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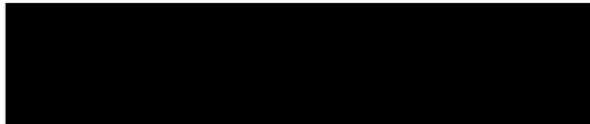
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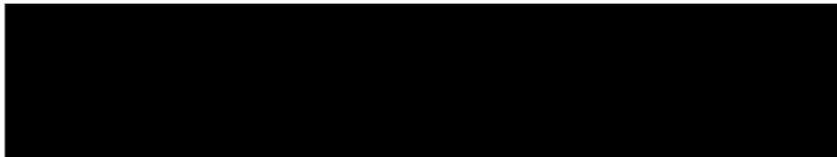
File: WAC 04 212 50373 Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2006

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, 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 wholesale of home appliances. The petitioner claims that it is the subsidiary of [REDACTED], located in Guangdong, China. 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 for an additional three years.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the U.S. petitioner was doing business as required by the regulations.

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 petitioner did in fact provide sufficient evidence to demonstrate that the beneficiary was employed in a qualifying managerial or executive position, and that the petitioner was currently expanding and developing in the U.S. market. In support of this assertion, counsel 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.

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 a letter of support dated July 22, 2004, the petitioner described the beneficiary's duties as follows:

[The beneficiary] has been in charge of the overall management of [the petitioner], including strategic planning, formulating and implementing policies, recruiting, evaluating, and terminating all personnel at [the petitioner]. [The beneficiary] enjoys significant discretion in day to day business management of [the petitioner] and reports directly to the CEO at [the foreign entity] in China.

As part of her executive powers, [the beneficiary] has retained a CPA firm to generate financial reports and a corporate counsel to ensure the new company's operation is in compliance with California law. [The beneficiary] has full discretion to advertise available positions, to interview and hire personnel, to negotiate compensation with potential employees, to evaluate employees' performance, and, if necessary, to terminate employment. [The beneficiary] is presently considering the necessity to implement "employee handbook" as part of the company policy.

As far as strategic planning and business development are concerned, sales people under [the beneficiary's] supervision and leadership are making progresses [sic] to develop new customers. [The beneficiary] primarily focuses her energy on big corporate accounts such as Kraft and Bed Bath and Beyond. [The beneficiary] is also evaluating the benefit and cost of participating in trade shows on a regular basis.

In the future, the beneficiary will continue to be in charge of [the petitioner's] overall management and to enjoy considerable discretion in day-to-day business operations. [The

beneficiary] is expected to continue to utilize financial reports to determine the progress of the [petitioner's] business and to designate further business goals and plans. As to staffing needs, [the petitioner] intends to hire two to three additional full-time employees in the next year in addition to various commission-based sales force.

Quarterly tax returns for the first two quarters of 2004 were also submitted, and indicated that as of the time of the filing of the extension, the petitioner employed four persons, including the beneficiary, on its payroll. Specifically, the other employees were:

[REDACTED], Sales & Marketing Coordinator (Full-Time)
[REDACTED], Bookkeeper and General Office Assistant (Part-Time)
[REDACTED], In House Sales (Full Time)

On August 3, 2004, the director requested additional evidence. Specifically, the director requested that the petitioner submit more detailed information regarding the beneficiary's duties and the manner in which they were managerial and/or executive in nature. Specifically, a complete description of duties was requested, including a list of all subordinate staff members and their positions and duties within the organization.

In response, counsel for the petitioner submitted a detailed response, including an updated organizational chart for the petitioner. The description of duties, however, was identical to the one set forth in the initial letter of support dated July 22, 2004. The petitioner supplemented this description by adding the following statement:

As President of [the petitioner], [the beneficiary] exercised and will continue to exercise considerable discretion in the day-to-day operations of [the petitioner], [sic] she had and she will continue to have hiring and firing authority for [the petitioner's] personnel and she managed and will continue to manage professionals (including lawyers, certified public accountants and a sales manager who in turn manages the expanding sales force).

The petitioner further stated that it now employed seven employees, and indicated that it had recently hired a second in-house salesperson.

On November 3, 2004, the director denied the petition. The director determined that the beneficiary was not employed in a primarily managerial or executive capacity, and that the evidence presented indicated that the beneficiary played a large role in generating the petitioner's products and services as opposed to performing primarily managerial or executive duties.

On appeal, counsel restates the applicable regulations and contends that the director ignored the beneficiary's advanced knowledge gained from her prior experience abroad as well as her professional duties since becoming president of the U.S. entity. Counsel further contends that the director erroneously denied the petitioner based on the staffing levels of the petitioner in the denial, and asserts that the response to the request for evidence clearly indicated that the beneficiary oversees a staff of seven employees, several of whom are professional on the basis of their educational degrees.

Upon review, the AAO concurs with the director's previous decision in this matter. 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.* On appeal, counsel submits an overview of the beneficiary's duties and concludes that she has, by virtue of her executive position and associated duties, been functioning in a qualifying capacity. Counsel further claims that sufficient evidence establishing her qualifications has already been submitted.

Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner claims that the beneficiary's duties are exclusively managerial and/or executive, yet the evidence submitted contradicts such assertions. For example, the petitioner indicates that "sales people under [the beneficiary's] supervision and leadership are making [progress] to develop new customers." However, copies of letters and email correspondence from June and July 2004 clearly indicate that the beneficiary personally corresponds with potential clients such as Kraft and Bed Bath & Beyond, and further attends sales shows and trade conventions. This contradicts the claim that the beneficiary is relieved of performing sales duties firsthand. 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).

For the first time on appeal, counsel addresses the subordinate staff of the beneficiary, and alleges that by virtue of the educational backgrounds of some of the employees, the beneficiary is thus supervising a staff of professionals and therefore qualifies as a manager. This assertion is not persuasive. In the request for evidence, the director specifically requested the educational backgrounds of all the petitioner's employees. The petitioner, therefore, was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit information regarding the educational backgrounds of these employees, and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The record prior to adjudication indicated that as of the time of the petition's filing, the beneficiary oversaw a sales and marketing manager, a part time clerical assistant, and one in-house sales person. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C) and as counsel contends on appeal, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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, as discussed above, although the beneficiary does have other employees which she oversees, the evidence submitted indicates that despite their presence, she still maintains contact with potential clients and engages in person to person marketing and sales without delegating these tasks to her subordinates. While the petitioner claims that it is expanding and developing and intends to hire 10-20 additional sales persons in the future, the fact remains that at the time of the filing of the extension, the beneficiary was still engaged in a majority of non-qualifying duties. The petitioner, therefore, has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Although the petitioner submitted evidence that by September of 2004, it had hired additional employees, the relevant organizational structure for purposes of this analysis is that at the time of filing.

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 petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitutes significant components of the duties performed on a day-to-day basis. The AAO further notes that, although more specific details regarding the beneficiary's duties were requested in the request for evidence, the petitioner chose to resubmit the same description of duties included with the extension that had previously been deemed insufficient by the director. Merely claiming that the beneficiary is an executive is insufficient to establish eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As stated above, 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. 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 petition may not be approved.

The second issue in this matter is whether the petitioner has been doing business as required by the regulations for the previous year. The regulation at 8 C.F.R. §214.2(l)(1)(ii)(H) defines the term "doing business" as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad."

In this matter, the petitioner claims that it is engaged in the wholesale of housewares; namely, slow cookers, rice cookers, pressure cookers, and light fixtures. The director denied the petition, finding that the petitioner had failed to satisfy the regulatory requirements for doing business.

Although the petitioner submitted copies of brochures and an income statement for the petitioner evidencing adequate capital reserves, no evidence of the petitioner's actual business practices was submitted. Consequently, in the request for evidence issued on August 3, 2004, the director requested documentation establishing that the petitioner had been doing business during the previous year as required by the regulations. In the response dated October 22, 2004, the petitioner submitted an unaudited financial statement as well as its U.S. Corporation Income Tax Return for 2003, showing a negative income for that period.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the previous year. The record indicates that the beneficiary was granted a one-year period of stay from August 31, 2003 to August 31, 2004 to open a new office. The record further indicates that the petitioner would engage in the wholesale of housewares. However, aside from a small number of email messages and letters discussing samples of the petitioner's pressure cookers, there is no indication that any goods were actually sold or exchanged for consideration. No invoices, purchase orders, or other similar documents have been submitted. In addition, there is no documentation or information regarding the activities of the beneficiary and the petitioner during the time period prior to the extension's filing.

Based on this limited information, the AAO cannot conclude that the petitioner was doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO acknowledges the petitioner's claim that the petitioner's business is new and is still developing. However, the record is devoid of an explanation as to what the petitioner did during its first year of operations, and, aside from the miniscule amount of correspondence between the beneficiary and potential clients in June and July of 2004, the record further lacks any explanation or documentation regarding other activities engaged in by the petitioner to promote its business during this period. The fact that the petitioner did not appear to actually commence operations and claims to be growing stronger every day does not excuse the petitioner from meeting the regulatory requirements.

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 establish the new office. Furthermore, at the time the petitioner seeks an extension of a new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) require the petitioner to demonstrate that it has been doing business for the previous year. In the present matter, the evidence submitted at the time of filing failed to establish that the petitioner had been conducting business as required. The fact that it began to expand its personnel after the expiration of the beneficiary's initial stay does not automatically entitle the petitioner to an extension of the visa, for it fails to change the fact that the petitioner failed to conduct business during the previous year. For this additional reason, the petition may not be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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

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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.