

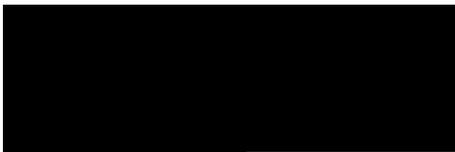
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D7



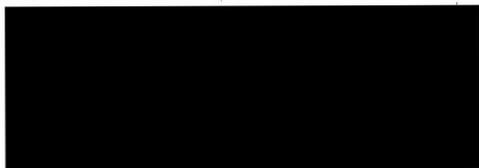
File: LIN-04-040-50628 Office: NEBRASKA SERVICE CENTER Date: JUL 17 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 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 limited liability corporation organized under the laws of the State of Wisconsin and claims to be engaged in network telecommunications. The petitioner claims that it is the subsidiary of [REDACTED] located in Istanbul, Turkey. 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, reasoning that the beneficiary was not managing professional, supervisory, or managerial personnel and that the petitioner had not established the beneficiary would be managing a function, department, or component of the petitioner.

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's conclusion was in error. In support of this assertion, the petitioner submits a brief and additional evidence.

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.

In its letter dated November 23, 2003, the petitioner suggests that the present petition should be adjudicated under the regulations governing new offices, provided in 8 C.F.R. § 214.2(l)(3)(v). However this appears to be language used in the petitioner's initial L-1A petition filed on behalf of the beneficiary that was simply not updated or amended. This appears to be the case for the following reasons: (1) the same page of the letter also claims the beneficiary is in B-1 status, when he had already changed status to and was present in the United States in L-1A classification as of the date of the letter, and (2) the petitioner indicated on the Form I-129 that it was not a new office. Even assuming *arguendo* that the petitioner is still requesting to be treated as a new office, counsel takes issue with the director's application of the regulatory requirements for new office extensions as provided in 8 C.F.R. § 214.2(l)(14)(ii). If a beneficiary is coming to the United States to open a new office, the petition may only be approved for a period "not to exceed one year." 8 C.F.R. § 214.2(l)(7)(i)(3). Any request for an extension of a petition that was originally approved as a new office is a petition that involved the opening of a new office and is subject to the criteria set forth at 8 C.F.R. § 214.2(l)(14)(ii).

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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first 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:

The beneficiary has founded the business in the United States and continues to be in full charge of all policy and decision-making. He has contracted with independent and general contractors in order to receive job orders. In addition, he has managed and overseen the installation of its telephone systems, security systems and other network systems in order to assure that the petitioner's customers receive service and products of the upmost quality.

On February 4, 2004, the director requested additional evidence. Specifically, the director requested evidence establishing the criteria required by 8 C.F.R. § 214.2(l)(14)(ii).

In response, the petitioner submitted additional documentation and described the beneficiary's prior and future duties as:

The beneficiary, in the previous year, has performed many managerial duties which have been essential in the expansion of the petitioner's business. To begin with, the beneficiary planned, budgeted and made the financial decision to invest in two new ventures, which include the rental of two premises in two separate malls for the sale of jewelry, accessories and toys, as evidenced by the rental agreements. The beneficiary's duties as a result thereof included negotiating with wholesalers in order to find the most economical products without jeopardizing, contracting with independent and general contractors in order to receive job orders. In addition, the beneficiary managed and oversaw the installation of its telephone systems, security systems and other network systems in order to assure that the petitioner's customers received service and products of the upmost quality. The beneficiary was also in full charge of hiring and firing employees. Under the extended period, the beneficiary will continue to perform many of the same functions and duties as performed to date. However, in the extended period, the beneficiary will place more emphasis in the expansion of its retail sale of jewelry, accessories and toys by funding the opening of a retail store outside the mall.

On July 22, 2004, the director denied the petition. The director determined that the petitioner had failed to establish the beneficiary would be employed primarily in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's decision was in error.

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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

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).

The initial description is vague and fails to adequately articulate the beneficiary's activities for the prior year. The duties listed for the prior year have not been demonstrated to constitute managerial or executive duties, and the basis for the petitioner's claim that the beneficiary's duties qualify as managerial or executive in capacity is not clear. As an example, the petitioner fails to identify the subject of the beneficiary's overseeing of the phone installations and security installations, etc. Was the petitioner intending to say the beneficiary

has been overseeing the installation of phone systems of customers or of the petitioner itself? If the former, the record does not contain any supporting documentary evidence that the petitioner installed any phone systems for clients, and if it is the latter then the amount of time spent installing the petitioner's phone systems would not constitute being employed primarily in a managerial or executive capacity. The AAO cannot presume or construct assertions on behalf of a petitioner, and can not extrapolate facts from evidentiary submissions where their relevance has not been made clear. The petitioner has the burden of proving eligibility in these proceedings. This burden includes clearly articulating assertions and associating those assertions with relevant, probative evidentiary submissions.

The petitioner has cited an interoffice memo by Associate Commissioner [REDACTED]. First, this memorandum merely reminds officers to apply the statutory and regulatory definition of managerial capacity when adjudicating L-1 or E1-3 petitions. There is no evidence in this matter that the director has not complied with this legal requirement. Second, internal memos are meant for guidance only and do not constitute any form of rulemaking or vest any claims or rights with petitioners. Such memos may also not be interpreted in such a manner as to circumvent the plain meaning of statutes or regulations. The petitioner must establish eligibility for a requested benefit. 8 C.F.R. § 103.2(b)(1). The Service has responsibility for determining whether the alien is eligible for admission and whether the petitioner is a qualifying organization. 8 C.F.R. § 214.2(l)(1)(i). The service, in its discretion, may determine the weight and sufficiency of submitted evidence and must base its decision on the record. If the record fails to contain any evidence on a particular issue then a favorable decision on that issue would not be based on the record. Thus, citing an interoffice memo when the record does not contain evidence of eligibility is not persuasive.

The only evidence submitted in response to the director's request for a description of the beneficiary's prior and proposed duties is a brief and vague statement by the petitioner. The description is inadequate and is not a detailed description as required by 8 C.F.R. § 214.2(l)(3). However, it is the petitioner's failure to document its assertions which is most fatal to the petition. 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)). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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, *aff'd*, 905 F. 2d 41; *Ayyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). In this case the primary deficiency in the petition is the petitioner's failure to submit probative documentary evidence supporting assertions that the petitioner is eligible for this benefit.

The description provided in response to the director's request for evidence (RFE) fails to elaborate significantly on the initial description. The petitioner also fails to demonstrate that the duties described therein are managerial in capacity. The description repeats the confusing statement with regard to installing phone and security systems. Activities such as selecting jewelry to sell or "negotiating with wholesalers"

have not been demonstrated to constitute a managerial activity. Further, the description demonstrates that the beneficiary was actually performing the duties listed as opposed to managing them. The record does not contain any corroborating evidence that the activities described actually occurred. While the record does contain evidence that two small jewelry kiosks were acquired, this is not probative as to the nature of the beneficiary's employment capacity. Moreover, asserting that the beneficiary's duties "included negotiating with wholesalers in order to find the most economical products without jeopardizing, contracting with independent and general contractors in order to receive job orders" indicates that he is performing tasks necessary to provide a service or product, and these duties will not be considered managerial or executive in nature. 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).

On appeal, counsel for the petitioner makes conclusory assertions that the beneficiary is eligible for this classification. However, the record does not provide support for counsel's conclusions. As an example, the petitioner has asserted that it has three employees and three business locations, two of which are jewelry kiosks in malls. Running a jewelry kiosk in a mall is a labor-intensive operation, and would require the presence of at least one sales associate for all regular business hours. This leaves one employee, presumably the beneficiary, to work at the telecommunications location. In addition to not submitting any probative evidence that any telecommunications services are being provided, it is not credible to assert that one employee can perform the routine activities necessary to provide the product and service and still act primarily in a managerial or executive capacity.

This classification is not based on a legal fiction or characterization, the petitioner must demonstrate that the beneficiary will *actually* be employed primarily in a managerial or executive capacity. The director's decision must be based on the record. The petitioner has the burden to establish eligibility through the submission of probative documentary evidence. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). As constituted, the record does not support that the petitioner is engaged in network communications or that the beneficiary is employed in a primarily managerial or executive capacity. Thus a favorable decision on the issue of being employed in a managerial or executive capacity could not be made based on the record.

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 hire additional managers and 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). Furthermore, 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 Citizenship and Immigration Services (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 managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the second issue in this proceeding is whether the foreign organization and petitioner have a qualifying relationship. A qualifying organization means a United States or foreign firm, corporation or other legal entity that:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L).

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

Documentation submitted as evidence of a qualifying relationship includes a letter from the beneficiary stating he is the one authorized to direct the foreign organization. Such evidence is not objective and independent and will not be afforded significant weight in these proceedings. The petitioner must submit competent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner also submitted tax documentation. The tax form submitted merely shows that the petitioner is owned by the beneficiary, however, and is not sufficient to demonstrate a qualifying relationship. The fact that the beneficiary owns the petitioner raises a question about the temporary nature of the beneficiary's stay. More importantly, however, this evidence contradicts the claims in both the Form I-129 and in the petitioner's letter dated November 24, 2003 that the foreign entity owns the petitioner and that the petitioner is thereby its subsidiary, not its affiliate. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Therefore, the petitioner has failed to show by a preponderance of the evidence that a qualifying relationship exists between itself and the foreign entity.

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 and the petition hereby denied.