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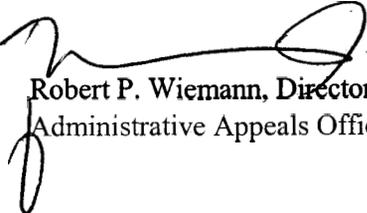
IN RE: Petitioner:
Beneficiary:

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 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 employ the beneficiary as an L-1A 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 Florida corporation that claims to be engaged in the retail sale of cellular phone accessories, stone products and incense. It operates several shopping mall kiosks. The petitioner claims that it is a subsidiary of [REDACTED] located in Lima, Peru. The petitioner seeks to employ the beneficiary as its vice president for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in a managerial or executive capacity in the United States.

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 erred in determining that the beneficiary would not supervise subordinate managerial personnel. Counsel submits a brief and an expert opinion letter 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 issue in this matter is whether the petitioner established that the beneficiary will be employed in a managerial or executive capacity under the extended petition.

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.

The nonimmigrant petition was filed on April 27, 2004. In an April 21, 2004 letter appended to the petition, the petitioner indicated that as vice president, the beneficiary would be the "executive director of company

operations” with responsibility for overseeing sales and administrative managers. The petitioner further stated:

[S]he will be responsible for managing the entire company operation; she will have the ultimate authority to hire and dismiss the employees under her supervision; she will be responsible for directing and coordinating the activities of managerial personnel, which are involved in the performance of internal day to day operations of the business and she will be fully responsible for the financial viability of the company.

The petitioner stated on Form I-129 that it had five employees at the time of filing, and submitted an organizational chart depicting the beneficiary reporting to the president and supervising a sales manager and an administrative manager, who, respectively, supervise a salesperson and an administrative assistant. The petitioner also provided its Florida Form UCT-6, Employer’s Quarterly Report, for the fourth quarter of 2003, which confirmed wages paid to the employees identified as president, sales manager, and administrative manager.

The petitioner stated in its letter dated April 21, 2004 that the company operates “several kiosks” at shopping malls in the Jacksonville, Florida area, selling cellphone accessories, stone products for home decoration, and incense products. The petitioner submitted current leases for four retail kiosks located in two different shopping malls, authorizing the company to sell toys, incense products, and nail care products.

The director issued a request for additional evidence on May 19, 2004, instructing the petitioner to submit: (1) a description of the beneficiary’s proposed duties in the United States broken down by percentage of time spent on each duty on a daily basis; (2) a description of the beneficiary’s U.S. subordinates’ duties and the percentage of time they allocate to each duty; and (3) the petitioner’s latest quarterly IRS Form 941, Employer’s Quarterly Federal Tax Return.

In a July 20, 2004 response, the petitioner provided the following description of the beneficiary’s proposed duties:

To be in charge of established [sic] of the new market of distribution through subscription contracts and to expand commercial activities (50%)

Direct activities of organization to plan procedures, establish responsibilities, and coordinate functions among departments and sites. (15%)

Plan and direct activities such as sales promotions, coordinating with other department heads as required (20%)

Develop and implement product marketing strategies including advertising campaigns and sales promotions.

The petitioner also provided position descriptions for its president, administrative manager, sales manager, salesperson and administrative assistant. The petitioner indicated that the beneficiary's immediate subordinates would perform the following duties:

Administrative Manager

- Determine staffing requirements, and interview, hire and train new employees. 20%
- Establish and implement departmental policies, goals, objectives and procedures, conferring with board members, organization officials, and staff members as necessary. 20%
- Manage staff, preparing work schedules and assigning specific duties 20%
- Monitor businesses and agencies to ensure that they efficiently and effectively provide needed services while staying within budgetary limits. 20%
- Determine goods and services to be sold, and set prices and credit terms, based on forecasts of customer demand. 20%

Sales Manager

- Resolve customer complaints regarding sales and service. 20%
- Monitor customer preferences to determine focus of sales efforts. 20%
- Determine price schedules and discount rates. 25%
- Review operational records and reports to project sales and determine profitability. 20%
- Represent company at trade association meetings to promote services. 15%

The AAO notes that the persons identified as sales manager, salesperson and administrative assistant did not appear on the petitioner's initial organizational chart.

The petitioner submitted its IRS Form 941 for the first quarter of 2004, which indicates that the petitioner paid \$9,347.50 in wages to four employees. The Form 941 does not contain information regarding which employees received wages during the quarter or during which months each was employed.

The director denied the petition on September 11, 2004, concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. The director considered the job descriptions provided for the beneficiary's subordinates, but found that the duties "do not reflect managerial positions." The director observed that the petitioner had not provided evidence that the beneficiary would supervise managerial employees, and determined that she would be performing, rather than supervising, the day-to-day operations of the U.S. entity. The director further concluded that the petitioner had failed to establish that the beneficiary would manage or direct the management of a function.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial or executive capacity. Counsel references the position descriptions provided for the beneficiary's immediate subordinates and asserts: "We believe that these managers will not be involved in day to day operations and will manage the company. Thus there would be no reason for the beneficiary to whom these managers must respond would be involved in day to day operations."

In support of this assertion, counsel submits a September 28, 2004 evaluation letter from [REDACTED] Ph.D., Associate Dean at Portland State University. Dr. [REDACTED] states that he reviewed the director's September 11, 2004 Notice of Decision, the petitioner's April 21, 2004 letter, and the job duties for the beneficiary and her subordinates, noting that he is "in no position to authenticate any of these documents." Dr. [REDACTED] remarks that the beneficiary's immediate subordinates would be considered managers and professionals based on the provided job descriptions, and concludes that the beneficiary's position "is clearly managerial and executive in nature."

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(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 has provided a vague and non-specific job description that fails to convey an understanding of the actual duties to be performed by the beneficiary. For example, the petitioner stated that the beneficiary would devote 50 percent of her time on a daily basis to establishing "a new market of distribution through subscription contracts" and expanding business activities. The petitioner failed to identify what specific tasks the beneficiary would perform to accomplish these broad goals, nor did it describe the proposed "new market of distribution" or indicate how the beneficiary would "expand" commercial activities. Without additional explanation, the AAO cannot determine that this responsibility would entail primarily managerial or executive tasks. 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 petitioner stated that the beneficiary devotes an additional 15 percent of her time to directing activities of the organization and to "plan procedures, establish responsibilities, and coordinate functions among departments." These duties overlap with those of the president who devotes a total of 35 percent of his time to "manage the entire company operation" and "establish internal procedures," as well as with those of the beneficiary's subordinate, the administrative manager, who devotes 20 percent of his time to "establish and implement departmental policies, goals, objectives." The petitioner has not outlined the specific procedures to be established by these three "managerial" employees, and without further clarification regarding the actual duties involved, the AAO cannot conclude that a company with five employees would realistically require three managers to engage in managerial or executive-level implementation of policies and procedures and company oversight.

The petitioner indicated that the beneficiary devotes the remaining 35 percent of her time to "plan and direct" and "develop and implement" product marketing strategies, advertising campaigns and sales promotions. However, the petitioner did not identify what specific efforts the beneficiary would take to perform these duties, and none of the beneficiary's subordinates are described as performing duties related to product marketing or advertising. The limited explanation and evidence in the record prohibits a conclusion that the

beneficiary would perform primarily managerial or executive duties associated with these activities. 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. at 1108. Overall, the job description provided is too vague and general to establish that the beneficiary will be engaged in primarily managerial or executive duties. While the job description itself does not include duties that are clearly non-qualifying in nature, the AAO cannot determine from the petitioner's description what duties the beneficiary performs such that they could be classified as managerial or executive. The AAO will not accept a vague job description and speculate as to the related managerial and executive job duties. Merely claiming that the beneficiary manages the petitioning company or has a managerial or executive job title is insufficient to establish eligibility.

In addition to being overbroad, the AAO finds that the job descriptions provided for the beneficiary and the petitioner's other employees are not credible given the size and nature of the petitioner's business. When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. As noted by the director, an individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Further, 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* § 101(a)(44)(A)(ii) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Based on the lease agreements submitted, the petitioner operates four shopping mall kiosks engaged in retail sales. The lease agreements require the petitioner to operate its kiosks during each shopping center's regular business hours, seven days per week. Accordingly, the petitioner requires employees to perform routine retail sales duties at each of its four locations, each of which is likely operating at least 60 to 70 hours per week. The petitioner does not claim to have any employees engaged in performing retail sales duties. Although the petitioner claims to employ an administrative manager, a sales manager, and an administrative assistant, their claimed job titles and duties are not credible when considered in the context of the petitioner's business model. Such a conclusion is further supported by the extremely vague nature of the job descriptions provided and the significant overlap between the various "managers" job duties. The AAO is left to question the validity of the petitioner's claim and the beneficiary's claimed duties. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If CIS fails to believe that facts stated in the

petition are true, then those facts may be rejected. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, based on the record in its entirety, it is evident that the beneficiary's four subordinates would perform the actual day-to-day tasks of operating the petitioner's four retail locations. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher, at most, than that of a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions.

Furthermore, the petitioner did not establish that it had sufficient staff as of the date of filing who would relieve the beneficiary and its other "executive" employee, the company president, from performing the routine day-to-day operational duties associated with operating the petitioner's retail kiosks. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this case, even assuming that the petitioner's four lower-level employees were employed on a full-time basis, they would only account for approximately 160 work hours per week. The petitioner's four retail kiosks would reasonably be expected to be open for business a total of at least 240 hours per week, based on the terms of the submitted lease agreements. The record does not establish who would operate the petitioner's businesses when the lower-level employees are not available, if not the beneficiary and the company president. Collectively, the record as a whole brings into question how much of the beneficiary's time could actually be devoted to qualifying managerial or executive duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO acknowledges receipt of the expert opinion letter from Dr. [REDACTED] who reviewed only a limited number of documents in the record, and who clearly concedes that he had no basis to authenticate the accuracy of the documents submitted to him. As noted above, Dr. [REDACTED] concluded based on the information provided to him that the beneficiary's subordinates would be employed in managerial or professional positions, and the beneficiary herself would serve as a manager or executive. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As discussed above, the AAO concludes, upon review of the record in its entirety, that the job titles and descriptions

provided for the beneficiary's subordinates are artificially inflated and not credible given the nature of the petitioner's business. As Dr. [REDACTED] conclusions were primarily based on these job titles and descriptions, his statement has little probative value in this proceeding.

For the foregoing reasons, the record is not persuasive in demonstrating that the beneficiary will be employed by the petitioner in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.