

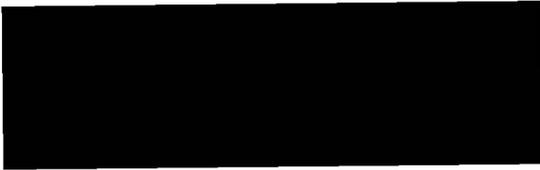


U.S. Citizenship
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File: WAC-04-177-52280 Office: CALIFORNIA SERVICE CENTER Date: **SEP 05 2006**

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)

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, Chief
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 chief executive officer 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 under the laws of the State of California and is engaged in garment trading and investment activities. The petitioner claims that it is an affiliate of [REDACTED] located in Ho Chi Minh City, Vietnam. The beneficiary was granted two one-year periods of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director reasoned that the petitioner had not sufficiently described its business activities, business structure and activities of its employees.

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 director failed to regard evidence and did not issue a Request for Additional Evidence (RFE). In support of this assertion, the petitioner submits additional evidence.

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.

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, the petitioner described the beneficiary's job duties as follows:

Responsible for general operating activities and finance of the company, increasing capital efficiently, and investing in real estate markets. Strategic and logistic planning of the company's goals and objectives both financially and operationally. Budgeting and contract negotiations and support system, procurement import and export merchandise. Recruiting and training new staff for future growth.

* * *

- Full responsibility for company development strategy using dynamic leadership and innovative strategic planning in parallel with service and financial support for US business growth opportunities
- Responsibility for developing, implementing, and overseeing the company's creative business plan, which requires awareness of contemporary designs and successful integration of up-to-date international fashion trends
- Determine and continually review company goals and objectives, focusing on product lines that reflect the "sign of the times" while maintaining policy flexibility to adapt to the rapidly changing business of fashion **20% time**
- Manage human, material, and financial resources of the company to achieve the optimum goals and objectives laid out and mandated by the Board of Directors **15% time**
- Respond to market demands/trends and the strategies of competitors by formulating and implementing an effective PR strategy that includes campaigns/advertising via traditional public media as well as web sites **15% time**
- Conduct and finalize all negotiations with wholesalers, material providers, etc., and execute all binding contracts on behalf of the company **10% time**
- Develop and continually review policy dealing with recruitment and training for human resources in order to enable the company to adapt to the rapidly changing fashion business and the global economy **30% time**
- Formulating recommendations and guidance concerning future policy changes and business investments for the Board of Directors **10%**

On June 12, 2004, the director denied the petition. The director determined that the petitioner had not established the beneficiary would be employed primarily in a managerial or executive position.

On appeal, counsel for the petitioner asserts that if the director had issued an RFE the petitioner would have had an opportunity to further clarify its position. Counsel contends on appeal that the director violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence before denying the petition. The cited regulation requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. Regardless, even if the director had committed a procedural error by failing to solicit further evidence and/or failing to fully evaluate the evidence submitted, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would

serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence. The AAO will review the record as it is currently constituted and issue a decision on the merits.

On appeal the petitioner has submitted a further description of the beneficiary's duties, employee position descriptions, an organizational chart, and tax records. While the AAO will accept these evidentiary submissions into the record, it should be noted that the description submitted by the petitioner is the same description as was initially submitted. Thus, the petitioner has not further clarified its position as it asserted it would have done in response to an RFE; it has simply reasserted its initial descriptions.

Upon review, the petitioner's description of the beneficiary's duties is 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. In this case the petitioner has asserted that the beneficiary will be primarily employed in an executive capacity, yet alternatively claims managerial capacity on appeal and refers to managerial duties throughout the record. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The job description provided by the petitioner is vague and does not articulate the beneficiary's specific duties. Reciting the beneficiary's vague job responsibilities as broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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). Statements such as "responsibility for company development strategy using dynamic leadership and innovative strategic planning" are too ambiguous to be of any probative value. Further, the description provided is not corroborated by any evidence contained in the record such as work product or evidence of the conduct of business by the petitioner. An additional example would be the lack of any evidence that there is actually a board of directors that holds meetings, issues directives and receives reports, which the petitioner claims are part of the beneficiary's duties. *See Management Overview*, attached hereto as petitioner's unlabeled appeal exhibit. Without evidence to corroborate the performance of the beneficiary's duties the petitioner's assertions are not persuasive. 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's description is ambiguous and not corroborated or clarified by any evidence in the record.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a

business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. An individual whose primary duties are those of 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.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. The descriptions of their duties provided by the petitioner are not corroborated by any evidence in the record. As an example there is no evidence that the chief marketing officer has performed any market analysis, used statistical data to gather research, researched market conditions, gathered data on competitors or collected data on consumer preferences. *See Personnel currently supervised by [the beneficiary] in the U.S.*, entered in the record as petitioner's unlabeled appeal exhibit. This is in addition to the fact that much of the descriptions provided for the employees duties are speculative, claiming, for instance, that the chief marketing officer will manage a sales force of 5 – 10 employees which does not exist, manage a marketing department which does not exist, and draft reports for a board that does not hold meetings or issue directives. *Id.* A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

As noted by the director, the facts surrounding the nature of the petitioner's business are murky. The tax records submitted by the petitioner indicate a fluctuating number of employees and nominal wages paid to the petitioner's employees. The petitioner has asserted that it "trades garments," yet the only evidence of garment related business activity in the record are documents labeled as "sales contracts" between the foreign organization and the petitioner, and which were executed by the "chief marketing officer" as a representative of the petitioner and the beneficiary as a representative of the foreign organization. There is no evidence that these garments were ever traded or sold, in a retail location or otherwise. *See Contracts*, entered in the record as petitioner's unlabeled exhibits, describing a purchase of fleece documents for a period in late 2003 and 2004. The petitioner's 2003 tax documentation indicates that it only paid \$13,000 in salaries and wages among four employees. Such wages are nominal, and undermine the petitioner's claims that its employees are working full time, or that the petitioner can support a managerial or executive position. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. The descriptions of the employees' duties are uncorroborated by the record, and there is little evidence that the petitioner had been conducting business and that the duties of the employees have or will actually be performed.

The record does not indicate that the beneficiary will be managing supervisory, managerial or professional employees. 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 petitioner has submitted an organizational chart which lists 3 other employees under the beneficiary. However, while it appears these

employees have managerial titles, the record does not indicate that there are any employees under them to actually perform the day to day activities. Thus, without a further articulation of how these employees actually function as managers and how their duties relate to the beneficiary, titles alone are not sufficient to establish that they are in fact managers or supervisors.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the work of the business development and marketing chief or financial officer, who are among the beneficiary's claimed subordinates. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions. Moreover, when the record is considered in its totality, with the lack of any evidence of business activity, lack of a clear business structure, and remuneration of employees, it is not clear that the beneficiary will operate in a primarily managerial or executive capacity.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, as noted above, 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.

Accordingly, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the petitioner's description and evidence of the stock distribution of the companies is not consistent and it cannot be determined that a qualifying relationship exists between the United States and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority

to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also 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. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In this case the petitioner has asserted on its Form I-129 that the petitioner is owned 80% by the beneficiary, 10% by [REDACTED], and 10% by [REDACTED]. However, schedule K of the petitioner's 2003 Form 1120 asserts that the petitioner is not a subsidiary in an affiliated group, and the Minutes of Annual Meeting of Shareholders submitted by the petitioner asserts that the beneficiary owns 90% of the petitioner and the other two named individuals 5% each. These assertions are inconsistent, and raise doubts about the actual ownership of the petitioner by the foreign organization. In addition, the stock certificates provided by the petitioner are numbered 18, 19, and 20, yet the petitioner does not explain why the remaining certificates are not presented and to whom they are or were issued. Thus, the record does not persuasively establish that a qualifying relationship exists. Consequently, it cannot be concluded that the petitioner is a qualifying organization doing business in the United States and at least one foreign country, or that it has a qualifying relationship with a foreign entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). For this additional reason the petition will be denied.

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.

ORDER: The appeal is dismissed and the petition hereby denied.