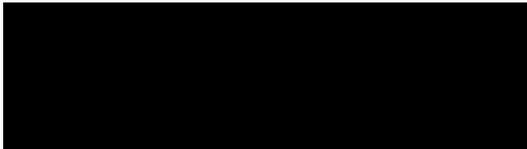




U.S. Citizenship
and Immigration
Services

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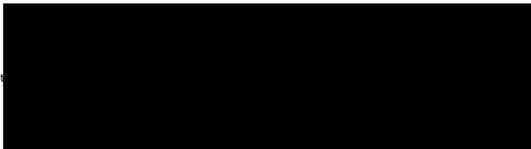
File: WAC 03 108 50558 Office: CALIFORNIA SERVICE CENTER Date: **SEP 21 2005**

IN RE: Petitioner:
Beneficiary:



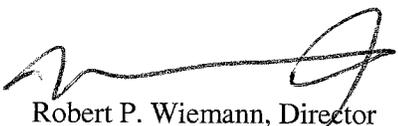
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 that is engaged in the import, export and retail sale of furniture, exotic crystals, ornaments and crafts. The petitioner claims that it is the branch office¹ of [REDACTED] located in Paranaque City, Philippines. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and was subsequently granted a two-year extension of stay. The petitioner now seeks to extend the beneficiary's status for an additional three years.

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 disputes the director's findings and asserts that the director incorrectly applied the law defining the terms "managerial" and "executive" capacity to this case and that the beneficiary meets the requirements of both statutory definitions. 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.

¹ The AAO notes that the U.S. entity does not qualify as a branch office of the foreign entity as defined in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(J). However, it does appear that there is a qualifying parent-subsidiary relationship between the two entities, as the foreign entity owns 60% of the U.S. entity. See 8 C.F.R. § 214.2(l)(ii)(K).

- (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 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 the initial petition, the petitioner described the beneficiary's job duties as follows:

Develops long range goals and objectives; plans, develops and establishes policies and objectives; review activity reports and financial statements to determine progress and status in attaining current conditions. Will also direct and coordinate formulation of financial programs to provide funding for new or conducting operations to maximize returns and productivity.

In a letter dated February 15, 2003, submitted with the petition, the petitioner provided the following description:

[The beneficiary] will continue to serve as President of the US Company and will be responsible for the overall management of the existing and future expansion of the company. She will make all corporate decisions regarding the efficient and effective operation of the company. She has already shown that she has the executive abilities to make our new venture very successful.

On Form I-129, the petitioner indicated that it employed four individuals at the time of filing. The petitioner also noted in its letter that it had opened a second retail store in 2001, but subsequently closed it due to the economic downturn following September 11, 2001.

On April 22, 2003, the director requested additional evidence to establish that the foreign entity was doing business during the year preceding the filing of the instant petition, and to establish that the beneficiary is employed in a managerial or executive capacity. Specifically, the director requested that the petitioner submit (1) the foreign company's payroll records and annual report; (2) an organizational chart for the petitioner showing all employees under the beneficiary's supervision by name and job title, and including a description of their job duties, educational qualifications, annual salaries and immigration status; (3) a more detailed description of the beneficiary's duties in the U.S.; (4) California Employment Development Department (EDD) Forms DE-6, Quarterly Wage Reports, for the last four quarters; and (5) signed and certified copies of the petitioner's Federal income taxes, including Form 1120 with all required schedules and statements, for the year 2002.

On July 14, 2003, the petitioner submitted a response to the request for evidence, which included the following documents: (1) the foreign company's financial statements for 2002, a list of the foreign company's employees, and its payroll records for January 2001 to January 2002; (2) the U.S. company's organizational chart, which shows two employees, the beneficiary and another employee whose position is described as "LAPR/Sales"; (3) Forms DE-6 for the last four quarters, along with both employees' W-2 forms for 2002; (4) the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return; and (4) the following description of the beneficiary's job duties:

Plans, develops and establishes policies and objectives of business organization. Coordinates sales by establishing goals concerning sales and advertising techniques. Plans business

objectives to develop organizational policies. Reviews market analyses to determine customer needs, volume potential, price schedules, and discount rates, and develops sales campaigns to accommodate goals of the company. Directs and coordinates formulation of financial programs to provide funding for new or continued operations to maximize returns on investments, and to increase sales. Evaluates performance of employees for compliance with established policies and objectives of firm and contributions in obtaining objectives.

On December 19, 2003, the director denied the petition. The director determined that the beneficiary would not be employed in a primarily managerial or executive capacity, but rather "has been and/or will be performing many aspects of the day-to-day operations of the business." In his decision, the director also noted the absence of a comprehensive job description for the beneficiary's position.²

On appeal, counsel for the petitioner asserts that the director incorrectly applied the statutory definitions of manager and executive to the facts of this case and contends that the beneficiary's position qualifies under both definitions. Counsel also notes that Citizenship and Immigration Services (CIS) approved two prior petitions based on the same facts and circumstances, and the director failed to identify any change in the law or regulations applicable to the definition of "managerial" or "executive" capacity, or any change in the standards or criteria used in applying these definitions. Counsel argues that CIS is therefore "estopped from denying the pending Petition extension," based on its previous affirmative adjudications and the petitioner's reliance upon them in proceeding with continued investments and planning for the U.S. market.

Upon reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or will be employed in a 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(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 must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager since it is representing that the beneficiary is both an executive and a manager. A petitioner cannot claim that the beneficiary is employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Further, 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).

As noted by the director, 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 states that the beneficiary's duties include "reviewing marketing analyses," "directing and coordinating

² The AAO notes a factual error in the director's decision with respect to the U.S. organizational chart. The director notes that the chart shows the positions of VP Finance, Secretary Treasurer, General Manager, Marketing Manager, Sales Representative and two drivers. These job titles, in fact, refer to the employees of the foreign company. The U.S. organizational chart submitted depicts only the beneficiary as president, and an employee responsible for "LAPR/Sales."

formulation of financial programs,” “developing sales campaigns” and “planning, developing and establishing policies and objectives.” The petitioner did not, however, define the beneficiary’s policies or objectives or clarify who actually performs routine day-to-day duties related to the marketing, sales and financial functions. 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)). 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). Rather than submit a specific, detailed job description of the beneficiary’s actual duties, as specifically requested by the director, the petitioner instead appears to have combined the generic job descriptions for “President” and “Sales Manager” provided in the *Dictionary of Occupational Titles*, as evidenced by excerpts of this publication which were submitted, perhaps inadvertently, with the petitioner’s response to the request for evidence. However, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co. Ltd. v. Sava*, 724 F. Supp. at 1108. In this case, the record suggests that the beneficiary’s actual duties are not primarily those described in the petitioner’s vague job descriptions.

In addition, rather than providing a specific description of the beneficiary’s actual job duties, 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 “planning, developing and establishing the policies and objectives of the organization,” “making all corporate decisions,” and being responsible for “overall management” of the company. However, conclusory assertions regarding the beneficiary’s employment capacity are not sufficient to meet 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.).

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional or managerial. See section 101(a)(44)(A)(ii) of the Act. Although the petitioner stated on Form I-129 that the petitioner employed four individuals, the company’s payroll records establish that the company employs only the beneficiary and an employee responsible for “LAPR/Sales.”

Though requested by the director, the petitioner did not provide a meaningful job title for the employee, a job description, or the level of education required to perform the duties of its “LAPR/Sales” employee. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not established that this employee possesses or requires an advanced degree, such that she could be classified as a professional. Nor has the petitioner shown that this employee supervises a subordinate staff or manages a clearly defined department or function of the petitioner, such that she could be classified as a manager or supervisor. Thus, the petitioner has not established that the beneficiary’s sole subordinate is employed in a supervisory, professional or managerial capacity, as required by section 101(a)(44)(A)(ii) of the Act. In addition, the petitioner has also not explained why it indicated that it employs four employees on the petition when it clearly only employed two individuals during the fourteen months preceding the filing of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to 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). Furthermore, doubt cast on any aspect of

the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Although the beneficiary is described as performing exclusively managerial and executive-level duties, it is evident that many of the duties performed by the beneficiary, by necessity, would be non-qualifying in nature. It has been noted in the record that there are only two employees, including the beneficiary, working for the petitioner, which operates a retail store in a 2500 square foot location. The other employee is apparently involved in sales, but her duties have not been described. There is no mention of who is responsible for maintaining inventory, stocking and displaying the store's merchandise, warehouse activities, operating cash registers, delivery of furniture purchased from the store, assisting customers with questions or problems, marketing and advertising the store, maintaining financial records and documentation, etc. However, a relatively large retail store would reasonably require at least two people on its premises during business hours to perform these routine operational duties. The beneficiary is described as "managing, directing and coordinating" the company's marketing, sales and finance functions, but there is no record of any employees actually performing the day-to-day activities associated with these functions. Collectively, this brings into question how much of the beneficiary's time can actually be devoted to the managerial and executive duties vaguely described by the petitioner. As stated in the statute, the beneficiary must be *primarily* performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the act. Furthermore the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

Based on the record of proceeding and the preceding discussion, it can be concluded that the beneficiary's job duties are principally composed of non-qualifying duties associated with the daily operations of a retail store, which preclude her from functioning in a primarily managerial or executive role. 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). The petitioner indicates that it plans to open a second store and hire additional employees 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).

While the AAO recognizes that the beneficiary may exercise considerable decision-making authority with respect to the petitioner's business, 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. The record indicates that a preponderance of the beneficiary's duties have been and will be non-qualifying, in that she 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 him from performing non-qualifying duties. The petitioner has not demonstrated that it currently maintains the organizational complexity that the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed by the beneficiary 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 appeal will be dismissed.

On appeal counsel for the petitioner noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). The prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Although a service center director approved previous nonimmigrant petitions on behalf of the beneficiary, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Finally, on appeal counsel contends the "Petitioner believes that the Service is estopped from denying the pending Petition extension of the L-1A status based on the two prior affirmative adjudications of similar petitions." The Administrative Appeals Office, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the Administrative Appeals Office is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See DHS Delegation Number 0150.1* (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's equitable estoppel claim.

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.