

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

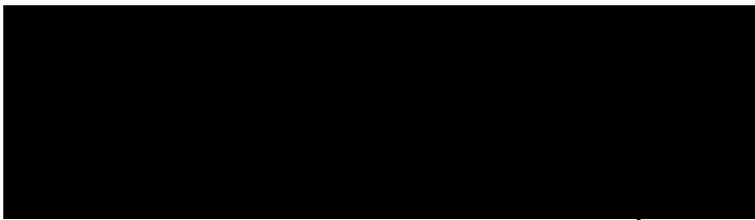
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D 7

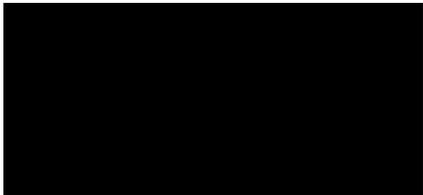


FILE: SRC 03 159 52074 Office: TEXAS SERVICE CENTER Date: **JUL 29 2005**

IN RE: Petitioner: 
Beneficiary: 

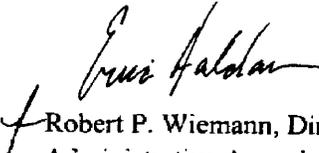
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 documentary evidence contained in the record, the petitioner was established in 1999 and is described as a business engaged in the import and export of furniture and constructed closets. The petitioner claims to be a subsidiary of [REDACTED], located in Mexico. It declares one employee with a gross annual income under \$79,000.00. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and general manager for two years, at an annual salary of \$108,000.00. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the U.S. entity employed the beneficiary primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary primarily performs executive duties at the U.S. entity.

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(1)(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(1)(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 issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary is employed by the U.S. entity primarily in an executive 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.

The petitioner initially described the beneficiary's job duties in the petition as: "in charge of marketing for wholesale line of closets and furniture. In charge of all hiring and firing decisions, set salaries, etc."

In a letter of support, dated May 12, 2003, the beneficiary described his job duties as:

Since arriving in the US, [the beneficiary] has worked to establish [the U.S. entity] in the US market, and he has been in charge of marketing a line of closets and furniture imported from Mexico. He has been in charge of hiring workers to install and transport the closet line and salesmen to market and sell the imported furniture and closets. He also has been in charge of all hiring and firing decision, setting salaries to employees, developing and implementing marketing plans, negotiating wholesale and distribution contracts and making all major decisions concerning the company.

The petitioner submitted copies of the U.S. entity's IRS Form 1120, U.S. Corporate Income Tax Return for 2001, bank statements, corporate lease agreement and photographs of the leased premises, and other business documents.

The director determined that insufficient evidence had been submitted to determine whether the beneficiary was eligible for an extended stay in an L1 intracompany transferee status and subsequently requested that the petitioner submit documents evidencing the beneficiary's eligibility. The director specifically requested:

Evidence of the staffing level in the United States. Include copies of current tax returns (2002), which list all employees by name.

Provide a list of all employee positions, duties and qualifications for each position.

Describe the duties of the beneficiary for the past year. Indicated the percent of time he/she spent performing each duty.

As evidence of staffing levels, the petitioner submitted copies of IRS Form W-2 for the year 2002 and an Application for Automatic Extension of Time to File Corporation Income Tax Return. In response to the director's request to provide a list of all employees, counsel asserted that the U.S. entity hired its employees on an as needed basis. Counsel further asserted that the beneficiary was the sole employee in charge of the office and that the organization anticipated hiring new employees when the specific needs of the office required such. Counsel described the beneficiary's duties as:

Sales

60%

Administration	30%
Travel within the US	3%
Developing New Projects	2%
Meetings with principals in Mexico	5%

The petitioner submitted copies of the U.S. entity's IRS Form 940-EZ, Employer's Annual Federal Unemployment Tax Return; IRS Form W-2 for 2002, IRS Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return; and evidence of business conducted in the United States.

The director subsequently denied the petition determining that the petitioner had failed to submit sufficient evidence to demonstrate that the beneficiary performs primarily in a managerial capacity. The director noted that the beneficiary was the sole employee of the U.S. entity; that the entity hired employees on an as needed basis; and that the beneficiary spent 60 percent of his time performing sales duties and 30 percent of his time performing administrative duties. The director determined that the tasks performed by the beneficiary were not ones that required a manager to perform and that there was no evidence to show that the entity employed subordinate staff sufficient to support the need for a manager.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary is not requesting consideration for an extension of stay as a manager but as an executive. Counsel also asserts that the petitioner has submitted sufficient evidence to demonstrate that the beneficiary primarily performs executive duties for the U.S. entity. Counsel further lists the statutory elements for executive capacity and attempts to explain how the beneficiary meets each of the criteria. On appeal, the petitioner submits as evidence: an Application for Employer Identification Number, an organizational plan and structural outline, reference letters, a company price listing, and other business letters. The petitioner also submitted copies of the foreign company's business invoices.

As evidence on appeal, the petitioner submitted a copy of the U.S. entity's Application for Employer Identification Number; an organizational plan and structural outline; a reference letter dated July 1, 2003; a company price listing dated June 6, 2003; a corporate letter of acknowledgement dated May 18, 2003; a letter recognizing an impending distributor's agreement dated July 8, 2003; and other business letters. The petitioner also submitted copies of the foreign company's business invoices. It is noted that the petition in this matter was filed on May 16, 2003.

In evaluating whether the beneficiary is employed in a primarily managerial or executive capacity, the AAO will look first to the petitioner's description of the beneficiary's 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.* Although counsel claims that the beneficiary performs primarily in an executive capacity, the evidence of record demonstrates that he primarily performs sales and administrative duties. Further, 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 prove 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).

Counsel contends that the beneficiary is employed by the U.S. entity in an executive capacity in that he directs the management of the organization; establishes goals and policies; exercises wide latitude in

discretionary decision-making; and receives only general supervision from senior executives. However, a review of the beneficiary's job descriptions fails to demonstrate that the beneficiary primarily performs in an executive capacity or that the organization is able to support such a position. Further, there is no evidence to show that the U.S. entity, as an established business, employs anyone other than the beneficiary to perform non-qualifying duties. The evidence submitted on appeal demonstrates that the beneficiary's duties and responsibilities primarily consist of sales, marketing, and distribution of building products and accessories. Consequently, there is insufficient evidence to show that the beneficiary performs the high-level responsibilities as defined, or that he primarily performs those duties rather than spending the majority of his time performing day-to-day functions of the organization.

The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he directs the management of the organization, establishes goals and policies, exercises a wide latitude in discretionary decision-making, and receives only general supervision or direction from higher level individuals. 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). Paraphrasing the regulations as a substitute for a comprehensive description of the beneficiary's job duties is insufficient to demonstrate the beneficiary is acting in an executive or managerial capacity. *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*, 1977 WL 188942 at *5 (S.D.N.Y.). There has been no evidence presented to demonstrate what goals and policies have been and will be established by the beneficiary in his capacity. For example, the petitioner described the beneficiary's duties in vague and general terms such as "developing and implementing marketing plans" and "making all major decisions concerning the company." Further, in response to the director's request for evidence, it is stated that the beneficiary spends 60 percent of his time performing sales duties and 30 percent of his time performing administrative duties; hence, 90 percent of the beneficiary's time is spent performing non-qualifying, non-executive duties.

The record does not demonstrate that the U.S. entity contains the organizational complexity to support an executive position. While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other pertinent factors such as the nature of the petitioner's business. Together, these facts can be used as indicators to help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's daily operations. In the instant matter, the latter more accurately describes the beneficiary's role. The evidence of record demonstrates that the U.S. entity currently employs only the beneficiary and hires new employees on an as needed basis. The record further demonstrates that the beneficiary spends the majority of his time performing sales and administrative duties. The petitioner stated that the beneficiary was responsible for hiring workers to market, sell, transport, and install the company's furniture and clothes closets. However, the current record demonstrates that the company has been conducting business in the past year and that the beneficiary is the sole employee of the U.S. entity. 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). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). There are no employees currently available to perform the functions of the organization or to relieve the beneficiary from performing non-executive duties such as marketing, selling, delivering, and installing the petitioner's product.

Neither is the record, as presently constituted, persuasive in demonstrating that the beneficiary is employed by the U.S. entity in an executive capacity. There has been insufficient evidence presented to establish that the beneficiary directs the management of the organization, establishes goals and policies, exercises wide latitude in discretionary decision-making, and receives only general supervision from higher-level executives. The petitioner has not shown that the beneficiary functions at a senior level within an organizational hierarchy other than in position title. There has been insufficient evidence submitted to establish that the beneficiary has been and will be employed by the U.S. entity in a primarily executive capacity.

Beyond the decision of the director, there is insufficient evidence to demonstrate that the petitioner will be able to remunerate the beneficiary for his services. In the petition, the petitioner stated that the beneficiary's salary would be \$108,00.00 annually. The petitioner submitted a copy of the company's IRS Form 1120, U.S. Corporate Income Tax Return for the year 2001, which indicated that the company gross receipts from sales was only \$101,255.00 and its gross profit was only \$22,000.00. The tax return also demonstrates that no money was paid out in compensation of officers or in salaries and wages for that year. For this additional reason, the petition may not be approved.

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.