

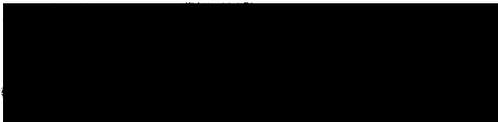
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

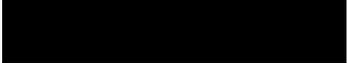
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FILE: SRC 03 227 56474 Office: TEXAS SERVICE CENTER Date: **AUG 11 2005**

IN RE: Petitioner: 
Beneficiary: 

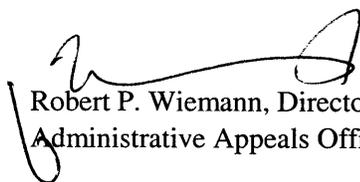
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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

According to the documentary evidence contained in the record, the petitioner was established in 2002 and claims to be an importer and exporter of automobiles and automobile parts. The petitioner claims to be a subsidiary of [REDACTED] located in Japan. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for three years, at an annual salary of \$35,000.00. The beneficiary was initially granted a one-year period of its stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the job duties performed by the beneficiary have been and would be primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the evidence submitted is sufficient to demonstrate that the duties performed by the beneficiary have been and will be managerial or executive in capacity.

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)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary 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 (1)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity has been and will be primarily managerial or executive in nature.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 petitioner initially described the beneficiary's duties in the petition as: "[The beneficiary] is president of the US corporation, and oversees all operations, including the establishment and expansion of the business, inventory, and client/vendor contract."

In a letter of support, dated August 15, 2003, the petitioner described the beneficiary's position in the United States as:

[The beneficiary] directs and coordinates business contracts in the entire operation of the company's market, and develop other relevant policies and procedures implementing the overall objective of [REDACTED]. He scouts for additional investment opportunities, and prepares financial forecasts and business proposals for use by the parent company in Japan.

The petitioner submitted as evidence copies of the U.S. entity's IRS Form 1120, U.S. Corporate Income Tax Return for 2002, and IRS Form 941, Employer's Quarterly Federal Tax Return for the quarters ending December 31, 2002, March 31, 2003, and June 30, 2003. The petitioner also submitted photographs of a gasoline station/convenience store, which it stated had recently been purchased by the U.S. entity. The petitioner stated that the U.S. entity staffed the newly acquired business with a full-time clerk and a general manager.

In response to the director's request for evidence, the petitioner submitted a copy of an organizational chart, which depicted the hierarchical structure of the organization. The chart depicted the beneficiary as president of the U.S. entity, with a sales and marketing agent and office administrator as his subordinates. The petitioner noted on the chart "company outsource[s] all the jobs other than administrative functions such as shipping, transportation and maintenance."

The director subsequently denied the petition determining that the evidence contained in the record was insufficient to establish that the beneficiary had been or would be employed by the U.S. entity primarily in a managerial or executive capacity. The director stated that according to the evidence contained in the record, the beneficiary supervised a person in charge of sales and marketing and a person in charge of the office administration. The director further stated that although the beneficiary evidently exercised discretion over the day-to-day activities of the business, he also performed much of the activity. The director also stated that the beneficiary did not supervise professional employees. The director noted that the petitioner had failed to demonstrate that the beneficiary's primary assignment had been and would be directing the management of the organization or primarily directing or supervising a subordinate staff of professional, managerial, or supervisory personnel, who could relieve him from performing non-qualifying duties.

On appeal, counsel disagrees with the director's decision and asserts that the evidence is sufficient to establish that the beneficiary has been and will be employed in an executive capacity. Counsel contends that the beneficiary is responsible for establishing all policies and procedures for the U.S. entity. Counsel also contends that although the beneficiary reports back to the board of director's of the foreign entity, he makes all decisions for the U.S. entity. Counsel further contends that the beneficiary hopes to hire additional employees in the coming year. Counsel argues that the beneficiary is not called upon to perform the day-to-day functions of the organization due to the nature of the entity's import/export business.

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(1)(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. 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.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include establishing policies and procedures and overseeing all operations of the entity. The petitioner did not, however, define the organization's policies and procedures, or clarify what actually constitutes the business operations of the company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as directing the entire operation of the organization, establishing policies and procedures of the organization, and exercising sole discretionary decision making authority. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. 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).

The petitioner fails to document what proportion of the beneficiary's duties would be executive functions and what proportion would be non-executive. The petitioner lists the beneficiary's duties as executive, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as researching and marketing the petitioner's product, contract negotiations, and other administrative tasks do not fall directly under traditional executive duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of an executive or function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Although the petitioner infers that the beneficiary is managing a subordinate staff in overseeing the entire business operation in the United States, 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. In the instant matter, the director noted that although the evidence showed that the beneficiary supervised a sales and marketing person and an office administrative person, there had been no evidence submitted to demonstrate that he primarily supervised a subordinate staff of professional, supervisory, or managerial personnel sufficient to relieve him from performing non-qualifying duties. The petitioner has failed to submit sufficient evidence to rebut the director's contention. 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. Because the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

There has been no evidence submitted to demonstrate that the U.S. entity employs any personnel on a regular basis to perform non-qualifying tasks sufficient to relieve the beneficiary from performing those duties. The petitioner has failed to overcome the objections made by the director. Although counsel claims that the beneficiary is not called upon to perform the day-to-day functions of the U.S. entity due to the nature of its business, it does not claim to have anyone on its staff to actually perform the day-to-day clerical and other administrative functions. The petitioner submitted copies of the U.S. entity's IRS Form 941, Employer's Quarterly Tax Return for the quarter ending June 30, 2003, which showed a total of three employees employed by the organization during that period. Based upon the salary figures, it appears that the U.S. entity employs the beneficiary and the sales and marketing person on a full-time basis and the office administrative person on a part-time basis. Thus, either the beneficiary himself is performing the clerical and administrative functions or he does not actually manage the clerical and administrative functions as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Further, the petitioner has failed to clarify whether the second and third employee listed on its payroll work at the gasoline station and convenience store or IAZ Trading (USA), Inc. If the beneficiary is performing the clerical and administrative functions, the AAO notes that 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).

In response to the director's request for evidence, the petitioner stated in the organizational chart that the company outsourced "all the jobs other than administrative functions such as shipping, transportation and maintenance." However, there is nothing in the record to substantiate the petitioner's claim. There has been

no evidence submitted to demonstrate the beneficiary's authority to manage the contracted employees. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily perform non-qualifying duties. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*.

The petitioner indicates that it plans to hire additional employees in the future. However, 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). Furthermore, 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has not demonstrated that the beneficiary has been or will be primarily directing the management of the organization. The record indicates that the beneficiary's primary duties have been and will continue to be that of providing the day-to-day services of the company rather than managing the operations of the U.S. entity. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring and firing of personnel, discretionary decision making, and setting company goals and policies constitute significant components of the duties performed by the beneficiary on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the U.S. entity. Further, regardless of the beneficiary's position title, the record is not persuasive that the beneficiary has been functioning or will function at a senior level within an organizational hierarchy. Accordingly, the appeal will be dismissed.

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.2nd 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).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.