

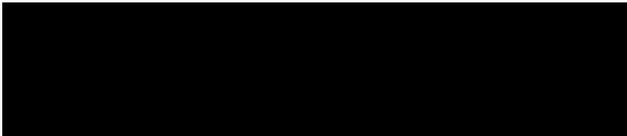
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**U.S. Citizenship
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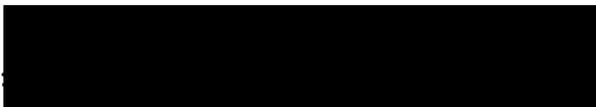
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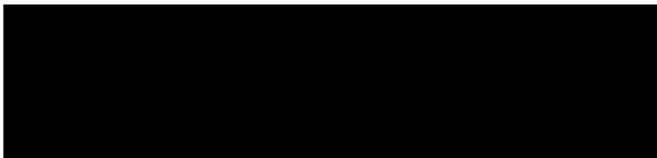
File: WAC 03 040 51698 Office: CALIFORNIA SERVICE CENTER Date: JUN 13 2005

IN RE: Petitioner:
Beneficiary:



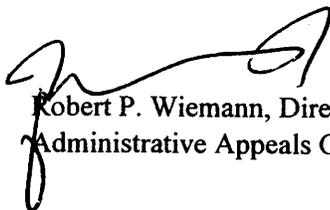
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president 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, a California corporation, is the subsidiary of [REDACTED], located in Manila, Philippines, and is engaged in international trade. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's 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 filed an appeal in response to the denial. On appeal, counsel for the petitioner asserts that the denial was erroneous and alleges that the petitioner submitted ample evidence to establish eligibility for the benefit sought. In addition, counsel alleges that the director improperly considered the regulation applicable to new offices when reviewing the petition. In support of these contentions, counsel submits a brief and additional evidence.

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 managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary issue in this matter is whether the beneficiary has been and will continue to be employed by the United States entity in a primarily managerial or 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.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as 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.

In the initial petition, counsel submitted a letter from the petitioner, dated November 15, 2002, which provided an overview of the U.S. entity's business dealings and the beneficiary's role within this structure. With regard to the beneficiary, the petitioner stated:

[The beneficiary] fill[ed] an executive position with our organization in the past year. In this position, she [was] responsible for the overall management of [the petitioner] and the development of the company's businesses. She perform[ed] the following executive and managerial duties: (1) plans, develops, and establishes the policies and objectives for the company's development under the supervision of the Board of Directors; (2) [e]xercises wide latitude and discretionary decision-making in the management and direction of the company's overall business activities; (3) [d]irects the implementation of the annual business plans and operation policies; (4) [e]stablishes the most advantageous courses of action for the management of the business operations; (5) [m]eets regularly with department managers to review the company policies and procedures and develop appropriate plans for the current market conditions; (6) [e]xercises authority in regard to hiring, firing, training, promotions, and delegation of assignments for managerial staffs; (7) [r]eports to President of the parent company: represents the unique concerns and requirements of the international operations and provides significant contributions in the formulation of strategic business plans for the parent company.

The petitioner further stated that the beneficiary's position required a minimum of three years of experience in a managerial position with the parent company as well as a four year bachelor degree, and confirmed that the beneficiary met all of these requirements.

On December 2, 2003, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit the following documentation: copies of the petitioner's federal and state Quarterly Wage Reports (Form DE-6 and Form

941) for the last four quarters; copies of the petitioner's payroll summary, including W-2 and W-3 forms evidencing wages paid to employees; and evidence that the petitioner had been doing business for the previous year as defined by the regulations. In its response dated April 30, 2003, the petitioner submitted several documents, including its federal and state Quarterly Tax Returns, its payroll summary, W-2 and W-3 forms, its 2002 Form 1120, U.S. Corporation Income Tax Return, and copies of recent bank statements. In addition, the petitioner provided an organizational chart outlining the structure of the U.S. entity, as well as a detailed description of the beneficiary's duties and how they satisfied the definitions of both managerial and executive capacity.

On August 11, 2003, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, found that the evidence in the record was insufficient to establish that the beneficiary was primarily employed in either capacity. The director further concluded that the evidence submitted did not indicate that the beneficiary had sufficient staff members to relieve her of performing many or all of the day-to-day tasks essential to the petitioner's business operations.

On appeal, counsel for the petitioner introduces new evidence in the form of updated payroll records and current quarterly wage reports and further contends that the beneficiary's managerial and executive duties qualify under the statutory definitions. Counsel alleges that the beneficiary's job duties were sufficiently explained prior to adjudication, and he reiterates those duties in detail in his brief. Counsel contends that the beneficiary qualifies as a manager *and* an executive, and finally asserts that the director erroneously relied on staffing levels as a basis for finding that the beneficiary would not be performing primarily managerial or executive duties.

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 description of duties provided by the petitioner in the initial petition did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a generic description of the nature of her duties and at times merely paraphrased the regulatory definitions. As previously stated, the initial evidence submitted was insufficient to warrant approval, and consequently, the director requested more specific information, including updated quarterly wage reports and payroll records. The petitioner submitted this requested evidence, which the director found to be insufficient to establish that the beneficiary's duties qualified under the requested classification.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary will not be primarily employed in either a managerial or executive capacity. First, the petitioner failed to specifically articulate the nature of the beneficiary's duties. 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). Although the petitioner provided detailed descriptions of the beneficiary's duties in both the initial petition and the response to the request for evidence,

these descriptions did not articulate of what a specific day in the role of the beneficiary would consist. Instead, the descriptions merely paraphrased the regulatory definitions of both managerial and executive capacity and failed to introduce job-specific tasks or obligations the beneficiary was required to perform. For example, in response to the request for evidence, the petitioner stated the major duties of the beneficiary involved:

1. To plan, establish, and administer the company administrative policies, commercial and financial goals, and strategies for international business development (compare to 8 C.F.R. § 214.2(l)(1)(ii)(C)(2), which states: *Establishes the goals and policies of the organization, component or function*);
2. To exercise a wide latitude of discretionary decision making over the overall operations (compare to 8 C.F.R. § 214.2(l)(1)(ii)(C)(3), which states: *exercises wide latitude in discretionary decision-making*);
3. To direct the implementation of the business plans focusing on establishing a nationwide network for the sale of our product in the United States (compare to 8 C.F.R. § 214.2(l)(1)(ii)(C)(1), which states: *Directs the management of the organization or a major component or function of the organization*);
4. To supervise and control the work of Business Manager and Financial Manager (compare to 8 C.F.R. § 214.2(l)(1)(ii)(B)(2), which states: *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*).

Clearly, these statements are conclusory in nature and heavily paraphrase the language of the regulations without affording Citizenship and Immigration Services (CIS) a true idea of the beneficiary's daily duties. 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.).

Second, whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner provides virtually no detail or discussion of the beneficiary's actual duties prior to adjudication. Instead, the petitioner merely claims that the services of the beneficiary are essential and, that as a result of the beneficiary's work experience and education qualifications, she is the ideal candidate for the position.

On appeal, counsel again restates the description of the duties that were previously deemed insufficient. Counsel paraphrases the statutory definitions of both managerial and executive capacity and provides a one to two sentence explanation of how each of the criteria pertains to the beneficiary. These explanations, however, are once again not specific. Based on the current record, the AAO is unable to determine whether the claimed managerial and/or executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. As previously stated, 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).

Furthermore, counsel submitted two organizational charts on behalf of the petitioner. The first chart, submitted with the initial petition, indicates that the beneficiary, as president, supervises a business manager and a financial manager and also exercises supervisory powers over unnamed "sales specialists" and accountants secretaries." The second chart, submitted in response to the director's request for evidence and current as of January 1, 2003, indicates that the beneficiary supervises an assistant (the former financial manager on the first chart), a vice president, a business manager, a market research assistant, a purchaser (the former business manager on the first chart), and a sales representative. There are two major problems with this evidence. First, the second organizational chart is not persuasive in establishing the beneficiary's managerial and executive duties because it represents the structure of the petitioning entity almost two months *after* the petition was filed. 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). Second, the evidence submitted in the form of payroll records and quarterly wage reports confirms that through December 31, 2002, the petitioner employed only five employees. Since the petition was filed on November 19, 2002, CIS is restricted to examining only the time period leading up to this date, and not afterwards. Although the second organizational chart indicates that seven employees work for the petitioner in 2003, the AAO cannot consider this chart as acceptable evidence that the beneficiary was not performing day-to-day duties during the relevant period from November 3, 2001 through November 2, 2002.

Since the record clearly establishes that the beneficiary and only four other employees worked for the petitioner at the time the petition was filed, the AAO will focus on the evidence initially submitted with the petition for purposes of the analysis.¹ The organizational chart indicates that the beneficiary as president claims to supervise a business manager and a financial manager. Also listed on the chart are "sales specialists" and "accountants secretaries," who are not named or identified on the chart but are later identified by name and by position title, namely, "secretary" and "sales specialist," on accompanying documentation. The wage statements and payroll records confirm that since the second quarter of 2002, these five employees were working for the petitioner.

Consequently, it is evident that the beneficiary, as president, supervises four employees. The business manager is responsible for the management of marketing and business operations, exercising discretion over day-to-day operations, managing sales activities, establishing marketing policies and promotional strategies, supervising and controlling the work of sales specialists, and hiring and firing sales specialists. The financial manager exercises discretion over the day-to-day operations of the financial department, administers the

¹ The AAO notes that according to the quarterly wage returns and payroll documentation, the vice president, Susan Ong, began working for the petitioner during the fourth quarter of 2002. Since there is no evidence in the record to confirm whether she began working for the petitioner before or after November 19, 2002, the AAO will rely on the organizational chart submitted with the petition, which omits the position of vice president, for purposes of this appeal.

financial policies, supervises and controls the work of accountants and assistants in handling all financial and accounting matters, and prepares analytical financial reports. The sales specialist is responsible for business negotiation, soliciting potential customers, conducting market research, contacting and negotiating with suppliers, placing and tracking orders, and arranging shipment and tracking payment. Finally, the secretary is responsible for administrative and clerical duties necessary for the company's operation. Specifically, she handles issues regarding reception, customer service, inventory, inquiries, budgetary requests, invoice preparation, travel arrangements, and she maintains records of business information and projects.

Upon review of the description of duties for these employees, it appears that the business manager and financial manager are both supervisory employees who supervise subordinate staff members (namely, the sales specialist and the secretary). By definition, a beneficiary may be primarily acting in a managerial capacity if she "supervises and controls the work of other supervisory, professional, or managerial employees." 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). On the surface, the claims of the petitioner appear to qualify the beneficiary as a manager under the regulatory definitions, since the remainder of the beneficiary's stated duties conform, albeit simplistically, to the regulatory requirements. However, the only evidence in the record with regard to these duties is a one-page statement from the petitioner describing these 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). Furthermore, counsel's aversions on appeal are also not supported by any independent evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Upon further review, however, the issue before the AAO is not whether the beneficiary's duties satisfy the regulatory requirements, but rather, whether the employment situation presented by the petitioner is credible. A critical analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employees relieve the beneficiary from performing non-qualifying duties. The most relevant documentary evidence submitted in this matter is the payroll history and quarterly wage reports for the petitioner during 2002. According to the records, the wages paid to the subordinate employees during the period from January 1, 2002 through December 31, 2002 are as follows:

	03/31/2002	06/30/2002	09/30/2002	12/31/2002
Business Manager [REDACTED]	\$3,000.00	\$3,000.00	\$2,566.80	\$2,400.00
Financial Manager [REDACTED]	\$2,400.00	\$2,400.00	\$2,651.00	\$3,000.00
Sales Specialist [REDACTED]	\$ 800.00	\$1,200.00	\$1,498.00	\$ 870.00
Secretary [REDACTED]	-----	\$1,200.00	\$1,200.00	-----

When tallying the total income for these employees, it appears that the business manager earned \$10,966.80, the financial manager earned \$10,451.00, the sales specialist earned \$4,368.00, and the secretary, who departed in the last quarter of 2002, earned \$2,400.00.

The petitioner urges this office to accept as true the evidence submitted, which on the surface indicates a president with four subordinate employees to carry out the day-to-day tasks essential to the operation of the business. However, the wages paid to the subordinate employees suggest that they are employed part-time, or perhaps only on an as-needed basis. For example, the payroll records for 2002 indicate that the business manager earned \$10,966.80. Assuming, as the petitioner would like us to believe, that the business manager was a full-time employee, it appears that he only earned \$5.27 per hour if he worked a standard 40-hour workweek for 52 weeks. More disturbing are the earnings of the sales specialist, whose hourly salary, assuming the same work schedule, amounts only to a mere \$2.10 per hour. Interestingly, the AAO notes that in 2002, the minimum wage in the state of California was \$6.75 per hour. Consequently, the evidence in the record suggests that these employees, who allegedly worked full-time for the petitioner, were paid grossly less than the minimum wage.

As addressed by the director, the low wages paid to the subordinate employees suggest that the employees are not full-time employees. Since no specifics with regard to their actual work schedules have been provided, the AAO cannot conclude that these employees were there on a regular basis to relieve the beneficiary from the basic, day-to-day tasks essential to the operation of a profitable and growing business. Furthermore, the payroll records indicate that the secretary, whose duty was to perform all administrative and customer service functions, only worked two quarters that year and departed the company on or before September 30, 2002. Consequently, there is insufficient evidence in the record to confirm that the beneficiary was not required to perform many, if not all, of the essential and routine functions of the business. Absent evidence to the contrary, it appears that the beneficiary's job duties are principally composed of non-qualifying duties that preclude her from functioning in a primarily managerial or executive role. 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).

Although counsel on appeal submits additional payroll records and wage reports intended to show the petitioner's expansion in 2003, this evidence is not persuasive nor will it be considered. As previously stated, 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. at 248.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it has hired and plans to hire additional managers and employees in the future. However, 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. Since the record lacks evidence to establish that the petitioner employed any other full time employees at the end of the first year of operations, it is clear that the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

Beyond the decision of the director, the record reflects that the petitioner did not file the petition for an extension within the required time frame. 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 authorized period of stay expired on November 2, 2002. However, the petition for an extension of the beneficiary's L-1A status was filed on November 18, 2002, more than two weeks after 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, it is noted for the record that the beneficiary is ineligible for an extension of stay in the United States.

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).

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.

ORDER: The appeal is dismissed.