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Services

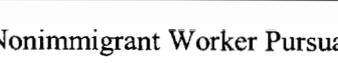
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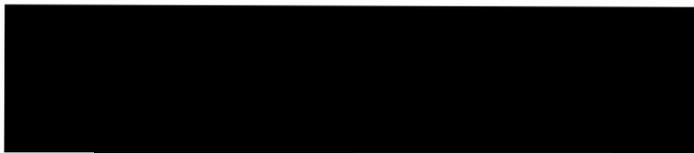
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FILE: WAC 05 012 50876 Office: CALIFORNIA SERVICE CENTER Date: **OCT 04 2006**

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:



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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its general 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, a Guam domestic corporation, claims to be the subsidiary of [REDACTED] located in [REDACTED]. The petitioner claims to be engaged in the manufacture, retail, and wholesale of furniture. 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 the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was erroneous in that it was not based upon a rational basis and was arbitrary and capricious. Counsel submits a detailed brief in support of these contentions.

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)(14)(ii) 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 issue in this 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.

With the petition, former counsel for the petitioner submitted a job description for the beneficiary's position of general manager in the United States. The description stated:

Manages all aspects of business engaged in furniture manufacture and sales and related services. Directly supervises business Manager. Primarily directs, supervises, and controls the work of all subordinate supervisory, managerial and professional employees. Exercises discretion in day to day operations of Guam branch office. Has the power to hire and fire employees of the business.

The General Manager will:

| | |
|---|-----|
| Hires and Trains Staff | 10% |
| Meet with business customers to promote products | 10% |
| Develops new product lines | 5% |
| Supervises local management | 50% |
| Supervises overseas orders, pricing and shipping | 10% |
| Directs business operations including bank financing for set up and expansion | 15% |

Additionally, the petitioner submitted its quarterly tax return for the quarter ending September 30, 2004, which indicated that the petitioner employed five persons during that period for a combined salary of \$3181.21.

On October 26, 2004, the director requested additional evidence. Specifically, the director asked for additional information pertaining to the staffing of the U.S. organization, including the total number of employees on staff and an organizational chart showing their position within the petitioner's organizational hierarchy. Additional details were requested regarding all positions, including salary and educational backgrounds of the employees, and the last four quarterly wage reports filed by the petitioner as evidence of the employment of these individuals. Finally, the director requested additional details with regard to the beneficiary's position.

In a response dated January 12, 2005, the petitioner responded to the director's request. In response to the director's request for further details regarding the beneficiary's duties, a virtually identical description to that submitted with the initial petition was provided. The petitioner claimed to employ 10 persons, all of whom were high school educated. An organizational chart submitted claimed that the beneficiary oversaw a project manager, who in turn oversaw a carpenter and two apprentices; a store manager, who oversaw two store assistants, and a sales manager, who oversaw two sales assistants. The petitioner's quarterly returns for the quarters ending September 30, 2004 and December 31, 2004, however, show that only five of the subordinate employees worked for the petitioner at the time of filing, namely, the three named managers, a store assistant,

and a sales assistant.¹ The quarterly return for December 30, 2004, indicates that at the end of that period, ten people were in fact on the petitioner's payroll. However, the total amount of wages paid ten employees during this period was \$12,619.

The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary was managing the organization as defined by the regulations, and specifically noted that the position descriptions of the beneficiary's alleged subordinates were too vague to allow the director to ascertain whether their positions and duties relieved the beneficiary from performing non-qualifying duties and permitted him to act in a primarily managerial or executive capacity. Furthermore, the small amount of total wages paid to the identified employees each quarter raised the question of whether these employees were actually employed full-time so that they could relieve the beneficiary from performing non-qualifying duties.

On appeal, counsel for the petitioner argues that the beneficiary is functioning in a primarily managerial capacity, and argues that the evidence provided was sufficient to establish this capacity. Counsel argues that the position descriptions provided were sufficient and established the beneficiary's eligibility, and submits a letter from the chairman of the foreign entity who seeks to describe the positions of the U.S. employees in further detail. Finally, counsel asserts that the petitioner's infancy, though acknowledged by the director, was a negative factor in the director's decision when analyzing staffing levels and the current organizational structure of the petitioner.

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 description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a vague overview of the nature of his duties. The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. Despite counsel's contentions on appeal, the AAO agrees with the director's finding that the descriptions, both in the initial petition and in response to the request for evidence, merely summarized the beneficiary's position in a broad manner. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his

¹ The AAO notes that the September 30, 2004 report indicates that [REDACTED] a store assistant, was employed during that period. However, the quarterly report for the quarter ending December 30, 2004 indicated in a handwritten notation that he was not hired until December 2004. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner contends that the beneficiary's duties are solely managerial and/or executive in nature, but appears to merely paraphrase the regulatory definitions when providing these descriptions. It is unclear exactly what the beneficiary does on a day-to-day basis from these descriptions. Absent a more detailed description of the beneficiary's engagement in these functions, the AAO is unable to determine the exact nature of the beneficiary's role in the company. This failure of documentation is important because in evaluating the annual salaries of the petitioner's other employees, it is unclear whether these persons are actually employed full time and thus able to relieve the beneficiary from performing non-qualifying duties. For example, the stated quarterly salaries of the petitioner's staff for the quarter ending September 30, 2006 are as follows:

| | |
|----------------------------|------------|
| Project Manager: | \$ 720.00 |
| Store Assistant [REDACTED] | \$ 61.80 |
| Store Manager: | \$ 120.00 |
| Sales Manager: | \$1,302.21 |
| Sales Assistant [REDACTED] | \$ 977.22 |

These same employees earned the following amounts for the quarter ending December 31, 2004:

| | |
|----------------------------|------------|
| Project Manager: | \$3,663.00 |
| Store Assistant [REDACTED] | \$ 386.25 |
| Store Manager: | \$2,418.00 |
| Sales Manager: | \$2,130.00 |
| Sales Assistant [REDACTED] | \$1,841.74 |

Assuming that the Project Manager worked a full-time schedule consisting of 40 hours workweeks in the last quarter of 2004, his hourly wage would amount to \$7.63 per hour. By examining the chart above, it is clear that he earned the most wages during this period. Therefore, if all other employees were also full-time personnel, their hourly earnings would be much lower. For example, the second highest paid employee, the Store Manager, would average approximately \$5.04 per hour. Without additional evidence pertaining to the nature and requirements of the petitioner's workforce, it cannot be determined, based on the low amount of wages paid to these persons and the \$5.15 minimum wage rate at that time, that the petitioner had a full-time staff of subordinates in place to relieve the beneficiary from performing non-qualifying duties. With the work schedules of these other five employees unclear, it is not possible to determine what an average day consists of for the beneficiary without further information. In addition, without evidence of sufficient staff to actually perform the functions the beneficiary reportedly manages, the AAO is left to conclude that the beneficiary himself performs these non-qualifying tasks. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, counsel submits a more detailed description of the duties of the beneficiary and of the beneficiary's subordinates, but fails to articulate how these duties relieve the beneficiary from responsibility for the overall composition of the company. In addition, no discussion or mention of the work schedules of

these employees has been provided. Although paystubs were provided for 2005, no evidence establishing the schedules of these persons at the time of filing has been submitted. 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).

The petitioner claims on appeal that the beneficiary oversees subordinate personnel and is in charge of the overall operations of the company. Although the beneficiary is not required to supervise personnel, if it is claimed that his 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.

While the petitioner claims that the beneficiary oversees ten subordinate employees (even though the documentation in the record establishes that only five were employed by the petitioner at the time of the filing of the extension in October 2004), the petitioner has failed to establish that these positions require an advanced degree, such that they could be classified as professionals. Although three of these employees possess managerial titles, no additional information regarding their qualifications, or the requirements of the positions, has been provided. In addition, it is unlikely that the prevailing wage for true professional employees possessing advanced degrees would be less than or just over the minimum wage.² Additionally, the petitioner has failed to show that these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. While the organizational chart suggests that a hierarchy exists between the employees, the record contains insufficient corroborating evidence with regard to the nature of the duties of all employees, as well as their actual work schedules, to allow the AAO to conclude that these employees are managerial or supervisory. Thus, the petitioner has not shown that the beneficiary's claimed subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

As previously stated, the salaries of the employees relative to their position titles raise questions with regard to the legitimacy of these identified positions. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Regardless, the evidence of record failed to establish that the beneficiary would have been relieved from having to primarily perform non-qualifying tasks at the time the instant petition was filed. Although counsel reasserts the beneficiary's qualifications on appeal, and submits a supplementary letter from the foreign entity's chairperson, this evidence will not be considered. The petitioner was put on notice of required evidence with regard to the positions of the beneficiary and his subordinates, and was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. 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.

² As indicated above, Guam paid the federal minimum wage of \$5.15 per hour in 2004.

Furthermore, although counsel continually asserts the qualifications of the beneficiary and the presence of a subordinate staff to relieve him from performing non-qualifying duties, insufficient evidence has been submitted to support these claims. 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. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

On review, the record as presently constituted 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 hired additional staff members after the filing of the extension, and anticipates further expansion in the future. However, 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. 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. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.