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FILE: SRC 05 186 50409 Office: TEXAS SERVICE CENTER Date: NOV 28 2006

IN RE: Petitioner:
Beneficiary:

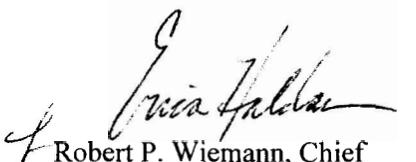


PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida limited liability company and claims to operate a pastry bakery and catering business. The petitioner states that it is a subsidiary of [REDACTED] located in Israel. Accordingly, the United States entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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 in order to continue to fill the position of business general manager.¹

The director denied the petition, concluding that the record contains insufficient evidence to demonstrate: (1) that the foreign entity continues to do business as a qualifying organization abroad; and (2) that the beneficiary will be employed in a managerial or executive capacity. The director determined that it did not appear that any of the beneficiary's subordinates were professionals, and thus the beneficiary will be primarily involved in performing the day-to-day services essential to maintaining the business.

On appeal, counsel for the petitioner argues that the petitioner submitted all the evidence requested by the director, and the director erred in denying the petition on the ground that the petitioner failed to submit evidence of the foreign entity doing business. In addition, counsel for the petitioner asserts that the beneficiary is employed in a managerial capacity as he manages an essential function of the U.S. company. Counsel submits a brief in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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 petitioner's previous petition to extend the beneficiary's status [REDACTED] was denied by the Director, Texas Service Center. A subsequently filed appeal was dismissed by the AAO based on its withdrawal by counsel.

- (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 to be addressed in this proceeding is whether the foreign company is a qualifying organization doing business abroad as required by 8 C.F.R. § 214.2(l)(14)(ii)(A).

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (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 in 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) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

Doing business means 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.

The director in the decision dated September 15, 2005, stated that the petitioner "failed to submit evidence of the foreign entity doing business." The director did not explain why the documentation submitted by the petitioner in response to the director's June 22, 2005 request for evidence was not sufficient.

On appeal, counsel for the petitioner states that the petitioner provided a significant amount of documentation to establish that the foreign entity is currently doing business. Counsel for the petitioner lists the documents submitted previously. Counsel for the petitioner also asserts that the director erred when "no details were given by the service as to the deficiency of the documents submitted by [the foreign company], other than this vague, non-specific response."

The AAO concurs with the statement made by the petitioner's counsel. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). In the instant matter, the director did not provide an explanation as required by the regulations.

Upon review of the documents submitted on appeal, the petitioner has established that the foreign company is doing business. The petitioner submitted recent bank statements, income tax receipts, invoices, tax reports, an organizational chart for the foreign company, photographs of the foreign company, a letter from the State of Israel Ministry of Finance and a letter from the foreign company's CPA stating the sales made by the company in the first half of 2005. All of the submitted documents establish that the foreign company was doing business at the time the instant petition was filed. Therefore, the petitioner has established that the foreign entity is a qualifying organization doing business abroad as required by 8 C.F.R. § 214.2(l)(1)(14)(ii)(A). The director's decision with respect to this issue will be withdrawn.

The second issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity by the U.S. entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means 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), provides:

The term “executive capacity” means 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 June 20, 2005. The Form I-129 indicates that the beneficiary will be employed in the position of business general manager. In a letter of support dated June 3, 2005, the beneficiary’s proposed duties in the U.S. are described as the following:

[The beneficiary] is the general manager and top management person in the company and is responsible for interviewing employees, hiring and firing (5%), signing checks and contracts (8%), landlord dealings (2%), overall guidance as the number one person in the company, establishes the goals and policies of the company (10%), directing purchasing (15%), promotions (10%), and acting on behalf of the company at all meetings, business and civic (20%), directing advertising (10%), meeting and interaction with employees (12%), dealing

with the company finances and company's CPA (8%). Included the above duties is supervising another manager, [REDACTED] who was approved by the USCIS, Texas Service Center, under case number [REDACTED]

* * *

He exercises wide latitude in discretionary decision-making and answers to no one else. He directs the entire organizational and is the highest level executive in the company. The position of general manager here is both executive and managerial in nature. [The beneficiary] is the person who has controlling interest in both the parent companies and it is he who decided to open the subsidiary. It is he whom has directed the investment of countless thousands of dollars. Without [the beneficiary], this business cannot survive.

The petitioner indicated that, in addition to the beneficiary and the manager, the company's employees include a sales clerk, a baker, an assistant baker, and a sales coordinator. The petitioner provided a brief job description for each position. The petitioner also submitted an organizational chart of the U.S. entity. The chart indicates that the beneficiary is the general manager who supervises the manager of bakery operations who then supervises one baker, one assistant baker and one baker helper/sales clerk/waitress. The U.S. entity also claims to employ one sales clerk/waitress, one food preparer and maintenance, and one sales coordinator who is a "minority owner of the company who works without salary."

On July 12, 2005, the director issued a request for additional evidence, in part instructing the petitioner to submit a copy of its state quarterly wage report for the first quarter of 2005. In response to the director's request, the petitioner submitted a copy of the U.S. company's Florida Employer's Quarterly Tax Return for the quarter ended March 31, 2005, which indicates that the U.S. entity paid wages of \$6,494.20 to a total of 14 employees during the quarter.

The director denied the petition on September 15, 2005 on the ground that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director noted that the manager supervised by the beneficiary, [REDACTED] had his L-1A petition approval revoked, and therefore, the beneficiary is not managing a manager. In addition, the director noted that it appears the beneficiary will perform the day-to-day operations of the business, rather than oversee the functions and/or the personnel that perform those duties.

On appeal, counsel for the petitioner states that [REDACTED] approval was not revoked prior to the date the denial decision was written, and counsel argues that the director erred in relying on the revocation as a factor in determining the beneficiary's employment capacity. In addition, counsel for the petitioner asserts that the beneficiary manages an essential function of the U.S. company, and thus the petitioner is not required to establish that the beneficiary supervises other supervisors, professional or managers.

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary would 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(1)(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 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).

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner's description of his duties suggests that the beneficiary's actual duties as of the date of filing would be primarily comprised of non-qualifying duties.

The beneficiary's proposed job description includes vague duties such as responsibility for the "overall guidance as the number one person in the company," establishing the goals and policies of the company; "acting on behalf of the company at all meetings, business and civic,"; "exercise wide latitude in discretionary decision-making and answers to no one else," and "directs the entire organizational and is the highest level executive in the company." 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The job description also includes several non-qualifying duties such as the beneficiary will be responsible for "signing checks and contract" and "landlord dealings," "promotions," and is responsible for "directing advertising" and "dealing with the company finances and company's CPA." It appears that the beneficiary will be performing administrative, marketing and promotions, and routine financial tasks necessary to operate the business, rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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 International*, 19 I & N Dec. at 604.

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

In reviewing the brief job descriptions of the employees at the U.S. entity, submitted by the petitioner in a letter dated June 3, 2005, it appears that the beneficiary and the manager of operations are engaged in the operational and administrative tasks in running the business. The AAO recognized that the beneficiary's subordinate was previously granted L-1A status, and, as of the date of filing, the petition had not been revoked. It must be emphasized that each petition filing is a separate record with a separate burden of proof. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. 103.2(b)(16)(ii). The evidence submitted with this petition fails to establish that the manager performed primarily managerial or supervisory duties, particularly considering that the lower-level staff all appear to be employed on a part-time basis. Based on the evidence submitted, it appears that both the beneficiary and the manager were performing all or many of the various operational tasks inherent in operating a retail store on a daily basis, such as acquiring products, maintaining inventory, paying bills, and customer service. The limited number of hours worked by the subordinate sales and bakery staff also raises questions as to whether the two claimed managerial employees would be relieved from producing and selling the petitioner's products. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. Accordingly, the director reasonably concluded that the beneficiary will be performing the day-to-day operations and directly be providing the services of the business rather than directing such activities through subordinate employees.

On appeal, counsel for the petitioner asserts that the beneficiary will manage an essential function of the U.S. entity. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

As discussed above, the totality of the record supports a conclusion that the beneficiary would be required to perform primarily non-qualifying duties associated with the petitioner's day-to-day functions, as the petitioner has not identified sufficient staff within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. It is the petitioner's obligation to establish however, through independent documentary evidence that the day-to-day non-managerial and non-executive tasks of the petitioning entity are performed by someone other than the beneficiary, although, as correctly noted by counsel, these employees need not be professionals. Here, the petitioner has not met this burden.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petition indicates that the beneficiary owns 51 percent of the foreign entity and his spouse owns 49 percent of the foreign entity, and thereby of the petitioning company. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this matter, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. For this additional reason, the appeal must be dismissed and the petition denied.

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 the decision. 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 appeal will be dismissed.

ORDER: The appeal is dismissed.