



U.S. Citizenship
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Services

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FILE: LIN 04 237 52528 Office: NEBRASKA SERVICE CENTER Date: JUL 06 2006

IN RE: Petitioner:
Beneficiary:



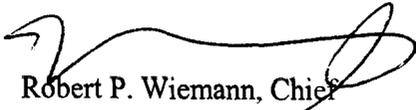
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Chief
Administrative Appeals Office

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DISCUSSION: The Director, Nebraska Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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 Illinois engaged in the import and sale of carved stone, iron and wood products from India. The petitioner claims that it is a subsidiary of [REDACTED] located in Ahmedabad, India. The petitioner seeks to employ the beneficiary as its president for a three-year period.

The director denied the petition concluding 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 petitioner submitted sufficient evidence to establish that the beneficiary will be employed in an executive capacity. Counsel claims that the director applied only the statutory criteria for “managerial capacity,” and failed to explain why the evidence submitted did not establish that the beneficiary would be employed as an executive. Counsel did not submit a brief or additional evidence in support of the appeal.

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 issue in this proceeding is whether the beneficiary will be employed by the United States entity in a 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 nonimmigrant petition was filed on August 23, 2004. In an August 16, 2004 letter, the petitioner described the beneficiary's proposed duties as president of the U.S. company as follows:

[The beneficiary] will be responsible for overall operation [and] well being of the company [and] its employees. She will have to look for growth opportunities, monitor accounting procedures, ensure QC, and maintain control of company through examination [and] interpretation of weekly management reports [and] meetings with VP. She would have to monitor all company checks and oversee project operations, oversee accounting and sales, manage key accounts, determine personnel salaries and bonuses and finally review and analyze all the management reports.

The petitioner noted that it had recently hired two employees, a sales manager and an administrative assistant, and provided recent payroll records as evidence of their employment. The petitioner stated that the sales manager “has a strong network of sales representatives who work on a commissioned basis, and he manages them daily for sales calls.” The petitioner further stated that the sales manager would be responsible for sales management in the Midwest region, including responsibility for exhibitions, following up and maintaining relations with customers, providing targets and managing sales representatives, and managing new orders. The petitioner described the administrative assistant as being responsible for “handling calls, customer service, mails, etc.”

In addition to its payroll employees, the petitioner stated that it leases a showroom in the “California Market Centre” in Los Angeles, California. The petitioner noted that a sales representative working for the California Market Center is responsible for manning the petitioner’s Los Angeles showroom. The petitioner noted that it outsources its customs clearance and warehousing functions to outside companies.

The director issued a request for additional evidence on August 24, 2004, instructing the petitioner to provide: (1) a complete, detailed description of the duties to be performed by the beneficiary in the United States, including the percentage of time the beneficiary will spend performing each duty; and (2) further documentary evidence to establish that the beneficiary qualifies under all four criteria for either a manager or an executive, and clearly identifying how the beneficiary’s proposed position is specifically situated in relation to others in the company.

The petitioner, through counsel, submitted a response to the director’s request on October 1, 2004. The petitioner indicated that the beneficiary would direct the management of the company and allocate her time as follows:

- A. **SALES MANAGEMENT** : Sales management is expected to take approximately 30-35% of her total time. . .
 - 1. **Recruitment, development and Retaining** sales managers and sales representatives, who would further recruit and manage all the commission based sales representatives. . . . (5- 10% of her total time)
 - 2. Guiding and supervising the work of Sales Managers and Sales Representatives to follow up on the leads obtained. These leads are received when sales reps make sales calls, follow ups from exhibitions, Emails, website hits and fax messages or telephone calls. These need to be evaluated and discussed and are replied by the sales reps and sales managers. At the end of each day, the President needs to follow up with each

sales rep and manager to get the report for the entire day. This activity would take up 20-25% of her total time.

3. Consistent and ongoing interaction with the top clients and their managers and utilize those relationships to help shape future clients for effective branding of the product. [The petitioner] has some key accounts. . . that consistently provide repeat orders and like to work directly with the President. The president would need to follow up with them at least thrice a week with each client. These calls and notes from the calls would take up approximately 5-10% of her total time.

B. MARKETING MANAGEMENT:

Marketing management is expected to take approximately 25-30% of her total time. . .

1. **Creating and implementing marketing strategic plans which would involve decision** of which temporary exhibitions . . . to participate, and allocate the necessary resources to promote the complete produce line and the brand at the highest levels possible. . . . This research, discussions and cost calculations would take approximately 10-15% of her time.
2. Profit and Loss responsibility and full operating management responsibility for each product stream. . . .The president would have to supervise her sales team to accurately monitor the Profit and Loss for each product and revenue stream. . . .Based on her analysis, she would have to make right decisions to make each steam profitable. This profit and loss analysis would take approximately 5-10% of her time.
3. Managing the Permanent Showrooms. . . . This activity would take about 10-15% of her time every day.
4. Develop client presentations such as marketing proposals, monthly/weekly reporting packages, visual aids. . . . Perform research on market, pricing and competitive trends. This would take up approximately 3-5% of her total time.

C. OPERATIONS MANAGEMENT:

Operations Management is expected to take approximately 30-40% of her total time. . . .

1. **Extensive coordination with the parent company, . . . regarding reviewing the designing** and manufacturing of the products as ordered by clients. The President, initially, would be responsible for all communications and supervision with all the Indian Managers regarding designing for customer made orders, manufacturing of the products, shipping and handling of the products, warehousing and dispatch of the products. . . . This would approximately take 15-20% of her time
2. Coordination and Supervision of Warehousing, shipping and handling in the USA. [The petitioner] has a warehouse established in Charleston, SC where it stores its inventory. . . . The president would have to supervise the warehousing/shipping manager in Charleston for various handling decisions. This would take up approximately 10-15% of her time.
3. Decision on Pricing, Profit Mark Ups and Discounts for various product lines for major quantities. . . . A detailed analysis needs to be performed regarding manufacturing, amount of carving detail requirements, shipping and warehousing to determine the price for the product. This would take up approximately 10-15% of her time.

D. FINANCE AND ACCOUNTING MANAGEMENT:

Finance and Accounting Management is expected to take approximately 10-15% of her total time. . . .

1. Work with financial accountants to review accounting operations including timely month-end and year-end closing process. Assist in placement of accounting and operations systems. Work with financial accountants in helping prepare external financial statements. . . Coordinate preparation of tax returns and other required tax filings. Review the annual and monthly budgets.
2. Supervising the Cash Flow Management: The President would have to manage the daily cash flow of the Company. This would include supervising the Administrative Assistant for the Receivables and Accounts Payables management and finalizing the payroll.

In support of its response to the director's request for evidence, the petitioner submitted a copy of an August 8, 2003 sales representative agreement between the petitioner and Kenneth Ludwig Home Furnishings, Ltd. (KLHF) which designates KLHF as the petitioner's exclusive sales representative, on a commission basis, in the territories of Minnesota, Wisconsin, Illinois, Michigan and Indiana. The petitioner noted that the sales representative has a permanent showroom in the Chicago Merchandise Mart. The petitioner also discussed its future plans to "sign up for" two additional showrooms, in Atlanta and Dallas, by the first quarter of 2005, and noted that it intended to hire a sales manager, Alpa Bagga, by the beginning of 2005 to manage sales for Ohio, Indiana and Wisconsin. The petitioner submitted a new organizational chart which includes the office administrator/administrative assistant, the sales manager, the Chicago-based commissioned sales representative, the "showroom manager" of the petitioner's Los Angeles showroom in the California Market Centre, the proposed sales manager, an outsourced accounting firm whose services are described as "quarterly financial statements, budgeting, and tax returns," an outsourced payroll services provider, and an outsourced warehousing management company. The petitioner showed all staff reporting directly to the beneficiary.

The director denied the petition on October 7, 2004, concluding that the petitioner had not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director noted that neither of the petitioner's current employees for whom the beneficiary would serve as a first-line supervisor are employed in professional positions. The director further observed that "the record provides no indication that any of the other functional responsibilities outlined for the beneficiary would only be managed or directed by the alien and not performed by the alien herself." The director concluded that the beneficiary would be primarily involved in performing the day-to-day services essential to maintaining the petitioner's business.

In an appeal filed on October 29, 2004, counsel for the petitioner asserts that the director applied only the statutory criteria for "managerial capacity," and failed to provide support for his conclusion that the beneficiary would not serve in an executive capacity for the U.S. company. Counsel asserts "in filing for the beneficiary to be president of the company, the petitioner was filing for the president to be considered as an executive." Counsel notes that in response to the director's request for evidence, counsel specifically stated "these duties clearly show that she directs the management, establishes the goals, and as president, exercises a wide latitude of discretionary decision-making (only general supervision)." Counsel asserts that this statement "directly reflects the regulation concerning duties as an executive." Counsel concludes by

reiterating that the director provided “no reasoning to show why the Beneficiary would not be functioning as an executive, when, in fact, we maintain she does, and have provided adequate proof to show this.”

Counsel’s assertions are not persuasive. Upon review of the petition and the evidence, the petitioner has not established that the beneficiary would be employed in the United States in a managerial or executive capacity under the extended petition. 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.*

Prior to the director’s decision, neither the petitioner nor counsel specified whether the beneficiary would be employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. Although the beneficiary’s proposed job title suggests an “executive” position, the petitioner’s initial description of the beneficiary’s duties failed to describe any executive-level duties. Accordingly, in his request for evidence, the director specifically requested that the petitioner clearly identify how the beneficiary’s proposed position meets all four statutory criteria for managerial capacity, as defined at section 101(a)(44)(A) of the Act, *or* all four statutory criteria of executive capacity, as defined at section 101(b)(44)(B) of the Act. Although the petitioner provided a lengthy job description in response, the petitioner failed to specify whether it intended to employ the beneficiary as a manager or as an executive, and failed to explain how the beneficiary’s duties met the requirements of one or the other statutory definitions. Contrary to counsel’s assertions on appeal, neither counsel nor the petitioner clearly indicated that the beneficiary would be employed in an executive capacity.

Further, and as discussed further below, the duties described in response to the director’s request for evidence did not suggest that the beneficiary would perform the types of duties or hold the level of authority consistent with an executive-level position. It was therefore reasonable for the director to primarily apply the statutory criteria for managerial capacity when analyzing the record in this matter. On appeal, the petitioner does not dispute the director’s findings that the beneficiary would not be employed in a managerial capacity. Regardless, as the AAO’s review is conducted on a *de novo* basis the AAO will herein address the petitioner’s evidence & eligibility under both statutory definitions. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Although the petitioner has provided a lengthy description of the beneficiary’s duties, portions of the description merely paraphrase the statutory definition of executive capacity at section 101(a)(44)(B) of the Act, while other portions are too vague to convey an understanding of what duties the beneficiary will perform on a day-to-day basis. General, over-broad statements such as “promotes strategic vision,” “manages and directs the U.S. operation,” “establish goals and policies of company,” and “use latitude in decision making and day to day operation,” do not assist the AAO in assessing the beneficiary’s actual tasks. 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. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Furthermore, the petitioner’s descriptions of the beneficiary’s duties include a number of operational tasks that do not fall under traditional definitions of managerial or executive capacity. The petitioner stated that the beneficiary will devote a total of 55 to 65 percent of her time to sales management and marketing

management tasks, but the petitioner's description of the beneficiary's duties associated with these "management" responsibilities includes routine daily supervision of sales staff, discussing and following up sales leads, calling on clients and taking notes from these sales calls, performing market research, and developing client presentations. While it appears that the beneficiary would exercise supervisory authority over the petitioner's "sales manager," based on the petitioner's representations, she will also directly perform non-qualifying sales, marketing and customer service duties.

The petitioner further indicated that the beneficiary would be responsible for "operations management" and would spend a total of 25 to 35 percent of her time communicating with the Indian parent company regarding product design, manufacturing, shipping and handling for customer orders, and coordinating domestic shipping and handling with the petitioner's outsourced warehouse services company. The petitioner did not identify any lower-level employees who would assist the beneficiary with these duties, nor clarify how communicating and coordinating product orders or product shipping and warehousing qualify as managerial or executive duties.

The beneficiary cannot qualify as a manager or executive simply because she will occupy the highest-level position within the company, supervise its employees, and be responsible for the expansion of the business. The fact that an individual has a managerial or executive job title and exercises discretion over a company's operations 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 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).

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). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

In the instant matter, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

The beneficiary in this matter will supervise a "sales manager," an administrative assistant, and a commissioned sales representative. As noted by the director, the petitioner did not establish that any of these positions require the services of an individual with a bachelor's degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Although one of the beneficiary's subordinates is referred to as a "sales manager" and the petitioner referred to his "network of sales representatives who work on commission basis," the petitioner provided no documentary evidence in support of its claim that the sales manager would supervise other employees. Further, the petitioner's organizational chart shows the only documented sales representative reporting directly to the beneficiary, and no sales representatives under the "sales manager." 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)). Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. The considerable portion of time the beneficiary will allocate to supervising her subordinates cannot be considered time spent performing managerial duties, further supporting a conclusion that the beneficiary's duties will not be primarily managerial or executive in nature.

On appeal, counsel claims that the beneficiary will be employed as an executive, and appears to suggest that it is irrelevant whether the beneficiary will perform the managerial duties of supervising professional, managerial or supervisory employees. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Here the petitioner's description of the beneficiary's duties makes no mention of the beneficiary's responsibility for establishing the goals and policies of the organization, and, as discussed above, the petitioning company has no subordinate managerial employees. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Rather, as discussed above, the record suggests that the preponderance of the beneficiary's time will be devoted to non-qualifying sales, marketing, first-line supervisory and operational tasks.

The director based his decision partially on the size of the enterprise and the number of staff, concluding that the petitioner did not employ subordinate employees to relieve the beneficiary from performing primarily non-qualifying duties. Counsel does not address this determination on appeal. Upon review, and in light of the discussion of the beneficiary's duties above, the AAO concurs with the director's conclusion. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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 comprises primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks.

At the time of filing, the petitioner was a one-year-old company engaged in the import, sales and marketing of its parent company's hand-carved garden accessories. The petitioner submitted evidence that it employed a "sales manager," a part-time administrative assistant, and one commissioned sales representative, and it proposed to employ the beneficiary in the "executive" position of president. 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 president and the above-referenced employees. 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 AAO acknowledges that the record contains numerous references to the future objectives of the U.S. operation, including a detailed business plan and proposed organizational chart reflecting the petitioner's anticipated staffing levels for 2007. However, this evidence is not probative of the petitioner's eligibility as of the filing date. The AAO is not required to consider evidence of speculative future activity. 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 discussion, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

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.

ORDER: The appeal is dismissed.