



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent identity information
in violation of personal privacy

PUBLIC COPY



D-7

File: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAY 19 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

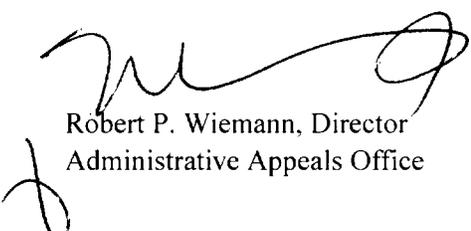
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 Operations Manager/General Manager 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 that designs and develops tradeshow materials. The petitioner claims that it is the subsidiary of [REDACTED], located in the Philippines. The beneficiary was initially granted L-1A status 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 did not establish that the beneficiary will be employed in the United States 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 asserts that the beneficiary will be employed in a primarily managerial and executive capacity. In support of this assertion, counsel submits a brief.

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 issue in the present 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 a letter submitted with the initial petition on August 25, 2003, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] will continue to direct and coordinate through supervisory personnel all activities concerned with production of company products or services, to achieve maximum operational efficiency and economy. He will be the individual responsible for planning and directing production activities, establishing priorities in keeping with effective operations and cost factors. He will confer with the President, Marketing/Sales Assistant and Operations Assistant to establish and develop marketing plans, production procedures and quality control standards. [The beneficiary] will also develop budgets and cost control for all operational activities according to our business plan.

[The beneficiary] will have the sole authority to hire and fire all supervisory personnel of the business. He will also institute training programs for staff and have the appropriate manager supervise such instruction.

When necessary, [the beneficiary] will negotiate, arrange and sign all contracts on behalf of the business in the USA. [The beneficiary] will report to the Board of Directors from time to time on the progress of the business.

In his managerial capacity with [the petitioner's] business, [the beneficiary] will have full control of the further direction of the corporation and will be responsible for decisions as regards to all of the aforementioned as well as the development and production plans extent and scope the corporation will continue to be involved in.

On October 12, 2003, the director requested additional evidence. In part, the director requested an organizational chart for the petitioner showing its managerial hierarchy and staffing levels, including the beneficiary's position and all subordinates under his supervision.

In a response dated January 6, 2004, in part the petitioner provided an organizational chart. The petitioner indicated that the beneficiary is the sole employee, and that his subordinates as shown in the chart are prospective employees.

On March 5, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director stated that, as the beneficiary is the petitioner's sole employee, it appears that he will be primarily engaged with non-qualifying, day-to-day functions of the petitioner. The director commented that "[t]he evidence has not established that the beneficiary supervises a subordinate staff of professional, managerial, or supervisory personnel who will relieve [him] from performing non-qualifying duties."

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a primarily managerial and executive capacity. Counsel further described the beneficiary's duties as follows:

- Planning, developing, establishing, and modifying new policies and objectives of the US office. Act as liaison between the foreign entity and the US entity on a need basis; (10%)
- Recruit, select, and train new employees and supervise managerial employees; (20%)
- To visit trade shows and research about newer types of materials and products for creating advertising materials; (15%)
- To review and approve major sales deals and finalize points of a transaction; (15%)
- Oversee and manage all financial budget and personnel salary operations as well as reviewing Company's financial position with the Company's accountants; (10%)
- Reviewing/allocating sales leads and following up on their progress with clients. Head sales expansion strategies; (15%)
- Conduct market research and forecast and plan and direct actual selling effort. (15%)

Counsel states that the "Beneficiary will not be charged with the manufacturing of the [petitioner's] products nor will he be providing actual installation services to the [petitioner's] customers." Counsel asserts that the beneficiary qualifies under the "two prong test" discussed by the Board of Immigration Appeals in *Matter of Church of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Specifically, counsel asserts that the beneficiary will have "substantial authority over the generalized policy of the company" and his duties will be "at the managerial level." Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga.

1988) and an unpublished AAO decision to stand for the proposition that the sole employee of a petitioner can be employed in a primarily managerial capacity. Counsel states that the director's decision lacked evidence to show that the beneficiary does not manage the petitioner.

Upon review, the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. 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(I)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. In the instant matter, counsel claims that the beneficiary qualifies for classification as both an executive and a manager. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity. *See* 8 C.F.R. § 214.2(I)(3)(ii).

The beneficiary's job description submitted with the initial petition refers to the beneficiary's duties with respect to subordinate employees. For example, the petitioner states that "[the beneficiary] will continue to direct and coordinate through supervisory personnel all activities concerned with production of company products or services," and he will "institute training programs for staff and have the appropriate manager supervise such instruction." However, as the beneficiary is the sole employee of the petitioner, it is evident that the job description refers to the beneficiary's duties as anticipated at an unknown future date, at such time that the petitioner hires additional staff members. 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). The fact that the petitioner intends to hire additional workers is not probative of its eligibility as of the date of filing. The petitioner must show that the beneficiary's duties will be primarily managerial or executive as of the date of filing the petition. As presented, it appears that the initial job description describes the beneficiary's anticipated duties at a later date, and is not an accurate account of the beneficiary's present tasks. Thus, the initial job description is insufficient to show the beneficiary's true and current employment capacity.

On appeal, counsel provides an account of the beneficiary's duties with a breakdown of the percentage of time he will devote to each task. Counsel states that the beneficiary will spend 20 percent of his time to "[r]ecruit, select, and train new employees and supervise managerial employees." Yet, the petitioner has not indicated that it intends to immediately hire new staff, such that recruiting and selecting employees is a present duty of the beneficiary. As the beneficiary is the sole employee, training and supervising managerial employees is not an actual task of the beneficiary. Counsel provides that the beneficiary will devote 15 percent of his time "[t]o visit trade shows and research about newer types of materials and products for creating advertising materials," yet without further explanation it is not possible to determine whether these are managerial or executive tasks. Counsel states that the beneficiary will devote a combined 30 percent of his time to "[r]eviewing/allocating sales leads and following up on their progress with clients [and heading] sales expansion strategies," and to "[c]onduct market research and forecast and plan and direct [the petitioner's] actual selling effort." Yet, these appear to be non-qualifying sales tasks, particularly considering that the beneficiary is the only employee available to make sales calls and contact prospective and existing clients. Accordingly, while the beneficiary

will have some managerial and executive duties, as much as 65 percent of his time has not been shown to be devoted to qualifying tasks.

Counsel claims that the beneficiary qualifies as a manager under the reasoning in *Matter of Church of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Yet, as discussed above, the petitioner has failed to establish that the majority of the beneficiary's duties will be managerial or executive tasks.

Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988) and an unpublished AAO decision to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. It is noted that *Mars Jewelers, Inc. v. INS* relates to an immigrant visa petition, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, *Mars Jewelers, Inc. v. INS* is distinguishable based on the applicable regulations. See 8 C.F.R. § 214.2(l)(14)(ii). Additionally, regarding *Mars Jewelers, Inc. v. INS*, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Regarding the unpublished AAO 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.

Yet, counsel correctly observes that a company's size alone 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). 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 instant matter, the petitioner has not established that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Counsel states that the director's decision lacked evidence to show that the beneficiary does not manage the petitioner. However, 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. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 103.3(a)(1)(i). In this case, the director has discussed the deficiencies in the petitioner's evidence and

adequately explained how he arrived at his decision to deny the petition. Counsel's argument is not persuasive.

The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The regulation at 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 established that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). For this reason, the appeal will be dismissed.

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.