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U.S. Citizenship  
and Immigration  
Services



DM

FEB 07 2005

FILE: EAC 02 197 50308 Office: VERMONT SERVICE CENTER Date:

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 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 extend the employment of its office manager as an L-1A intracompany transferee pursuant to § 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 New York that is engaged in the distribution and sale of the foreign entity's products in the United States. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Haryana, India. The petitioner now seeks to extend the beneficiary's stay for three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary has been employed in the United States or would be employed under the extended petition in a primarily managerial or executive capacity.

On appeal, counsel claims that Citizenship and Immigration Services (CIS) "failed to evaluate all of the available evidence," and erroneously determined that the beneficiary would not be performing managerial functions in the United States entity. Counsel contends in a brief submitted in support of the appeal that the director incorrectly based his denial on the belief that the beneficiary would perform the services of the business because of the small size of the petitioning organization.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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 proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.<sup>1</sup>

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

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<sup>1</sup> As the present matter relates to the extension of a petition involving a new office the beneficiary is not required under the regulations to have been employed in the petitioning organization in a primarily managerial or executive capacity prior to the filing of this petition.

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 filed the instant petition on May 21, 2002, noting that the beneficiary would be employed in the United States entity as the company's office manager. The petitioner indicated on the petition that the beneficiary's proposed job duties would include managing all details of the business, making discretionary decisions, and hiring and firing employees. In an accompanying letter dated May 16, 2002, the petitioner stated that the beneficiary would be employed in the United States in a managerial role, and would be given full discretionary authority to enter into sales negotiations, to determine shipping schedules, to establish prices, to conduct all aspects of the petitioner's marketing, and to control the local office. The petitioner noted on the petition that it presently employed six workers, including the beneficiary, and stated in its May 2002 letter that the beneficiary would supervise the following employees: sale supervisor; sales staff; and a marketing manager. The petitioner explained that the beneficiary "[would] be responsible for managing and directing all of these individuals together with supervisory personnel that we anticipate hiring in order to market our products in the United States."

The director subsequently issued a request for evidence on June 30, 2002. Noting that additional evidence was needed in order to determine the beneficiary's employment capacity, the director asked that the petitioner submit the following: (1) an organizational chart of the United States entity indicating the beneficiary's position in the hierarchy; (2) a comprehensive description of the beneficiary's job duties indicating how the beneficiary's proposed employment meets the regulatory requirements for managerial or executive capacity; and (3) descriptions of the positions and educational credentials of the beneficiary's subordinate employees, including a breakdown of the number of hours each employee would devote to their individual job responsibilities.

Counsel responded in a letter dated September 23, 2002. In his response, counsel outlined the regulatory requirements for managerial and executive capacity, and stated that the beneficiary's proposed responsibilities relate most to the criteria of an executive.<sup>2</sup> Counsel stated that although the petitioner maintains five

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<sup>2</sup> Throughout counsel's response to the director's request for evidence counsel erroneously refers to the regulatory requirements relating to petitions for employment-based immigrants. The AAO notes that the appropriate statute and regulation are section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L) and the regulation at 8 C.F.R. § 214.2(l).

employees on its payroll records, "it is important to note that the concept of an executive, as defined by 8 C.F.R. [§] 204[.]5(j)(2)[,] incorporates a functional manager or an individual with broad discretion to establish the goals and policies of the organization," and therefore, the fact that the beneficiary is managing employees "is not dispositive in determining if the beneficiary satisfies the definition of an intracompany executive." Counsel explained that while in the "executive position" of "founder and president," the beneficiary has been responsible for the petitioner's marketing, its maintenance of client contacts, formulating the petitioner's policies, and reviewing market analyses to determine client needs, volume potential and price schedules. Counsel further stated that as the petitioner's "sole executive," the beneficiary has been responsible for the development, marketing and management of the company, for controlling the company's budget, expenses, and revenue by negotiating prices, quantities and payment terms, and for the management of the petitioner's accounting, marketing and sales functions. Counsel claimed that "[a]ccording to the definition of a multi-national executive, it is quite clear that [the beneficiary] is operating in an executive capacity," as his responsibilities "include establishing the goals and policies of the organization, exercising wide latitude in discretionary decision-making, and directing the management of a major component of the organization."

Counsel also referred to an unpublished AAO decision, stating that it "stands for the proposition that a functional manager with broad decision making discretion qualifies under the category of Certain Multinational Executives and Managers." Counsel claimed that the instant matter is analogous as the beneficiary "not only functions at a senior level within the organizational hierarchy with respect to the functions managed, but also has absolute authority over the functions, specifically sales and accounting which are essential to the organization."

In response to the director's request for a comprehensive description of the beneficiary's job duties, counsel submitted the following:

Managing the business, administration, purchases, sales, payments, taxation, marketing, customer relationship, and wholesale trade, supervise the other employees and function at a senior level within the organization[al] hierarchy with respect to the function managed. He has all powers and can hire and fire any employee. The beneficiary has to report to the director only regarding the smooth functioning of the company. This is a managerial post with some duties of an executive as the company just started its business in the U.S.

Counsel noted that in addition to the beneficiary, the petitioner employs five workers. Counsel, however, lists only the following four employees: a sales associate, a packing incharge [sic], a production coordinator, and a bookkeeper. Counsel stated that the petitioner also hires outside companies for consulting, legal and accounting services, and plans to hire additional employees, such as sales representatives and executives, a purchase manager and marketing assistants as the company grows. Counsel provided a brief description of the job duties performed by each of the four employees and the employees' resumes.

In a decision dated April 2, 2003, the director determined that the petitioner did not demonstrate that the beneficiary would be employed under the extended petition in a primarily managerial or executive capacity. The director stated that the petitioner's vague job description did not identify the daily activities of the beneficiary, and merely paraphrased the regulatory definitions of manager and executive. The director also noted that the record did not show that the beneficiary would be managing supervisory, professional, or managerial employees who would relieve the beneficiary from performing the services of the corporation, or

that the petitioning organization “would realistically utilize the beneficiary as a veritable manager.” The director concluded that the beneficiary would be involved in the non-managerial, day-to-day functions of the organization. Accordingly, the director denied the petition.

In an appeal filed on May 5, 2003, counsel states that CIS erroneously concluded that the beneficiary would not be performing managerial functions during his employment in the United States entity. Counsel claims that CIS’ denial of the petition “has displayed its standard bias against small corporations,” as the director assumed that a corporation with less than an undefined number of individuals would not support a successful L-1 petition. Counsel challenges the director’s finding that the beneficiary would perform the services of the corporation, and states that the nature and size of a corporation are irrelevant to determining the capacity in which the beneficiary is employed. Counsel also contends that the beneficiary is responsible for managing the corporation, determining personnel decisions, and making discretionary decisions regarding the success of the business, and accordingly, “is at the apex of the employment hierarchy in the corporation.” Counsel acknowledges that the beneficiary’s subordinate employees are not professional or managerial, but states that nevertheless, the beneficiary exercises management and control over the workers’ activities.

On appeal, the petitioner has not established that the beneficiary would be employed by the petitioning organization 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

In the present matter, the petitioner fails to clarify whether it is claiming that the beneficiary would be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. While the petitioner stated in its May 16, 2002 letter that the beneficiary would “fulfill a managerial role with our company in the United States,” counsel notes in his September 2002 letter that the beneficiary’s employment more closely resembles that of an executive. In fact, counsel claimed that according to the regulations, the beneficiary would be employed as a multi-national executive, and provided what counsel claimed are executive job duties, such as formulating policy, reviewing market analyses, determining the company’s budget, and directing the management of accounting, marketing, and sales. Alternatively, counsel also stated that the beneficiary’s “Managerial/Executive” position includes hiring employees and managing the organization, which are deemed to be managerial responsibilities. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B). Counsel subsequently states on appeal that “the beneficiary will be performing a managerial function,” and outlines managerial tasks to be performed by the beneficiary. A petitioner may not claim to employ a beneficiary as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Counsel fails to clarify the inconsistencies in the record, and does not establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive or the statutory definition for manager.

Additionally, the petitioner provides a vague job description that also prevents the AAO from ascertaining in what capacity the beneficiary would be employed. While counsel provided in his September 2002 letter a brief outline of the beneficiary’s proposed job duties, he also stated that:

The position of Manager/Executive offered to [the beneficiary] is an executive position in which he establishes the goals and policies of the organization, exercises wide latitude in

discretionary decision-making and directs the management of a major component of the organization.

Counsel also states on appeal that with regard to the beneficiary's managerial capacity, he would "manage the organization," "supervise and control the work of other employees," "exercise day-to-day control over the enterprise," and would have the authority to hire and fire employees. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Moreover, as noted by the director, the record does not show that under the extended petition the beneficiary would be relieved from performing non-qualifying functions of the petitioning organization. It is evident from both the petitioner's May 2002 letter and counsel's September 2002 letter, which describe the beneficiary's responsibilities as negotiating sales, determining shipping schedules, establishing prices, devising the company's budget, and reviewing market analyses, that the beneficiary would be performing non-managerial and non-executive operations of the business. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Also, 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).

Counsel correctly notes on appeal that a company's size is irrelevant of the beneficiary's employment in a qualifying capacity. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, it is appropriate for CIS 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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).

The AAO will also address the conflicting assertions made by counsel in his response to the director's request for evidence. It appears that counsel is claiming in his September 2002 response that the beneficiary would be employed in the United States as a functional manager, even though he asserts that the beneficiary would

be employed as an executive. Additionally, counsel seems to attempt to circumvent the requirement that a manager supervise supervisory, managerial or professional employees by claiming the beneficiary is a multinational executive rather than a multinational manager. Neither of counsel's claims is supported by the record.

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. 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. at 604. In this matter, counsel has not provided evidence that the beneficiary manages an essential function.

Moreover, counsel's claim that the facts in the instant matter are analogous to those in an unpublished AAO decision is misplaced. Counsel refers to an unpublished decision concerning an immigrant petition. As the instant matter involves a nonimmigrant petition, the unpublished decision is not controlling. Also, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Furthermore, following the filing of the nonimmigrant petition, counsel may not alter the employment capacity of the beneficiary in order to conform to the requirements of either a manager or executive. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998) (determining that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Counsel improperly claimed that the beneficiary would be employed as an executive after the petitioner had indicated in documentation submitted with the nonimmigrant petition that the beneficiary would be employed as a manager. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Lastly, as noted previously, counsel repeatedly references incorrect sections of the regulations in support of the beneficiary's qualifying employment. This blatant error not only confuses the record, but also undermines the legitimacy of the petition. 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).

Based on the foregoing discussion, the record does not support a finding that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed by the foreign corporation in a qualifying capacity. In its May 2002 letter, the petitioner identified non-qualifying tasks performed by the beneficiary abroad, such as determining clothing styles, arranging customs orders, determining methods of manufacturing, analyzing market trends, and meeting with store executive and personnel to initiate sales. 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. at 604. For this additional reason, the appeal will be dismissed.

In addition, the director did not address the issue of whether the beneficiary's foreign employer and the petitioning entity are qualifying organizations as required in the Act at section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and 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. Here, although the petitioner submitted a stock certificate identifying the beneficiary's foreign employer as the parent of the United States company, the record contains conflicting evidence. Schedule K of the petitioner's 2000 corporate tax return fails to indicate that at any time during the tax year an individual or corporation owned a portion of the petitioner's stock. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The appeal will be dismissed for this additional reason.

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 regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's original petition expired on May 20, 2002. However, the petition for an extension of the beneficiary's L-1A status was filed on May 21, 2002, one day following the expiration of the beneficiary's status. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed, the beneficiary is ineligible for an extension of stay in the United States.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

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**ORDER:** The appeal is dismissed.