

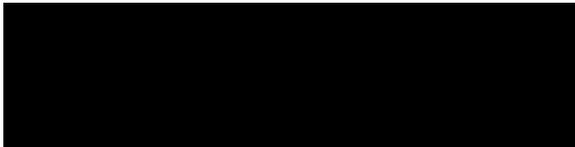
U.S. Department of Homeland Security
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U.S. Citizenship
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FILE: EAC 02 145 51486 Office: VERMONT SERVICE CENTER Date: **AUG 30 2005**

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

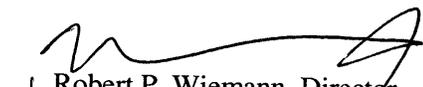
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Vermont 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 incorporated in 2000 and claims to be in the business of manufacturing and selling furniture. The petitioner states that the U.S. entity is a subsidiary of [REDACTED] located in Baalbeck, Lebanon. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its director of sales for a period of one year, at a yearly salary of \$45,000.00. The director determined that the petitioner failed to establish that the beneficiary has been or will be employed primarily in an executive or managerial capacity. The beneficiary was initially granted a one-year period of stay in the United States and the petitioner now seeks to extend the beneficiary's stay for another one year.

On appeal, counsel disagrees with the director's determination and asserts that the evidence establishes that the beneficiary's duties have been and will continue to be employed primarily executive or managerial in nature.

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) further 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) 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 to be addressed in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity.

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.

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In a letter dated May 5, 2002, the petitioner described the beneficiary's duties as follows:

As director of sales for MB Furniture, [the beneficiary] is responsible for establishing and carrying out company policy in the area of sales. She will recruit and train a staff of sales personnel. She also creates sales and promotional campaigns and oversees and coordinates all major accounts. [The beneficiary] is responsible for contacting and negotiating with purchasing managers of furniture retailers and wholesalers. She seeks to obtain distribution agreements with major national and regional department stores and furniture retailers. She will evaluate the performances of our U.S. staff and has the authority to hire, fire, and promote personnel, assigning tasks and projects as needed. [The beneficiary] represents MB Furniture at furniture shows and industry conventions and with senior personnel of customers and potential customers. In addition, she assumes the duties of the president of the company in his absence.

In the request for evidence, dated May 13, 2002, the director requested that the petitioner submit a comprehensive description of the beneficiary's duties; a list of employees including their names and position titles; a U.S. entity organizational chart; copies of company payroll records; and income tax records demonstrating whom the U.S. entity employs.

In response to the director's request for evidence, the petitioner submitted a copy of the beneficiary's pay stub covering the pay period July 1 to July 31, 2002. The petitioner also submitted a copy of a letter from the foreign entity, dated February 20, 2001, which stated that the beneficiary had been employed by the organization as a sales manager since 1994.

The director determined that the petitioner's descriptions of the beneficiary's duties identified general manager functions and paraphrased INS regulations. The director noted that the beneficiary's job descriptions were vague and did not specifically identify her past or proposed duties. The director concluded by stating that based upon the U.S. entity's staffing arrangement, it did not appear that the beneficiary would be responsible for performing professional duties.

On appeal, counsel argues that the petitioner has demonstrated that the beneficiary serves in a senior managerial capacity, in that she manages the sales function within the U.S. entity. Counsel also argues that the beneficiary exercises discretion over the petitioner's day-to-day operations. Counsel further argues that the size of the U.S. entity is immaterial to the beneficiary's managerial functions.

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. 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. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial.

The petitioner has not provided a comprehensive description of the beneficiary's purported job duties. The beneficiary's position description is too vague to establish that the preponderance of her duties will be managerial or executive in nature. The following duties are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive: responsible for establishing and carrying out company policy in the area of sales, creates sales and promotional campaigns, and coordinates major accounts. In addition, there is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Further, there is no indication from the record how much of the beneficiary's time will be spent performing each task. 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 has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who can relieve her from performing non-qualifying duties. The evidence fails to establish that the U.S. entity employs anyone other than the beneficiary. The petitioner failed to comply with the director's request for evidence of subordinate job titles and duty descriptions. The petitioner indicates that the beneficiary will recruit and train a staff of sales personnel.

However, there has been no independent documentary evidence submitted to substantiate this claim. 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).

Although counsel contends that the beneficiary manages the sales function of the U.S. entity, the record demonstrates that she performs the duties related to the function of the organization. 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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Although the petitioner stated that the beneficiary has been or will be primarily responsible for managing the sales division of the organization, the record reflects that the beneficiary has been performing and will continue to perform the duties necessary to establish the business and sell its products. 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).

The petitioner failed to comply with the director's request for evidence in that it did not submit a comprehensive description of the beneficiary's job duties, a list of all employees employed by the U.S. entity, an organizational chart depicting the U.S. entity's hierarchy, a list of all subordinate titles and duty descriptions, company payroll records, or IRS Form W-2 and W-3 representing the U.S. entity's current employees. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Based upon evidence submitted on the record, it appears that the beneficiary will be performing the services of the U.S. entity rather than serving as a manager or an executive. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that it is eligible for an extension of the initial one-year "new office" validity period. As previously noted, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. The petitioner has not satisfied all of the enumerated evidentiary requirements. The petitioner has not submitted evidence to demonstrate that a qualifying relationship exists between the U.S. and foreign entities as defined in paragraph (l)(1)(ii)(G). Although specifically requested by the director, the petitioner failed to submit copies of the U.S. entity's Articles of Incorporation, stock certificates, stock ledger, and Notice of Transaction Pursuant to Corporation Code Section 25102(f). The petitioner also failed to submit evidence to show that the foreign entity had paid for stock issued by the U.S. entity. In addition, there has been insufficient evidence submitted to establish that the foreign entity has been and will continue doing business during the beneficiary's stay in the United States. In response to the director's request for additional evidence on the subject, the petitioner submitted photographs of the exterior and interior of a building containing furniture. The petitioner also submitted copies of untranslated invoices. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). The evidence submitted is insufficient to

establish that the foreign entity is engaged in the regular, systematic, and continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(l)(1)(ii). For these additional reasons, the petition may not be approved.

Beyond the decision of the director, there has been no evidence submitted to demonstrate that the U.S. entity will be in a position to remunerate the beneficiary for her services pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(E). Tax records submitted by the petitioner reflect that in 2001, the U.S. entity did not realize any gross receipts or sales. The IRS Form 1120, U.S. Corporation Income Tax Return for the year 2001 shows that there was no compensation of officers and no salaries or wages paid for that year. A copy of the petitioner's bank statement for the period of June 7 through July 5, 2002, reveals a combined ending bank balance of \$61.55. In addition, the petitioner failed to comply with the director's request for copies of the company's IRS W-2 and W-3 forms. Evidence in the record demonstrates that the beneficiary's salary is \$45,000 per year. Based upon the evidence submitted it does not appear that the petitioner is in a position to remunerate the beneficiary for her services or that the reasonable needs of the petitioning company would plausibly be met by the services of the beneficiary as a manager or executive. For this additional reason, the petitioner may not 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.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.