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U.S. Citizenship and Immigration Services

D7

[redacted]

File: EAC 07 093 51393 Office: VERMONT SERVICE CENTER Date: NOV 06 2007

IN RE: Petitioner:
Beneficiary: [redacted]

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:

SELF-REPRESENTED

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, Vermont 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 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, a Nevada limited liability company, states that it operates a retail store selling imported Mexican furniture and home and garden accessories. It claims to be an affiliate of Sedona Style S.A. de C.V., located in Jalisco, Mexico. The petitioner seeks to employ the beneficiary as its manager for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the U.S. entity 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, the petitioner asserts that the beneficiary will serve in a managerial capacity and is "vitally essential in the day to day management" of the U.S. company. The petitioner suggests that the director placed undue emphasis on the small size of the petitioning company in determining that the beneficiary would not be employed in a managerial capacity. The petitioner submits a brief and documentary evidence in support of the appeal.

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 sole issue addressed by the director is whether the petitioner established that 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 nonimmigrant petition was filed on February 15, 2007. On the Form I-129, the petitioner stated that the U.S. company currently has one employee, a manager, and indicated that it seeks to employ the beneficiary in the position of manager. On the L Classification Supplement to Form I-129, the petitioner described the

beneficiary's proposed duties as follows: "Knowledge of merchandise build [sic] [and] purchased in Mexico, inventory, display, sales, accounting."
In an attached letter, the petitioner indicated that the beneficiary would perform the following duties:

> At our U.S. facility she identifies and prices product, does the accounting, office work, customer relations and everything else associated with running a factory import business and retail store.

The petitioner indicated that the beneficiary, who was in the United States in B-2 status at the time of filing, is "still responsible for the total Mexican operation, including negotiating and purchasing from some 30 different supplies of products from Mexico."

On February 23, 2007, the director issued a request for evidence instructing the petitioner to submit: (1) a complete position description for all employees in the United States, including the beneficiary; (2) a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis; (3) an organizational chart for the U.S. entity; and (4) information regarding the number of subordinate supervisors to be managed by the beneficiary, the amount of time she will spend in managerial duties, and the degree of discretionary authority she will have over the day-to-day operations.

In a response received on February 28, 2007, the petitioner indicated that the U.S. company has not hired any employees, other than the current manager. The petitioner's manager described the beneficiary's duties and his own duties as follows:

> [The beneficiary] procures all imported merchandise from Mexico vendors that only speak Spanish. She talks with our Mexican entity employees daily about their duties which consists of manufacturing product, finishing, buying from other vendors, packing all product, loading trailers, etc. Here in the U.S. she also greets and attends to our customers, does all the accounting, banking, enters and tracks all inventory in the computer systems, etc.
>
> As far as my duties I open and clean the store daily, help load merchandise in customer's vehicle's, deliver merchandise to the customer's home, unload trailers, unpack merchandise, design new product, and display the merchandise in the showroom.

In a separate statement describing the staffing of the foreign entity, the petitioner noted the following additional duties, some of which appear to reference her position in the United States:

> [The beneficiary] generates the purchase orders for the product we manufacture. The vendors we purchase from, she confirms that everything is received, finished, packed and ready to be shipped. She also is in charge of all documents required by the Mexican and U.S. Customs prior to importing.
>
> Another duty she has is generating invoices for each trailer that comes from Mexico, listing all individual items that have been shipped with our description, retail price, and quantities. When

> it arrives to our U.S. facility it has to be identified and then be inventoried in our computer system. Finally, she is in charged [sic] of accounts receivables, payables, banking, etc.
>
> She still overseas [sic] all the manufacturing, production and exporting via telephone with her two assistants in our Mexico facility, plus the purchasing from outside vendors by phone, e-mail and fax.

The director denied the petition on March 7, 2007, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director observed that the brief description of the beneficiary's duties suggests that she "will be doing almost everything involved in the running of the office." The director noted that although the beneficiary's title would be "manager" the description of the proposed duties, and the lack of personnel to relieve her from the day-to-day duties of the business, do not establish that her actual daily activities would be primarily managerial.

On appeal, the petitioner asserts that the beneficiary will be employed in a managerial capacity and meets all criteria for the classification as outlined in the statute. The petitioner notes that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the director must take into account the reasonable needs of the organization. The petitioner indicates that the beneficiary is indispensable due to her knowledge of the business and necessary to the company "for her skills in purchasing, bookkeeping, website maintenance, inventory, and all other attributes which make the company viable." The petitioner states that the company will fail without the beneficiary's services, and suggests that the director must take into account the company's reasonable needs.

The petitioner further states that although the office is small, its sales volume is "comparable to companies with more employees." The petitioner asserts that its ability to achieve sales of $50,000 per month or more after only 18 months in business with only two employees makes it evident that the beneficiary "is vitally essential to the day to day management of the company." The petitioner notes that the company "was started with not enough capital to allow a full time staff," and has chosen to re-invest in inventory rather than hiring additional employees.

Upon review, and for the reasons discussed herein, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary's duties for the petitioner will be primarily managerial or executive in nature. 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 definitions of executive and managerial capacity have two separate requirements. 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 ensures 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 performance of the duties of another type of non-managerial or non-executive position, or other involvement in the operational activities of the company.

In this case, although the beneficiary has been designated as a manager of the company, the petitioner's description of her duties includes the routine, day-to-day functions of the petitioner's business, and none of the high-level responsibilities specified in the statutory definitions of managerial and executive capacity. The petitioner initially indicated that the beneficiary's duties will include purchasing products from suppliers, inventory, display, sales, accounting, office work, customer relations and "everything else associated with running a factory import business and retail store." However, the petitioner has not explained how the beneficiary's direct involvement in the petitioner's purchasing, sales, inventory, and day-to-day administrative and financial operations fall under the statutory definitions of managerial or executive capacity.

In response to the director's request for a complete position description of the beneficiary's duties, the petitioner again indicated that the beneficiary is responsible for purchasing all imported merchandise, generating purchase orders and invoices, maintaining accounts receivables and payables, banking, and entering and tracking inventory in the computer system. The petitioner added that the beneficiary "greets and attends to our customers," and indicated that she is needed for her skills in bookkeeping, purchasing and website maintenance. Although requested by the director, the petitioner did not indicate how the beneficiary's time would be allocated between her various duties. Nevertheless, as noted above, the beneficiary's duties appear to be limited to administrative and operational tasks associated with purchasing, importing, inventory, and retail sales, and depict an employee who is directly involved in all of the day-to-day operations of the business. 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). 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).

The petitioner 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). However, it is appropriate for U.S. Citizenship and Immigration Services (USCIS) 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). Moreover, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

As discussed, the petitioner has not identified any managerial or executive duties to be performed by the beneficiary in her capacity as manager of the petitioning entity and therefore the petition could be denied

without consideration of the petitioner's staffing levels. However, since the director addressed the company's staffing, the AAO notes that the petitioner intends to operate its 10,000 square foot warehouse and retail furniture store with a staff of two managers and no subordinate employees. The petitioner has not claimed to utilize the services of any contract employees in the operation of its business. Therefore, all of the day-to-day purchasing, warehouse, sales, inventory, customer service, merchandise displays, delivery, bookkeeping, banking, and administrative tasks of operating a large store that, according to advertisements submitted by the petitioner, is open seven days per week, must fall on the two managers. It is reasonable to assume, and has not been shown otherwise, the both employees would be required to primarily engage in non-managerial tasks in order to keep the store open for business on a daily basis.

Although the petitioner emphasizes that the store is thriving with only two employees, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

The petitioner suggests that the U.S. company will eventually hire additional full-time staff. 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 does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; however the petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. The fact that the beneficiary is a "manager" of a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). Here, the record fails to establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization. Accordingly the appeal will be dismissed.

Beyond the decision of the director, the evidence of record does not establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for at least one continuous year within the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii). The petitioner stated on Form I-129 that the beneficiary has been employed by the petitioner's Mexican affiliate, Sedona Style, S.A. de C.V. since September 22, 2005. The beneficiary was admitted to the United States as a nonimmigrant visitor in B-2 status on August 29, 2006, less than one year after commencing employment with the foreign entity, and remained in the United States at the time the instant petition was filed on February 15, 2007.

Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(A), periods spent in the United States in a lawful status for a branch of the same employer or a parent, affiliate or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad, but such periods shall

not be counted toward fulfillment of that requirement. Although the evidence suggests that the foreign entity continues to pay the beneficiary's salary, and the petitioner indicates that the beneficiary continues to perform duties on behalf of the foreign entity, the time she has spent in the United States as a visitor does not count towards the fulfillment of her one year of employment with the foreign entity. The beneficiary was employed with the Mexican company for only 11 months prior to coming to the United States, and she cannot be considered to have one year of qualifying employment with Sedona Style, S.A. de D.V. within the required three-year time frame.

The AAO acknowledges the petitioner's claim that "The Duke Conglomeration S.A. de C.V." previously employed the beneficiary from 1994 until August 15, 2005. However, the petitioner's manager and majority shareholder indicates that he sold this company to an unrelated entity "two years ago." Therefore, the beneficiary's period of employment with the now unrelated company cannot be considered employment with a qualifying organization for the purpose of this nonimmigrant visa classification. For this additional reason, the petition cannot 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025 at 1043.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.