

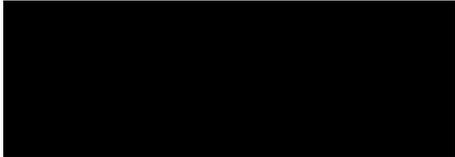
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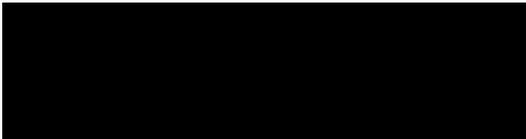


File: WAC 03 263 50429 Office: CALIFORNIA SERVICE CENTER Date: **SEP 21 2005**

IN RE: Petitioner: 
Beneficiary: 

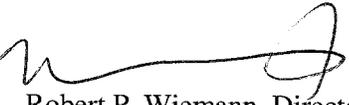
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, California 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 branch 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 California that is engaged in the wholesale trade of cubic zirconium jewelry stones. The petitioner claims that it is the subsidiary of [REDACTED] located in Seoul, Korea. The beneficiary was initially granted a one-year period of stay to open a new office in the United States for the petitioner's predecessor company in 1998 and was subsequently granted two extensions of stay. The petitioner seeks to extend the beneficiary's status for an additional two-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would 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 notes that the beneficiary was previously granted two extensions of stay and asserts that the beneficiary "should be continuously accorded an L-1A, because the beneficiary has been carrying out the same job duties over the years as a U.S. subsidiary manager." Counsel also asserts that the director's decision inappropriately emphasized the small size of the petitioner's organization, rather than the beneficiary's actual duties. Counsel submits a brief and additional evidence in support of these assertions.

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.

At 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, the petitioner identified the beneficiary as its "branch manager" and described his job duties as follows:

Direct the entire operation of the company, arrange sales network and hire employees and salesmen. Overall entire business transaction.

The petitioner also submitted a letter, dated September 8, 2003, which states that the beneficiary will serve as its "managing director" and that he "has been continuously employed by the petitioner since July 1994 in a managerial position and has been in L-1A status since 1998 to present." Also submitted was an organizational chart depicting the petitioner as the foreign company's "U.S. Sales Representative." The chart showed that the petitioner employed the beneficiary and another employee identified as a "worker."

On November 14, 2003, the director issued a notice of intent to deny the petition. Specifically, the director noted that the five-year old company employed only the beneficiary and one other employee at the time of filing. The director stated that there was insufficient evidence to establish that the beneficiary would supervise and control the work of other supervisory, professional or managerial employees who will relieve him from performing non-qualifying duties, and that the petitioner had not shown that the beneficiary had been or would be functioning at a senior level within an organizational hierarchy. Finally, the director mentioned that in light of the overall purpose and stage of development of the organization, the petitioner had not demonstrated that the U.S. business realistically could support a position involving primarily managerial or executive responsibilities. The petitioner was asked to provide additional information, evidence or arguments to support its petition.

In response, counsel for the petitioner submitted a letter dated December 1, 2003, the petitioner's financial statements for the eleven months ended November 30, 2003, and another copy of the petitioner's organizational chart. In her letter, counsel asserts that the beneficiary "should be continuously accorded an L-1A as matter of course, because the beneficiary has been carrying out the same job duties over the years as a U.S. subsidiary manager." Counsel's letter included the following description of the beneficiary's duties:

The alien has been managing this small U.S. subsidiary corporation and exercising his professional judgment and discretion over the day-to-day operations. He has authority to hire and fire employees and evaluate their performance. He has authority to grant them leave and assign the job duties. . . .The small size of the corporation does NOT relieve a manager to direct seminal decisions for the corporation.

* * *

[T]he U.S. Subsidiary is headed by the beneficiary having only the President of the parent company above him. Essentially, the beneficiary is in the highest position for the U.S. operations. He is directed minimally by the President in Korea. He manages day-to-day operations of the subsidiary and supervises and controls subordinates. He makes important decisions as to the operations of the subsidiary. He has the authority to hire fire employees, vendors, and contractors. He has the authority to legally bind the corporation and enter into

contracts. He will accept or reject the terms of contracts. All of the above-mentioned duties of the alien are primarily managerial functions within the corporation.

On December 18, 2003, the director denied the petition. The director determined it appears that the beneficiary has been performing the daily non-qualifying duties necessary to run the office on a daily basis. The director noted that, at best, the beneficiary has been functioning as a supervisor of a single low-level employee. Finally, the director noted that the petitioner has not demonstrated that the U.S. business "realistically can support a position involving primarily managerial or executive responsibilities."

On appeal, counsel for the petitioner asserts that the beneficiary's prior L-1A approvals evidence his continuing eligibility for the benefit sought; that he is performing primarily managerial functions; and that the director inappropriately relied upon the petitioner's small size in reaching his conclusion that the beneficiary would not be employed in a managerial capacity.

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.* However, the petitioner has failed to clearly define the beneficiary's duties, even when put on notice that the job description provided with the petition was insufficient to establish that the beneficiary would be performing primarily qualifying duties. The beneficiary is described as "managing the day-to-day operations," being responsible for "overall entire business transaction," and having "authority to legally bind the corporation and enter into contracts." The petitioner did not, however, define what specific duties are involved in managing the daily activities of a two-person office, provide evidence of any contracts entered into by the beneficiary or quantify the value of such contracts, or explain what specific tasks are encompassed by its "overall entire business transaction." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *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).

Although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional or managerial employees. See section 101(a)(44)(A)(ii) of the Act. 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. The petitioner indicates that the beneficiary supervises a single employee, who is described as a "worker." The director specifically advised the petitioner in his notice of intent to deny that, based on the information submitted, it appeared that the beneficiary did not have a staff to relieve him from performing non-qualifying duties. The notice of intent to deny clearly identified the deficiencies of the petition and allowed the petitioner 30 days to rebut the director's findings as required by 8 C.F.R. § 214.2(l)(8)(i). In its response to the director's notice, the petitioner failed to provide a job description for the beneficiary's sole subordinate, making it impossible for the director to determine whether

the “worker” performed any professional duties. In this case, the provision of a specific, concrete job description for the beneficiary, and a detailed explanation of the role filled by the “worker” within the petitioner’s organization, with probative supporting documentation, might have led to a determination that the beneficiary is able to plausibly concentrate his efforts on primarily managerial functions. Because this critical information was not provided, the AAO must conclude that the “worker” is not performing in a professional capacity, or that she relieves the beneficiary from performing non-qualifying operational tasks. Consequently, as the beneficiary is supervising a single non-professional employee, the beneficiary cannot be deemed to be primarily acting in a managerial capacity as a personnel manager.

Notwithstanding the petitioner’s claims that the beneficiary is primarily responsible for hiring, firing and supervising staff, “arranging” sales networks, and overall responsibility for the day to day operations of the company and the “entire business transaction,” the record reveals that the beneficiary is not in fact primarily involved in personnel matters, having hired a single employee over a five-year period. Furthermore, the petitioner’s company is described on the organizational chart as the foreign company’s “U.S. Sales Representative,” with sales of the foreign company’s jewelry stones being the sole purpose of the company. Even though the petitioner claims that the beneficiary directs the overall operations and business transactions of the company, it does not claim to have any employees performing sales-related functions, marketing, customer service, import and customs-related duties, or any other operational tasks associated with operating an import and wholesale business. Since the “worker’s” duties have not been defined, the AAO must assume that the beneficiary personally performs many or most of the non-managerial tasks required to keep the company operational. Based on the record of proceeding and a critical analysis of the nature of the petitioner’s business, the beneficiary’s daily responsibilities, by necessity, would be principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. 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).

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* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). At the time of filing, the petitioner was a five-year-old importer and wholesaler of cubic zirconium stones that claimed to have gross annual income in excess of \$304,000 in 2002. The firm employed the beneficiary as branch manager, plus a “worker.” As the petitioner has not described the duties of the worker, 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. Based on the petitioner’s representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as manager and a single worker. 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) of the Act. As discussed above, the petitioner has not established this essential element of eligibility. The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those duties will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Finally, counsel repeatedly notes that CIS has approved three other petitions that had previously been filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 f.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 51 (2001).

In sum, the record as presently constituted is not persuasive in demonstrating that the petitioner is able to employ the beneficiary in a primarily managerial or executive capacity. The fact that the petitioner is engaged in wholesale trade suggests that a sufficient staff is required to perform the essential tasks of selling the petitioner's products. Regardless of the beneficiary's high degree of discretionary authority over all aspects of the business, the record indicates that the petitioner lacks the necessary staff to perform its essential operational activities. The fact that an individual manages a small business and is given a managerial job title does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that at the time the petition was filed a majority of the beneficiary's duties consisted primarily of directing the management of the organization or supervising a subordinate staff of professional, managerial or supervisory personnel. Nor has the petitioner demonstrated that, after five years of doing business, it had reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constituted significant components of the duties performed by the beneficiary.

Consequently, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the petition cannot 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. 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.