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FILE: SRC 02 234 51539 Office: TEXAS SERVICE CENTER Date: JUN 14 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

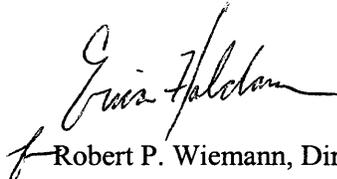
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The 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.

The petitioner claims that it is a subsidiary of Zebra Limited, located in Kenya. The petitioner operates a dry cleaning business and imports and distributes African garments. The U.S. entity was incorporated in the State of Florida on December 20, 1999 and claims to have four employees. Accordingly, in July 2002, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive for three years. The petitioner seeks to employ the beneficiary as the U.S. entity's president for a three year period.

On July 30, 2002, the director denied the petition. The director determined that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial capacity.

The petitioner subsequently appealed requesting that the director treat the appeal as a motion to reopen or reconsider. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review.

On appeal, the petitioner's counsel claims that the "decision of the director is contrary to the law and facts" and that "the beneficiary will be coming to the United States to act in an executive capacity."¹ Counsel submits a brief and additional evidence in support of the appeal.

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.

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.

¹ The AAO notes that the petitioner claims that the beneficiary is coming to the United States to act in an executive capacity; therefore, the AAO will adjudicate this petition on the basis of whether the beneficiary is acting in a primarily executive capacity rather than in a primarily managerial capacity.

(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 beneficiary will be employed in a primarily executive capacity. 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.

On July 30, 2002, the petitioner submitted Form I-129 with a cover letter from counsel. On Form I-129, the petitioner described the beneficiary's U.S. duties as the "[p]resident of the [U.S.] subsidiary business, which has invested in dry cleaners, and will be engaged in retail [and] wholesale of imported clothing." In the July 25, 2002 supporting letter, counsel stated that the foreign entity "wishes to transfer the beneficiary to the United States to act as [p]resident." In addition, the petitioner stated in a May 9, 2002 letter that the foreign entity would like to transfer the beneficiary to "take along with him his expertise and business skills to enable us to promote and establish our new company in the initial stages of growth." The petitioner indicated on Form I-129 that it currently had a staff of four employees, and expected to employ five to six employees by the end of 2002.

On September 20, 2002, the director requested additional evidence. Specifically, the director requested a list of the U.S. entity's employees with their job titles, and the two most recent Employer's Quarterly Federal Tax Returns to demonstrate that the employees were being paid.

In response, the petitioner submitted a list of the U.S. entity's employees, the two most recent Forms 941 Employer's Quarterly Federal Tax Returns, and the Florida Department of Revenue Employer's Quarterly Report. The petitioner indicated that it employed a manager for both of its dry cleaning businesses, a plant manager, and two pressers. Counsel also submitted a lease for an additional store

which would commence business on November 28, 2002 and employ at least two additional employees.

On July 2, 2002, the director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial capacity. The director stated that the petitioner had not demonstrated that the beneficiary will manage or direct the management of a department, subdivision, function, or component of the organization, or that he would supervise a staff of managerial, professional, or supervisory employees. The director also found that the majority of the beneficiary's work time would be spent on the non-managerial, day-to-day operation of the business.

On appeal, the petitioner's counsel claims, "the beneficiary will be coming to the United States to act in an executive capacity." Counsel also claims that the director "applied the wrong legal standard" because the director did not determine whether the beneficiary's position was executive in nature. Counsel describes the beneficiary's proposed executive duties:

[The beneficiary] will be coming to run a business that has three retail outlets and one pressing plant. The business currently has seven employees, and with [the beneficiary's] direction of the business, it will open up other locations and businesses, thus creating even more employment for [U.S.] workers.

* * *

It is clear that with the additional location, and the plans for future expansion, the beneficiary's services are required in order to direct the entire business operations. He clearly and definitely meets each of the four criteria to qualify as an executive. He will direct the management of the operation; he will establish the goals and policies of the organization; he will exercise wide latitude in discretionary decision-making; and he will receive only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization since he is the highest ranking executive as well as being a co-majority shareholder in the company.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a primarily executive capacity. The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner described the beneficiary's duties as "act[ing] as [p]resident" and "run[ning] a business." Based upon the petitioner's limited description, it is unclear whether the beneficiary's duties are those of an executive. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive 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).

In addition, the petitioner claims that the beneficiary will be coming to the “United States to act in an executive capacity” and “take along with him his expertise and business skills to enable [the petitioner] to promote and establish [its] new company in the initial states of growth.” However, the petitioner fails to identify how the beneficiary will specifically draw upon his expertise and knowledge to promote and establish the U.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)).

Further, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as “direct[ing] the management of the operation,” “establish[ing] the goals and policies of the organization,” “exercise[ing] wide latitude in discretionary decision-making,” and “receiv[ing] only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” However, 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; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). In sum, the petitioner’s description of the beneficiary’s proposed position does not allow the AAO to determine the actual duties the beneficiary will perform, such that they can be classified as managerial or executive in nature.

Counsel correctly states that an executive is not required by regulation to supervise managerial, professional or supervisory employees. However, the petitioner must still demonstrate that it employs a staff sufficient to relieve the beneficiary from performing non-qualifying operational duties so that the majority of his time may be devoted to the high-level responsibilities that are specified in the definition of “executive capacity.” As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization

A critical analysis of the nature of the petitioner’s business undermines counsel’s assertions that the beneficiary will perform only executive duties. At the time of filing, the petitioner was a two-year-old company that claimed to operate two retail dry cleaning stores and one dry cleaning plant. At the time of filing, the petitioner claimed to employ two store managers, a plant manager and two pressers who work in the plant. The petitioner describes both retail locations as fully staffed and operational, but it is not clear a store can operate with a single “manager” and no subordinate employees. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the retail stores. Based on the petitioner’s representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and the above-mentioned employees. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Moreover, the AAO notes that the petitioner indicated that it plans to hire additional employees in the future. On Form I-129, the petitioner stated that it currently employs four employees but expects to employ five to six employees by the end of the year. In addition, in a May 9, 2002 letter, the petitioner stated, "it is forecasted that the company will employ four to five employees." Finally, in an October 28, 2002 letter responding to the director's request for additional evidence, the petitioner stated that it recently entered into a lease for an additional store that will commence business on November 28, 2002 and will have "at least two employees, and possibly three." On appeal, counsel states that "the business currently has seven employees, and with [the beneficiary's] direction of the business, it will open up other locations and businesses. . . ." However, 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). At the time of filing, the petitioner had not reached the point that it can employ the beneficiary in a predominantly executive position.

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

The AAO notes that counsel requests approval for a one-year period to allow the beneficiary "to enter the United States, take over control of the company, and then furnish additional evidence at the end of the one year that the company has expanded to the point where a full-time executive would be required." However, 8 C.F.R. § 214.2(l)(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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Beyond the decision of the director, the AAO finds insufficient evidence to establish that the beneficiary has been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). As previously stated, to establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. *Id.* On review, the petitioner submitted a limited and vague description of the beneficiary's foreign duties. On Form I-129, the petitioner stated that the beneficiary has been working abroad since April 12, 1999 as the managing director. In addition, in a July 25, 2002 supporting letter, the petitioner stated that the beneficiary "has been responsible for all managerial aspects of the business including overseeing personnel matters, formulation and implementation of marketing and expansion strategies, finance, and other managerial and executive duties." Based upon the petitioner's overbroad description of the beneficiary's foreign duties, it is unclear exactly what duties the beneficiary actually performs for the foreign entity. Moreover, the May 9, 2002 letter is vague. For example, the petitioner claims that the beneficiary "plays a leading role in our company" and is "responsible for the supervision

of our internal departments.” 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)). In sum, the AAO is not persuaded that the beneficiary has been employed in a primarily managerial or executive capacity abroad. For this additional reason, the petition will not be approved.

Another issue beyond the decision of the director is whether the petitioner and foreign entity have a qualifying relationship. The AAO finds that the petition also may not be approved because there is insufficient evidence of a qualifying relationship between the petitioner and the Kenyan entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner claims that it is a subsidiary of the foreign entity. On Form I-129, the petitioner stated that “[t]he stock of the U.S. company is owned 51% by the Kenyan parent company, thereby creating a subsidiary relationship.” According to the petitioner’s amended articles of incorporation, [REDACTED] (the beneficiary) owns 51 percent of the U.S. entity’s shares, [REDACTED] owns 25 percent of the U.S. entity’s shares, a [REDACTED] owns 24 percent of the U.S. entity’s shares. However, according to the stock certificates, the foreign entity owns 51 percent of the U.S. entity’s shares. In addition, on appeal, counsel states that the beneficiary “is the highest ranking executive as well as being a co-majority shareholder in the company.” This conflicting information has not been resolved. 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 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 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 appeal will be dismissed.

ORDER: The appeal is dismissed.