

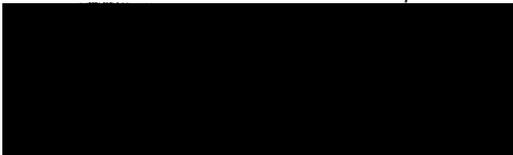
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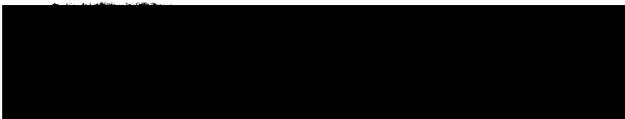


FILE: WAC 03 031 54509 Office: CALIFORNIA SERVICE CENTER Date: MAY 13 2005

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 is a new office operating as a jewelry retailer. It seeks to employ the beneficiary as operations manager, and filed a petition to classify the beneficiary 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 claims that it is the affiliate of the beneficiary's current foreign employer located in Bataan, Philippines.

The director denied the petition concluding that the petitioner has failed to establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner claims that the petitioner has a reasonable need for an employee who will perform in a management capacity, and that the beneficiary would be performing a management role within the company and would not be engaged primarily in day-to-day non-managerial duties. Counsel further asserts that the director failed to consider that the beneficiary qualifies for a management position requiring specialized knowledge of the company.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). 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. 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.

Moreover, pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The issue in this proceeding is whether the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity within one year of approval of the petition.

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 a letter dated November 6, 2002 submitted with the petition, the petitioner described the proposed duties of the beneficiary as operations manager of the U.S. entity as follows:

[The beneficiary] will be required to direct the management of the U.S. affiliate and establish corporate organizational goals and policies. She will exercise a wide latitude of discretionary decision-making. She will hire/fire personnel and have complete autonomy regarding personnel matters.

[The beneficiary] will formulate company financial and business goals and develop business strategies. She will develop marketing strategies to increase business, investigate new markets and act as a liaison with the home company. She will also be responsible for supervising the manager who will do the purchasing and ordering of the jewelry from foreign suppliers so as to meet with the market demands.

The petitioner also provided a proposed organizational chart for the U.S. entity, identifying the beneficiary as jewelry operations manager, subordinate to the general manager/owner. The chart also indicated that in addition to the beneficiary, the petitioner would employ a bookkeeper/accountant, an assistant store manager, three sales clerks, and a cashier.

In a notice dated November 20, 2002, the director requested, among other things, further evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. entity. Specifically, the director requested: (1) a more detailed description of the beneficiary's duties in the U.S. entity; (2) a description of the education and employment qualifications for the position in the U.S. entity, and evidence that the beneficiary meets the petitioner's requirements; (3) a list of all employees under the beneficiary's direction, including the job title and position description of each of those persons; and (4) a breakdown by percentage of time to be spent in each of the beneficiary's duties.

In a letter dated January 27, 2003 responding to the director's request, counsel for the petitioner provided the following description of the petitioner's duties in the United States:

[The beneficiary] will be responsible for developing, and modifying new policies and objectives of the US office, act as a Liaison between the foreign entity and the US entity on a need basis [sic]. She will hire and train a store manager who reviews inventory levels in conjunction with sales and purchase orders to ensure proper inventory levels available at all times. She will facilitate the supply and demand factor of products affecting the operations of the company. She will authorize orders of more stones, settings and finished jewelry. [She] will be representing the companies [sic] interests and will make connections at various jewelry trade shows where she will research new types of jewelry, contact jewelry vendors and pursue customers to ensure company awareness. She will deal with all publicity and advertising and enter the company into contracts with the magazines and other mediums. After the hiring of the US staff she will be responsible to [sic] review and approve major sales deals and finalize points of a transaction in which the store manager is unable to resolve.

She will also review employees [sic] work/sales figures, discussions and take meetings with store manager and sales managers regarding major business issues, and continued employee training [sic]. Correspond with the webmasters for the development of a company website. Ensure that all aspects of e-commerce are efficiently and effectively being utilized. Working with [the general manager] she will oversee and manage all financial budget and personnel salary operations as well as reviewing the company's financial position with the accountants. Finally the petitioner will determine if a full-time or a part-time jewelry repairer is necessary depending on demand, the progress of this situation will be addressed by [the beneficiary.]

Counsel further noted that "percentage of time is a little premature" at this time, and that petitioner will be able to provide a breakdown of the beneficiary's duties by percentage of time after twelve full months of operation. With respect to other employees for the U.S. entity, counsel stated in the same letter that the business is not yet at its target level of operation and is in the process of hiring staff. Counsel also indicated that the beneficiary would direct a store manager who would act as a liaison between the president and jewelry operations and direct the sales staff, cashiers, as well as the part/full time jewelry repairer. According to counsel, the beneficiary will hire and train the sales staff and associates, but she would not be directly supervising any of the day-to-day operations of their positions.

In denying the petition, the director concluded that it has not been established that the beneficiary will be employed in the United States in a managerial or executive capacity. The director found that based on the description of the company and the beneficiary's job duties, it is apparent that the beneficiary will be engaged in all aspects of the operation, including day-to-day non-managerial duties. Specifically, the director noted that the beneficiary's duties, as described, involve not only managerial duties, but also tasks relating to purchasing, sales, and quality control. Furthermore, the director found the evidence indicates that the U.S. entity intends to function with two to three persons in total.

On appeal, counsel for the petitioner asserts that despite its size, the petitioner has a reasonable need for an employee who will perform in a management capacity, and that the beneficiary would be performing a management role within the company and would not be engaged primarily in day-to-day non-managerial duties. Counsel further asserts that the director failed to consider that the beneficiary qualifies for a management position requiring specialized knowledge of the company.

On review, the AAO notes that the director failed to recognize that the beneficiary would be employed in a new office and therefore based his decision only on the regulation at 8 C.F.R. § 214.2(l)(3)(i) through (iv). Because the petitioner is a new office, the appropriate analysis is whether the U.S. entity, within one year of approval of the petition, would support the beneficiary in a primarily managerial or executive capacity. Based on the evidence presented, the AAO cannot conclude that the U.S. entity would support the beneficiary in a primarily managerial or executive capacity within one year of approval of the petition, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans, organizational structure, and size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

While the petitioner has described some managerial duties that would be performed by the beneficiary in the U.S. entity, the petitioner has not sufficiently established that within one year of approval of the petition the beneficiary's responsibilities would be in a primarily managerial or executive capacity. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial or executive in nature. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). As the director noted, the job descriptions provided by the petitioner indicated that the beneficiary will be involved in certain aspects of the day-to-day operations of the company, including purchasing, sales, quality control, public relations, advertising and marketing. These are tasks that are necessary to provide the services of the company. The AAO notes that, the petitioner failed to provide any projected breakdown by percentage of the amount of time the beneficiary would spend on each job duty, as requested by the director. Given that the tasks described above do not fall directly under traditional managerial duties as defined in the statute, without a breakdown of time to be spent on specific duties, the AAO cannot determine whether the beneficiary would be *primarily* performing the duties of a manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). 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).

Additionally, the record does not demonstrate that the beneficiary would be relieved from performing non-qualifying functions within the requisite one year of approval of the petition. The proposed organizational chart for the U.S. entity submitted with the initial petition showed that the U.S. staff would include a bookkeeper-accountant, an assistant store manager, three sales clerks, and a cashier. In response to the request for further evidence, the January 27, 2003 letter states that a store manager, sales staff and "associates," and a jewelry repairer will be hired. However, the petitioner did not indicate any dates by which the employees would be hired, or describe the duties to be performed by the proposed staff. Thus, absent

further evidence, the record does not establish that there would be additional staff to relieve the beneficiary from performing non-qualifying job duties to function in a primarily managerial or executive capacity within one year of approval of the petition.

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 a multinational manager or executive. *See* section 101(a)(44)(C), 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, the Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *Id.* However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The reasonable needs of the petitioner do 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)(A) and (B). As discussed above, the petitioner has not established this essential element of eligibility.

Based on the evidence presented, the AAO concludes that the record does not demonstrate that within one year of approval of the petition the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity.

Counsel also asserts on appeal that the director failed to consider whether the beneficiary qualifies for a management position requiring specialized knowledge of the company. Counsel's assertion is without merit in light of the fact that the petitioner is requesting classification as an L-1A nonimmigrant intracompany transferee, based on employment in a managerial or executive capacity, rather than an L-1B classification, based on employment involving specialized knowledge. *See* section 101(a)(15)(L) of the Act. In filing the petition, the petitioner did not request consideration based on the beneficiary's specialized knowledge, nor did the petitioner submit any evidence relevant thereto. The assertions of counsel on appeal 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).

Beyond the decision of the director, the evidence does not establish that the foreign entity employed the beneficiary in a primarily managerial capacity. In response to the director's request for further evidence, counsel provided the following description of the beneficiary's job duties in the foreign entity:

1. Prepares daily reports to inform the workers at each branch of overstocked items, pricing, what to look for, and any growing concerns as provided by local police. **10% of work week**
2. Responsible for the auditing of items sold and disposed of, versus the original stock, supply and demand, sales feasibility, identifying seasonal items, etc. **20% of work week**
3. Audits the total amount pawned for the day and the total amount redeemed for the day and compares them to the figures indicated in each receipt. Should there exist any discrepancies they are then dealt with immediately. **30% of work week**
4. Inspects the pawned articles as to their appraised value before sealing them for safe keeping. **20% of work week**

5. Decide on gray areas or disputes arising from the value of articles being pawned or sold. Set up and arrange and manage the auction sales of unredeemed articles. Assigns tasks and directs the jobs of the branch managers. Checks the delivery of jewelry from suppliers as to their quality, craftsmanship and cost. Negotiates new and renegotiates existing contracts with the suppliers. Report the sales figures directly to the president. **20% of work week**

The majority of the tasks listed above are those that are necessary to provide the foreign entity's service or product, and as such, cannot not be considered managerial or executive in nature. As previously noted, 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. at 604.

In addition, the evidence of record raises doubts as to whether the petitioner qualifies as a United States employer, as required under the regulation at 8 C.F.R. 214.2(l)(1)(ii)(G)(2). It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. The record reflects that the U.S. entity is a sole proprietorship, operated by a national of the Philippines. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual proprietor. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). If the petitioner, doing business as a sole proprietorship, is not a U.S. citizen, there is no U.S. entity to employ the beneficiary and therefore no qualifying organization. Insofar as the record does not clearly indicate the U.S. immigration status of the sole proprietor in question, the AAO is unable to determine whether the petitioner is indeed a United States employer, as required under the regulations.

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.