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File: WAC 04 162 51550 Office: CALIFORNIA SERVICE CENTER Date: AUG 23 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

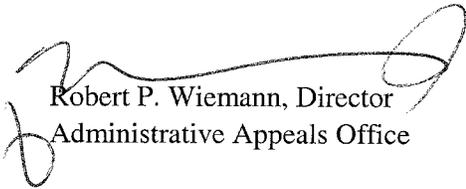
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that operates as an importer, distributor and retailer of body jewelry. The petitioner claims that it is the subsidiary of Astra Industries Co., Ltd., located in Bangkok, Thailand. The beneficiary was granted a one-year period of stay in order to open a new office in the United States, and the petitioner now seeks to extend his stay.

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 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 beneficiary will be employed in a managerial capacity. Counsel submits a brief and additional 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in the present matter is whether the beneficiary will be employed by the United States entity in a managerial capacity. The petitioner does not contend that the beneficiary will be employed in an 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.

The petition was submitted on May 14, 2004. Neither the petitioner nor counsel submitted a letter or statement describing the beneficiary's job duties. The petitioner submitted an organizational chart depicting the beneficiary as director of the "USA Marketing Office" with four subordinates identified as "sales," "accounts," "leasing specialist," and "banking." The chart shows that the sales employee oversees "independent retail outlets." The petitioner submitted its California Forms DE-6, Quarterly Wage and Withholding Report, for the fourth quarter of 2003 and the first quarter of 2004. The Forms DE-6 confirmed the full-time employment of the beneficiary and the sales employee. The petitioner also submitted letters from the individuals identified on the organizational chart as "accounts," "leasing specialist," and "banking." The letters confirm that the beneficiary has contracted the services of a firm to compile financial statements, reports, and income tax returns on behalf of the petitioner; that the beneficiary signed the petitioner's lease, and that the petitioner has a checking account. Finally, the petitioner submitted seventeen letters from "independent distributors" who have done business with the petitioner, all of which have the same text, stating in part: "Our original designs and orders are executed only after careful review and advisement from [the beneficiary] acting in his capacity as President of [the petitioner]."

On July 3, 2004, the director denied the petition. The director determined 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 observed that the petitioner "only submitted letters from different stores acknowledging that the beneficiary is president of the U.S. entity . . . The record lacks adequate supporting documentary evidence to define the beneficiary's duties as primarily executive or managerial."

The director further noted that the fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity, and found that "the record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the organization and supervising three . . . non-professional employees." The director concluded that the petitioner has not demonstrated that that it has reached or will reach a level of organizational complexity wherein the beneficiary would perform primarily managerial or executive duties on a day-to day basis, noting that the beneficiary will not be functioning at a senior level within an organizational hierarchy, supervising managerial, professional or supervisory personnel, or managing an essential function.

On appeal, counsel for the petitioner asserts that the beneficiary qualifies for an extension of his L-1A status based on his management of an essential function of the petitioning company. Counsel provides the following description of the beneficiary's duties:

The president has the overall responsibility for the establishment and conduct of [the petitioner's] business operations. He is in charge of marketing the business to prospective customers and managing the customer base. He controls the staff, and supervises the sales manager. . . . The beneficiary has created and has authority over the company's marketing

plan. . . He, alone, has the ability to implement decisions. The beneficiary of the L-1A petition is a manager with management and control over the function of marketing the business to prospective customers, successful management of the customer base, and determining and establishing the petitioning company's product line. The beneficiary has management and control over the selection of manufacturers of the products sold through the petitioning company, discretion to select what jewelry designs are to be purchased from abroad for resale to the United States vendors, and overall design of the catalogs used to feature the designs that the manager has designated as the company's product line.

Counsel provides examples of the beneficiary's achievements during the first year of operations, including organization of exhibits for trade shows and obtaining the business of over 60 vendors. Counsel cites an unpublished decision to support his claim that the beneficiary's responsibility for obtaining new clients should be considered a managerial duty. Finally, counsel notes that the beneficiary has hired a sales manager who serves as a first-line supervisor and reports to the beneficiary.

Upon review, the director's decision will be withdrawn and the matter remanded for further consideration and a new decision.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence [I]n other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence

As the present petition is a request for an extension of the beneficiary's L-1A status following the opening of a new office, the petitioner was required to submit a significant amount of supporting documentation pursuant to 8 C.F.R. § 214.2(l)(14)(ii). The director examined the petitioner's evidence and determined that the petitioner failed to establish eligibility. The director's decision was based in part on a finding that the petitioner did not submit sufficient documentation regarding the beneficiary's actual job duties. However the director did not point to any evidence of ineligibility that would justify his decision to deny the petition without first requesting additional evidence or issuing a notice of intent to deny the petition. *See* 8 C.F.R. § 103.2(b)(8); *see also* Memo. From William R. Yates, Associate Director, Operations, U.S. Citizenship and Immigration Services, to Regional Directors, et al, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*, HQOPRD 70/2 (February 16, 2005).

Accordingly, as the evidence of record does not directly reflect that the petitioner or beneficiary is ineligible for the benefit sought, the director should not have denied the petition based on a lack of evidence without first requesting additional explanation and documentation. *See* 8 C.F.R. § 103.2(b)(8); 8 C.F.R. § 214.2(l)(14)(i). The AAO agrees that the evidence of record raises underlying questions regarding eligibility.

In such an instance, the director "shall request the missing initial evidence, and may request additional evidence" 8 C.F.R. § 103.2(b)(8).

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. The initial petition did not include a description of the beneficiary's job duties. The petitioner, through counsel, has provided a brief statement regarding the beneficiary's job duties on appeal. While counsel has described the beneficiary's duties and authority in general terms, the job description does not show what actual tasks the beneficiary will perform on a daily basis. The petitioner should provide more detail regarding how the beneficiary will spend his time, including a breakdown of the percentage of his weekly hours that will be devoted to his various duties.

By way of example, general statements such as the beneficiary is "in charge of marketing of the business to prospective customers and managing the customer base" are not clearly managerial duties as defined by section 101(a)(44)(A) of the Act. The petitioner should explain in detail the specific tasks the beneficiary performs as part of his marketing responsibilities, whether and how the beneficiary works with subordinate employees on these tasks, as well as the specific efforts the beneficiary undertakes to "manage" the customer base. The minimal evidence submitted suggests that the beneficiary may be directly responsible for performing non-qualifying duties such as personally marketing the petitioner's products and services and taking and filling orders for products.

Counsel claims on appeal that the beneficiary qualifies for an extension of his L-1A status as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a comprehensive description of the beneficiary's duties that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. For example, if the petitioner indicates that the beneficiary is the only employee within its organization responsible for performing marketing duties, his position would be more akin to a marketing representative than a function manager. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

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). While it is permissible for the beneficiary to perform some non-qualifying duties, the petitioner bears the burden to establish that the majority of his time will be devoted to managerial or executive tasks. The record as presently constituted does not contain sufficient detail in order for Citizenship and Immigration Services (CIS) to determine whether the beneficiary will be employed in a primarily managerial capacity.

The petitioner claims that the beneficiary will have supervisory authority over subordinate employees. Thus, it is evident that the beneficiary must commit a portion of his time to supervising them. In order for the petitioner to establish that the beneficiary's supervisory tasks constitute managerial duties under section 101(a)(44)(A) of the Act, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See section 101(a)(44)(A)(ii) of the Act. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

If the beneficiary's subordinates are deemed not to be supervisory, professional, or managerial, the beneficiary may still qualify as a managerial or executive employee. However, time he invests in supervising them will not be considered time acting in a managerial or executive capacity. Again, the petitioner bears the burden of showing that the majority of the beneficiary's time will be devoted to managerial or executive tasks.

In the instant case, the petitioner has provided evidence that it employed a sales employee at the time the petition was filed. The petitioner should provide a complete list of individuals that the beneficiary supervised at the time of filing the petition, including a description of each employee's duties, educational background, and supervisory responsibility, if any. If the petitioner had additional staff employed on a commission or contract basis, the petitioner must provide their job titles and duties, evidence of payments to these employees, and indicate the amount of time they devote to the business in order for the AAO to accurately assess the petitioner's staffing levels. The record does not establish who performs the petitioner's day-to-day operational duties such as routine sales and marketing tasks, clerical and administrative tasks such as preparing correspondence and invoicing, purchasing, placing orders for products from abroad, and managing accounts payable and receivable. The record indicates that the petitioner operates a retail cart in a shopping mall, and also has a web site. The petitioner should indicate who is responsible for performing day-to-day duties associated with these two components of its business.

It is emphasized that 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). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, May 14, 2004. Documentation of business activity and hiring that occurred after the date of filing is not probative of the petitioner's eligibility and will not be considered.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the petitioner meets the requirements for L-1A classification as of the date

of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated July 3, 2004 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.