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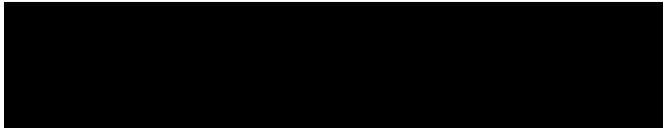
JUN 13 2005

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)

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

www.uscis.gov

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Rajat International USA, Inc., endeavors to classify the beneficiary as a manager or executive 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 claims to be a subsidiary of Karamjot Exports, located in India and operates an import, resale, and wholesale business. The initial petition was approved for one year to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's manager. The petitioner claims that it was established in 2001 and has one employee.

On July 31, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity.

On appeal, the petitioner's counsel submits a brief and claims that the beneficiary is "only performing managerial or executive duties."

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. 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. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(14)(3) state 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.

Further, pursuant to 8 C.F.R. § 214.2(l)(14)(ii), if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation requires:

A visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (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 issue in this proceeding is whether the beneficiary has been and will be primarily performing executive or managerial duties for the United States entity. 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.

In a February 10, 2003 supporting letter appended to the Form I-129, the petitioner described the beneficiary's U.S. duties as:

[The beneficiary] has been able to place substantial orders for products from [the foreign entity] and is able to sell the products on consignment basis to U.S. Companies. However, with the US Economic recession, the Company needs a little more time to realize its target potentials to the maximum.

The letter further stated that the petitioner needs the beneficiary's services because of "his profound knowledge and understanding of the company, nature of the business and export expertise" which can "help build the future infrastructure" for the U.S. company.

On the Form I-129, the petitioner indicated that the beneficiary will "direct foreign sales and services, arrange shipping details, and make import arrangements." Counsel indicated in his cover letter that the petitioner had hired one employee.

In a request for additional evidence dated March 26, 2003, the director requested that the petitioner submit evidence of the following: 1) a description of the duties performed by the beneficiary; 2) the staffing of the U.S. company indicating the number of employees and the duties performed by each; and, 3) personnel structure of the company.

In a letter dated June 16, 2003, counsel for the petitioner described the beneficiary's U.S. duties as:

The beneficiary's duties and responsibilities are essentially managerial and executive in nature. Since the commencement of his employment with [the petitioner], he has directed foreign sales & service outlets of [the foreign entity] in the U.S[.], negotiated contracts with foreign sales & distribution centers in the U.S. to establish outlets. In the last year, the Company has hired two additional employees who takes care of the day-to-day activities of the Company. [The beneficiary] [d]irects the clerical staff in expediting export correspondence, bid requests & credit collections. Being the sole proprietor of the parent Company, he also directs conversion of products from India to foreign standards and specifications to ensure efficient operations under foreign conditions. [The beneficiary] also supervises and arranges all shipping details, such as export licenses, customs declarations and appointment of shipping agents. . . .

The petitioner also claimed that the company “already has two other employees” and that the beneficiary “has just hired another one.” The petitioner stated that the employees “do routine clerical works like taking care of office correspondence and typing orders, vouchers and other documents” and “searching for possible buyers and contacting them with specifications, comparing products to test latest trends and customs in cabinet hardware and evaluating the prices against product specifications and durability.” The petitioner claims, “there is a stock person who usually takes care of the orders including storage, dealing with licensing agents and receiving the goods.” The petitioner stated that one other person had been hired as “procurements in charge” and “has been sent to India” to “place orders and confirm the next dispatch schedule from India”

On July 31, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The director found that the new company did not grow to a sufficient size to support a managerial or executive position. The director noted that the petitioner had not provided detailed position descriptions for the beneficiary’s subordinates and that the quarterly tax statements indicated that only the beneficiary had been paid.

On appeal, the petitioner’s counsel submits a brief and claims that the beneficiary is “only performing managerial or executive duties.” Counsel explains that there are three employees who “do most of the day-to-day jobs” and that it is “not necessary that employees have to be on a payroll” because “[w]ork can be done by contract labor also.” Counsel cites several unpublished AAO decisions and claims that the AAO has determined “that an organization after it becomes operational” looks at “the increase in the number of employees, significant growth in cash flow, presence of significant customers and clientele.” Counsel also claims, “there is no requirement in the law that a set number of employees are required to have a Manager. As long as a person is working in a managerial position and he is performing all managerial functions.”

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). On review, the petitioner has not established that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The beneficiary’s described duties are broad and do not elaborate how the beneficiary will primarily perform managerial or executive duties. For example, the petitioner described the beneficiary’s duties as “plac[ing] substantial orders for products” and “sell[ing] the products on consignment basis to the [sic] U.S.” In addition, the petitioner claimed that it needs the beneficiary because of “his profound knowledge and understanding of the company, nature of the business and export expertise.” However, it is unclear how his “profound knowledge” would be utilized in a capacity that is primarily managerial or executive in nature. 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 director had specifically requested a detailed description of the beneficiary’s duties, in response, the petitioner provided a vague description of the beneficiary’s duties stating that the beneficiary’s duties involved “supervise[ing] and arrang[ing] all shipping details “Reciting the beneficiary’s vague job responsibilities or broadly-cast business objectives is not sufficient; the

regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Further, the petitioner claimed that the beneficiary's duties were "essentially managerial and executive in nature." The petitioner does not clarify whether the beneficiary is claiming to 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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

In addition, the petitioner described the beneficiary as being involved in selling the company's products by "direct[ing] foreign sales [and] service outlets of [the petitioner]," and negotiate[ing] contracts with foreign sales [and] distribution centers in the U.S." Since the beneficiary will actually be involved in the sales, he will be providing the services of the business rather than directing such activities. It is unclear who else would be performing the sales activities of the company. 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).

On appeal, counsel stated that there are "three employees who do most of the day-to-day jobs" and that it is "not necessary that employees have to be on a payroll" because "[w]ork can be done by contract labor also." However, there is insufficient evidence to establish the existence of these employees. Additionally, the petitioner has not explained how the services of these claimed contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, at the time the petition was filed, the petitioner only claimed to have one employee in addition to the beneficiary. The petitioner submitted a copy of Form W-2 evidencing wages of \$5,362.50 paid to Markan Rakesh in 2002, but failed to indicate his job title or duties. Even if the petitioner established that it hired additional payroll or contract employees 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).

Moreover, counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to an L-1A manager or executive. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. In

the present matter, however, 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). 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. 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. While the beneficiary in this matter likely performs some qualifying managerial duties, the record does not support the petitioner's claim that such duties require the majority of his time. The petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

On appeal, counsel further asserts that a set number of employees is not required "[a]s long as a person is working in a managerial position and he is performing all managerial functions." Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial or executive, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "sell[ing] the products," do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Finally, counsel refers to several unpublished decisions to support his assertion that the beneficiary qualifies as a manager or executive. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. 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.

After careful consideration of the evidence, the AAO concludes that the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that it maintains a qualifying relationship with a foreign entity as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). On Form I-129, the petitioner claimed that it is a subsidiary of the foreign company. The petitioner also indicated that the beneficiary is the sole proprietor of the foreign company, and that he also owns 100 percent of the petitioner's stock. Based on the petitioner's description of the company's ownership, the AAO notes that if any relationship exists, it would be an affiliate relationship pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(L). However, the record is devoid of any documentary evidence to substantiate the petitioner's claim that the two companies share common ownership. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The petitioner claims that it is a subsidiary of the foreign entity. It is further noted that the petitioner has submitted insufficient evidence to establish that the foreign sole proprietorship continues to do business, as required at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). A sole proprietorship is a business in which one person owns all of the assets and operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Edition). As the beneficiary claims to be the owner and sole proprietor of the foreign business, the presence of the beneficiary in the United States raises the question of whether the foreign business continues to do business abroad. The lack of current evidence lead the AAO to conclude that the foreign sole proprietorship is no longer doing business. Based on the above discussion, the petitioner has not established a qualifying relationship with the foreign entity. For this additional reason, the petition may not be approved.

In addition, since the petitioner stated that the beneficiary is the owner of both the parent company and the U.S. company, if this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States. For this additional reason, the petition 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 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 appeal will be dismissed.

ORDER: The appeal is dismissed.