

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



DA

File: EAC 02 121 54066

Office: VERMONT 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, 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 vice-president of marketing as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of New Jersey that is engaged in the import and sale of granite products. The petitioner claims that it is the subsidiary of Mira Textiles & Industries (India) Ltd., located in Chennai, India. 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 for three more years.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary has been and will continue to be employed in the United States in a primarily executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the director's decision was "arbitrary, unreasonable, and against the weight of evidence," and claims that the evidence contained in the record clearly established that the beneficiary qualified as an executive. In support of these contentions, counsel submits a detailed 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 management 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 will 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 February 12, 2002, in which it discussed the beneficiary's role in the U.S. petitioner's organization. The petitioner stated:

[The beneficiary] manages day-to-day operations of [the petitioner], with a view at the continued expansion of the company. He works in concert with our U.S. director and the Board of the Directors in India. [The beneficiary] ensures that [the petitioner's] operations are fully in accord with the parent company's corporate objectives and will continually liase [sic] with the parent company executive as to the company's operations. Finally, [the beneficiary] oversees dealings between [the petitioner] and local businesses used for the conversion of granite slabs into kitchen and table tops, and for the transportation of goods.

The petitioner further stated that the beneficiary would be responsible for all marketing matters and will have full responsibility for such matters.

The director found the initial evidence submitted to be insufficient, and consequently issued a request for additional evidence on March 26, 2002. In the request, the director required the petitioner to submit specific evidence establishing that the beneficiary was employed in a primarily executive capacity. A breakdown of the hours the beneficiary devoted to these tasks on a weekly basis, as well as an organizational chart of the U.S. petitioner, was requested. Finally, the director requested a complete position description for all of the U.S. entity's employees, and a description of duties performed by contractors, if applicable.

In a response dated June 13, 2002, the petitioner, through counsel, addressed the director's query. Counsel restated the petitioner's claim that the beneficiary would be in charge of marketing, and further stated that the beneficiary's duties include management of the company, as well as exercising wide latitude in discretionary decision-making. Counsel further indicated that the beneficiary spent 15 hours per week performing market studies of the stone industry, and that an additional 10 hours was spent planning the company's market strategies. Counsel further stated that five hours per week were spent traveling to various warehouses in the

State of Georgia, another five hours were spent overseeing company operations, and the final five hours were spent looking for sources for new granite.

On September 5, 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 failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization. The director further concluded that the beneficiary would not be supervising subordinate managers or supervisors, since the evidence indicated that he hired custom brokers and truckers on a contract basis to perform necessary tasks, and thus they were not employees for purposes of this analysis.

On appeal, counsel restates the beneficiary's duties and alleges that the director erred by concluding that the beneficiary was not a qualified executive pursuant to the regulations.

Upon review, counsel's assertions are not persuasive. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is an executive by virtue of his position title, experience, and associated duties. However, the description of duties provided by counsel is vague and fails to specify the exact nature of the claimed executive 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).

The actual duties themselves reveal the true nature of the employment. *Id.* In reviewing the beneficiary's stated duties, it appears that the majority of his time is devoted to the company's marketing and advertising. Furthermore, the beneficiary is the only employee of the petitioner, thereby leading to the conclusion that he is the only person who will perform the routine tasks necessary to keep the business running. By the petitioner's own admission in its letter dated February 12, 2002, the beneficiary "manages day to day operations." Finally, on appeal, counsel contends that "there is no need for the petitioner to hire marketing personnel as all of the marketing aspects have been taken care of by the beneficiary himself." Clearly, the beneficiary is the sole employee of the petitioner and is therefore performing all of the tasks required to support the U.S. entity. 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).

In the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). Although counsel on appeal strongly asserts that this is not a new office petition, counsel misinterprets the regulations with regard to this matter. The record clearly indicates that the initial petition allowed the beneficiary to come to the United States to establish the new business. Specifically, the beneficiary commenced employment with the petitioner in April of 2001 with the prospect of organizing and operating the newly incorporated U.S. office. The petitioner is now seeking to extend the initial new office petition. Consequently, counsel's position on this issue is misplaced.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. Although counsel states on appeal that the petitioner has contractual employees to relieve the beneficiary from performing non-qualifying duties, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). Thus, in the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Although the petitioner alleges that its hiring attempts had been unsuccessful, this claim is not persuasive for purposes of overcoming this denial. At the time the petition was filed, the beneficiary was the petitioner's only employee. Furthermore, the assertions of counsel and the petitioner that claim to verify the beneficiary's qualifications are unacceptable. 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. at 1108.

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).

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties are primarily managerial or executive in nature. For this reason, the petition may not be approved.

Beyond the findings in the previous decision, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner alleges that the U.S. entity is the subsidiary of the foreign entity. However, the only evidence submitted in support of this contention is a stock certificate, identified as number 2, for the U.S. petitioner. The record does not contain the stock ledger for this company, which would provide clarification as to whether share certificate number 1 was issued, and to whom.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without

full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. Furthermore, the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2001, Schedule E, and its Forms CBT-100-R, New Jersey Corporation Business Tax Return, Schedule F, for 2001 and 2002 indicate that the beneficiary owns 100% of the U.S. company's stock. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. 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.