumption and misapplication of legal standards. Counsel, citing several precedent decisions, asserts 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. Counsel claims that the beneficiary now supervises two employees and devotes 100 percent of her time to management duties. Counsel submits a brief, but no new evidence, in support of the motion to reconsider.

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)(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 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.

The petition was submitted on July 31, 2001. The petitioner indicated on Form I-129 that it had one employee, and attached a July 24, 2001 letter describing the beneficiary's job duties as follows:

[The beneficiary] was transferred to the United States to develop and expand business ventures specifically directed to utilize business opportunities and diversify business activities. Since her arrival in USA, she has orchestrated annual sales of more than \$8 million and is actively pursuing other business opportunities. Her duties as General Manager remain the same; namely, negotiate contracts, credit terms, identify new and improved products, and independent decision making to meet the projected demand based on market conditions. In addition to her continued liaison between the U.S. and foreign companies, [the beneficiary] continues to remain responsible for overseas investment and business operations of the parent company.

On September 21, 2001, the director requested additional evidence to establish that the beneficiary would be employed in a managerial or executive capacity. The director observed that the beneficiary's duties, as described in the record, did not appear to relate primarily to policy and general operations oversight, but appeared related to the day-to-day operation involved in producing a product or providing a service. Accordingly, the director instructed the petitioner to provide: (1) a breakdown of the number of hours devoted to each of the beneficiary's job duties on a weekly basis; (2) an organizational chart for the United States entity, as well as complete position descriptions for its employees; and (3) the number of supervisors under the beneficiary's management, their job titles, and their job duties.

In a response dated December 12, 2001, the petitioner submitted the following job description for the beneficiary's role as general manager:

[The beneficiary] is responsible for operation and management of [the petitioner's] import, sale and distribution of 22kt gold hand made jewelry primarily from India. Her duties and average time spent include:

- 10% Identify the design and jewelry to meet customers' requirements
- 30% Import wholesale- send purchase orders and follow-up
- 45% Negotiate Contracts with retailers for sale, display, payment, credit, returns, and all items of quality control.
- 15% Arrange custom clearance and delivery to retailers.

The petitioner submitted an organizational chart which depicted the beneficiary as general manager over "custom clearance," "freight forward service," a marketing assistant (██████████) who performs "marketing services," a contracted attorney, and a contracted accountant. The petitioner also submitted a statement from its president identifying its management and personnel structure as follows:

[The petitioner] imports 22kt hand made gold jewelry primarily from India. The items for importation are identified as a result of marketing effort of ██████████. Customs clearance and freight forwarding services are obtained from independent firms. The items sold are either delivered to and/or picked up by the retailers. Payments from sales are utilized to pay [for] the purchase and meet the expenses of small office. Legal and accounting services are obtained as needed.

The director denied the petition on January 21, 2002 concluding that the beneficiary would not be employed in a managerial or executive capacity. The director observed that the beneficiary alone was responsible for the day-to-day operations of the U.S. company. The AAO affirmed the director's decision and summarily dismissed the petitioner's appeal on August 3, 2004.

On motion, counsel claims that the director's determination that the beneficiary will be engaged in primarily non-managerial operational tasks of the company "is based upon alleged 'appearance' and/or 'presumption'" and "lacks the application of appropriate legal criteria and the findings of facts and conclusions of law to sustain the standard of judicial review."

Counsel incorporates into her brief a large portion of the U.S. District Court's decision in *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570 (N.D. Ga. 1988), in which the denial of the beneficiary's immigrant visa petition was deemed an abuse of discretion in part because the director based his decision on the small size of the petitioning company. Counsel claims that the beneficiary devotes 100 percent of her time to management of the company, supervises a "Manager Operations" and sales clerk, and exercises absolute discretion in hiring, firing, negotiating contracts, arranging terms and financing for the company. Counsel claims that the beneficiary's duties are the critical factor in determining whether the beneficiary serves in a managerial or executive capacity, and asserts that the director placed undue emphasis on the size of the organization.

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 in an executive or managerial capacity. *Id.*

Counsel has provided no additional evidence on motion to persuasively demonstrate that the beneficiary would be employed in a managerial or executive capacity. Although counsel claims the beneficiary devotes 100 percent of her time to management duties, the breakdown of the beneficiary's job duties submitted in response to the request for evidence shows that she primarily performs operational duties that allow the petitioner to provide its goods to U.S. customers. For example, the beneficiary devotes 10 percent of her time to "identify[ing] the design and jewelry to meet customers' requirements." This is a market research task and has not been shown to be a managerial or executive duty. The beneficiary allocates a total of 45 percent of her time to sending and following up on purchase orders and arranging custom clearance and delivery of goods to retailers. The petitioner has not explained how purchasing and arranging delivery of products meets the definition of either managerial or executive capacity. The beneficiary devotes the remainder of her time to "[n]egotiat[ing] Contracts with retailers for sale, display, payment, credit, returns and all items of quality control." The petitioner has failed to distinguish these duties from routine sales and customer service tasks. The petitioner states that the beneficiary "is responsible for operation and management of [the petitioner's] importation, sale, and distribution of 22kt gold hand made jewelry," however, based on the job description provided, it is evident that the beneficiary is primarily engaged in non-qualifying operational duties necessary for the petitioner to import, sell and distribute jewelry in the United States. 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 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 show 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). Where an individual is primarily performing the tasks necessary to produce a product or to provide a service, that individual cannot also primarily perform managerial or executive duties. In the instant matter, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time.

Counsel correctly observes that a company's size alone 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 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). Furthermore, in the present matter, 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. Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. It is noted that both of the cases cited by counsel relate to immigrant visa petitions, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, the cases cited by counsel are distinguishable based on the applicable regulations. See 8 C.F.R. § 214.2(l)(14)(ii).

At the time the petition was filed, the petitioner claimed to have one employee. In response to the request for evidence, the petitioner indicated that the beneficiary oversees an attorney, an accountant, customs clearance and freight forwarding services, and a marketing assistant whose duties are described as "marketing services." The petitioner provided no evidence of payments to the accountant or attorney, nor has the petitioner explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Likewise, the petitioner submitted no evidence to confirm the employment of the marketing assistant, such as a state quarterly wage report listing all employees for the third quarter of 2001, the quarter within which the petition was filed. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. The petitioner has not established the basic eligibility requirement in this matter, that the beneficiary is primarily performing managerial or executive duties. Although counsel asserts that the director abused his discretion by placing undue emphasis on the size of the petitioner's organization, the AAO finds that the director properly concluded that the beneficiary's actual duties would be performing essentially all of the petitioner's non-qualifying operational tasks. This conclusion was reasonably drawn from the petitioner's job description for the beneficiary and was not based on mere speculation, as intimated by counsel. 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).

On appeal, counsel claims that the petitioner's business is growing and the beneficiary is now supervising additional employees, including a subordinate manager. 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). The AAO need not and will not consider evidence of business growth or expansion that occurred subsequent to the filing of the petition. 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. The record indicates that as of the date of filing, the beneficiary was solely responsible for all aspects of the petitioner's business. Accordingly, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. The petitioner has not submitted evidence on motion to overcome the director's decision on this issue.

Beyond the decision of the director, the petitioner has not established that it maintains a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The petitioner claims that the foreign entity owns 60 percent of its stock, and submitted two stock certificates showing that 600 shares were issued to the foreign entity and 400 shares were issued to the beneficiary. However, the petitioner's 2000 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, indicates at Schedule E that the beneficiary owns 100 percent of the company's common stock, which directly contradicts the petitioner's claim that the petitioner is a subsidiary of the foreign entity. In addition, the petitioner has failed to submit evidence to demonstrate that the foreign organization continues to do business, and thus it can not be concluded that the foreign entity is a qualifying organization as defined at 8 C.F.R. § 214.2(l)(ii)(G). 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The decision of the AAO dated August 4, 2003 is affirmed.