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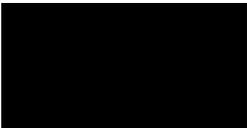
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File: SRC 02 179 50227 Office: TEXAS SERVICE CENTER Date: SEP 14 2005

IN RE: Petitioner:
Beneficiary:



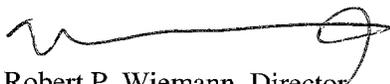
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Texas Service Center, denied the petition for a nonimmigrant visa. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. Counsel for the petitioner has submitted evidence to establish that she timely filed a brief in support of its appeal. Accordingly, the appeal was improperly summarily dismissed. The AAO will reopen the matter in order to consider counsel's brief and issue a new decision. The appeal will be dismissed.

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 Texas that claims to be engaged in investment and retail sales. The petitioner claims that it is the subsidiary of Goyal Industries located in Bahadurpura, India. 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 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 director applied an incorrect standard and erroneously based her decision upon size of the U.S. company and the small number of employees. Counsel contends that the beneficiary is a "function manager" and states that the petitioner is not required under current regulations to prove that the beneficiary does not "directly perform" the function he manages. Counsel submits a brief in support of the appeal.

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 primary 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 May 17, 2002 letter appended to the initial petition, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] currently serves as the President of [the petitioner.] As such, [the beneficiary] is the primary officer responsible for the creation, implementation and monitoring of all operations for [the petitioner] as well as for planning and implementing the expansion of our business. Under his supervision, [the petitioner] has purchased a retail business in Atlanta, and [the beneficiary] continues to explore business opportunities and investments for the company. [The beneficiary] supervises approximately 3 employees, including the General Manager of the retail business. In addition, he formulates company policies and oversees our overall financial administration. [The beneficiary] has the authority to negotiate and enter into contracts on behalf of the company, hire employees, direct their training, dismiss employees, and oversee domestic distribution systems. He is granted broad discretion over the day to day operations of [the petitioner.]

The petitioner indicated on Form I-129 that it employs four workers. The petitioner indicated in its letter that the company maintains headquarters in Longview, Texas, and operates a "full-range, budget-priced retail store" located in Georgia, which was purchased during the first year of operations. In support of the petition, the petitioner submitted its Form 941, Employer's Quarter Federal Tax Return, and its Georgia Form G-7, Quarterly Return for Quarterly Filers, for the first quarter of 2002. These documents indicate that the petitioner employed three individuals as of March 2002. In addition, the petitioner submitted its 2001 Form

1120, U.S. Corporation Income Tax Return, on which it reported \$27,000 in gross receipts for the year, no salaries, no inventory, no investments and no assets.

On September 27, 2002, the director issued a request for additional evidence asking the petitioner to provide the names and job titles of the company's four workers.

In a response dated November 26, 2002, the petitioner's contracted tax practitioner/accountant provided the following information regarding the petitioner's staffing:

[The beneficiary]	CEO
Cindy Shelton	Store Manager
Amy Sue Davis	Cashier
Kathy Shoemaker	Bookkeeper

On December 31, 2002, the director denied the petition. The director determined that the beneficiary would not serve in a primarily managerial or executive capacity under the extended petition. Specifically, the director noted that the petitioner had not established that the beneficiary manages or directs the management of a department, subdivision, function or component of the organization, or that he will supervise the work of other supervisory, professional or managerial employees. The director concluded that the petitioner's organization had not expanded to the point where it required a bona fide full-time president, and that the beneficiary would devote the majority of his time to non-executive, day-to-day operations of the business.

On appeal, counsel for the petitioner asserts that the director's decision "is based upon an unsupported legal conclusion that is contrary to statute and regulation." Counsel states that the director incorrectly based her decision solely on the number of employees in the company. Counsel further asserts that the evidence submitted clearly establishes that the beneficiary qualifies as a "function manager," and contends that the director erroneously required that the petitioner demonstrate that other employees in fact directly perform the function managed by the beneficiary. Counsel claims that the "essential function" managed by the beneficiary is "the operation of the United States subsidiary" and the fact that the beneficiary "has few subordinates is immaterial, as is their 'supervisory, professional or managerial' status or the impression that they may not be demonstrated as sufficient to 'relieve' him from primarily performing the services of the U.S. subsidiary." Counsel concludes that the beneficiary qualifies as the "executive and manager of an essential function" and that the petitioner's staffing levels are reasonable given the needs of the organization.

Upon review, counsel's assertions are not persuasive. 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). 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.*

In this case, the petitioner's description of the beneficiary's job duties is vague and does not establish what tasks he will perform on a daily basis. For example, the petitioner states that the beneficiary will be responsible for "planning and implementing the expansion of our business" and "explore business

opportunities and investments for the company.” However, the petitioner fails to identify any managerial or executive tasks associated with these broad responsibilities. Without additional explanation, and absent evidence that the petitioner is actively engaged in investment activities, the AAO cannot determine whether the beneficiary is doing anything more than performing market research, which is not traditionally a managerial or executive duty. Similarly, the petitioner does not clarify what specific managerial or executive tasks the beneficiary performs to “oversee domestic distribution systems,” particularly since the petitioner does not claim to be engaged in distribution of goods other than retail sale of goods from its discount store. The petitioner further states that the beneficiary has the authority to negotiate and enter into contracts on behalf of the company, but provides no examples which would demonstrate that this duty rises above the level of signing routine sales contracts or contracts with vendors and suppliers. 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). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job description does not allow the AAO to determine the actual tasks that the beneficiary performs, such that they can be classified as managerial or executive in nature.

The petitioner further states that the beneficiary “is granted broad discretion over the day to day operations” and “formulates company policies.” These statements borrow liberally from the definition of executive capacity and do not convey an understanding of the beneficiary's daily duties. 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.). The beneficiary's job description does not allow the AAO to determine his actual duties, such that the AAO can determine whether they are managerial or executive in nature.

Counsel correctly observed that CIS may not base a determination of the beneficiary's eligibility for managerial or executive capacity solely on the size of the petitioning company. 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 claimed to maintain a headquarters office in Texas and a retail store in Georgia, with a total of four employees. The petitioner claimed that the beneficiary works in the Texas office, and the petitioner's Georgia Form G-7 Quarterly Return indicates that the petitioner's other three employees were working in Georgia. In response to the director's request for evidence, the petitioner claimed that its

three employees served in the position of store manager, cashier and bookkeeper. Only one of these employees, the individual identified as the “store manager” was included on the most recent Form G-7 at the time of filing. The only address listed on many of the petitioner’s tax documents is a residential address in Georgia, rather than the company’s purported Texas headquarters. The record does not contain the address for the retail store, much less evidence that the petitioner purchased the store or obtained a lease or deed for its premises. The only other address indicated for the store is the address of the petitioner’s contracted accountant. Based on the evidence on record, the AAO cannot determine with any certainty where the beneficiary is working, when/if the petitioner actually acquired a retail store, or the job titles and duties of the petitioner’s subordinates at the time of filing. If the beneficiary was indeed working in Texas, it is evident that he was the only employee in the office and by necessity would have been responsible for all administrative and clerical work, as well as market research and other mundane tasks associated with the petitioner’s investment business. An employee who primarily performs the tasks necessary to produce a product or 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).

Furthermore, although the petitioner indicated that the beneficiary works at its Texas headquarters, the beneficiary’s job description suggests that he is directly involved in the retail business, as the petitioner indicates that he supervises and trains the store’s employees. If the beneficiary is in fact working at the petitioner’s store, the petitioner has not established that a store manager and one cashier are sufficient to relieve the beneficiary from performing non-qualifying duties associated with operating a store, including tracking and ordering inventory and directly supervising employees engaged in sales and customer service.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While the beneficiary in this case likely performs some managerial or executive duties in overseeing the petitioner’s operations, the petitioner’s vague description of the beneficiary’s duties, its business operations, and its staffing levels precludes the AAO from finding that the beneficiary is performing primarily managerial or executive duties.

Additionally, counsel observes that Congress omitted the language that discussed individuals who produce a product or provide a service from the Immigration Act of 1990 and asserts that this is a clear indicator that such individuals are not precluded from qualifying as multinational managers or executives. However, the AAO will not draw this conclusion based solely on an omission. Counsel does not reference a preexisting precedent decision that discussed individuals that are engaged in the production of a product or service. That precedent clearly states that an employee who primarily performs the tasks necessary to produce a product or to provide a service is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual “primarily” perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word “primarily” is defined as “at first,” “principally,” or “chiefly.” *Webster’s II New*

College Dictionary 877 (2001). Where an individual is “principally” or “chiefly” performing the tasks necessary to produce a product or to provide a service, that individual cannot also “principally” or “chiefly” perform managerial or executive duties. Counsel submits no evidence in the form of congressional reports, case law, or other documentation to support his argument. Accordingly, counsel’s unsupported assertions are not persuasive on this point.

Finally, the AAO acknowledges counsel’s assertion on appeal that the beneficiary will serve as an executive or manager of an “essential function.” The term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an “essential function” within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary’s daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary’s daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Again, 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 this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. Counsel’s unsubstantiated statement that “the operation of the United States subsidiary is clearly an ‘essential function’” is not persuasive. 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).

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to expand its operations in the future. 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). Furthermore, as noted above, 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.

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

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 for the entire year prior to filing the petition to extend the beneficiary’s status. The petitioner submitted copies of sales and use tax returns suggesting that it has been selling its goods on a regular basis. The earliest

invoice documenting the sale of the petitioner's goods dates back to January 2002. However, the new office petition was approved in August 2001. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business from August through December of 2001. For this additional reason, the petition may not be approved.

In addition, the record reflects that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's authorized period of stay expired on May 19, 2002. However, the petition for an extension of the beneficiary's L-1A status was filed on May 20, 2002, one day following the expiration of the beneficiary's status. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed, it is noted for the record that the beneficiary is ineligible for an extension of stay in the United States.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.