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U.S. Citizenship
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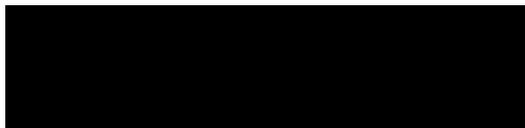


FILE: WAC 03 162 50514 OFFICE: CALIFORNIA SERVICE CENTER Date: MAY 11 2005

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 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 is a corporation organized in the State of California and claims to be a computer education service provider. The petitioner states that it is an affiliate of Innovative Training Works, Inc., located in the Philippines. 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 failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits a brief listing and explaining each of his objections.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulations at 8 C.F.R. § 214.2(l)(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.
- (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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) 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.

At issue in this proceeding is whether the petitioner has established that the beneficiary would be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i.) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii.) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii.) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv.) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i.) directs the management of the organization or a major component or function of the organization;
- (ii.) establishes the goals and policies of the organization, component, or function;
- (iii.) exercises wide latitude in discretionary decision-making; and
- (iv.) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner provided the following description of the beneficiary's job duties:

[The beneficiary] is responsible for managing company operations, including strategic and business planning, sales and marketing and distribution of the company's products in the United States. She is responsible for all product research and sourcing, supplier/source liaison and contract negotiation. [The beneficiary] coordinates planning, cost estimation, product distribution and management of development projects. She manages the financial affairs of the company, including budgeting, cost controls and capital expenditures and provide[s] leadership in creating new initiatives for [the petitioner] through application of management principles and effective administration of the annual and overall budget of the company. [She] directs the contractor/consultant meetings and oversees communications with U.S. suppliers, consultants, regulatory agencies and clients. The job duties of this senior management position require constant interface and liaison with the affiliate company in the Philippines in order to achieve the company's sales and marketing goals.

On July 28, 2003, Citizenship and Immigration Service (CIS) issued a request for additional evidence. The petitioner was asked to provide a more detailed description of the beneficiary's duties listing all employees under the beneficiary's control and assigning a percentage of time to each of the beneficiary's listed duty. The petitioner was also instructed to provide several of its quarterly wage reports.

The petitioner responded with the requested documents and information. The response included the following breakdown of the beneficiary's proposed duties in the United States:

- Establish worldwide distribution/sales channels, manage contract negotiations with potential vendors for licensing and distribution of [the petitioner] products and services . . . ; (30 percent);
- Coordinate distribution processes of company products and services to U.S. clients and direct meetings with suppliers, vendors and clients (20 percent);
- Oversee development of the company's research and development and identify potential new products and services for sale and distribution by [the petitioner] (15 percent).

- Manage annual budget and cost controls including capital acquisitions and meet with the consultants and regulatory entities regarding routine compliance under federal and state law including corporate maintenance, tax filings and employee reporting requirements (15 percent);
- Supervise planning and implementation of business and marketing plans for the [the petitioner] product and services for the U.S. market . . . (10 percent);
- Liaison with U.S. suppliers for [the petitioner] and its affiliate company . . . (10 percent); [sic]

The petitioner stated that the beneficiary does not currently have any employees under her supervision, but “anticipates hiring several employees in the near future.” The petitioner also submitted its quarterly wage and withholding reports for the first and second quarters of 2003, both of which indicate that the beneficiary was the petitioner’s only employee prior to and at the time the petition was filed.

On August 29, 2003 the director denied the petition concluding that the beneficiary was providing the petitioner’s services and therefore could not be deemed an L-1A manager or executive.

On appeal, counsel submits a brief asserting that the director’s consideration of the petitioner’s lack of staff was improper as this factor is not an accurate indicator as to the beneficiary’s day-to-day duties. Counsel states that small businesses, like the petitioner, benefit from the executive’s direct involvement in the daily operations. However, 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 petitioner has adequately illustrated the beneficiary’s high degree of discretionary authority, this factor alone does not determine that the beneficiary would be employed in a managerial or executive capacity. Rather, 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). In the instant case, while the petitioner has used words such as “manage,” “oversee,” and “supervise” in describing the beneficiary’s daily tasks, there is no evidence on record to indicate who or what the beneficiary would manage, oversee, or supervise, as the petitioner has readily admitted to having hired no staff aside from the beneficiary. Although counsel is correct in pointing out that the size of the petitioner’s staff cannot be the sole determining factor in deciding whether a beneficiary primarily performs qualifying tasks, the fact remains that 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). Thus, whether the petitioner has a support staff working directly for its organization or whether such individuals are hired on a contract basis, evidence must be provided to establish that someone other than the beneficiary is performing the daily operational tasks.

In the case at hand, the petitioner indicates that it plans to hire additional employees in the future. 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. Furthermore, 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). Therefore, the petitioner's business activity and the beneficiary's subsequent change of duties that may result after the filing of the petition are not probative of the petitioner's eligibility as of the filing date.

While counsel claims that the printing and distribution are outsourced to various vendors, the record lacks evidence, such as Forms 1099, to show that any miscellaneous income has been paid to any such vendors. 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). Furthermore, based on the petitioner's tax return for 2002 only \$1,160 worth of goods were sold. There is no indication of who did the selling as items 12 and 13 (page one) do not show that any money was paid for compensation of officers or salaries and wages of employees; nor did the petitioner indicate that it paid any additional labor costs in Schedule A item 4 of that tax return.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The petitioner is currently run entirely by the beneficiary. However, the fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. Rather, the beneficiary's list of duties suggests that at least 50% of her overall responsibilities will include coordinating distribution of the petitioner's product, establishing sales channels, and negotiating contracts. While these tasks are all crucial to the success of the petitioner's operation, they are not of a qualifying managerial or executive nature. Thus, the record indicates that a significant portion of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing nonqualifying duties. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that she operates at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States and abroad pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). Even though the essence of the petitioner's business is selling a product created abroad by the parent organization, the petitioner has not submitted any sales invoices to indicate that it has commenced doing business. Furthermore, as discussed above, the petitioner's 2002 tax return shows that the petitioner has sold only \$1,160 of its goods. This considerably small volume of sales suggests the petitioner has not been selling its product on a regular, continuous, and systematic basis. It is noted that 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). As such, due to the additional grounds discussed in this paragraph, this petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.