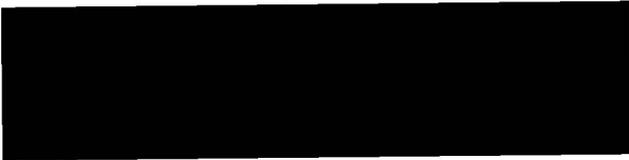




U.S. Citizenship  
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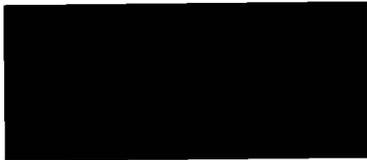
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FILE: LIN 04 153 50174 Office: NEBRASKA SERVICE CENTER Date: JAN 29 2007

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

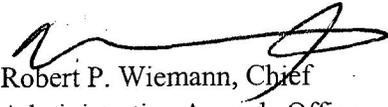
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president/chief executive officer 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, an Illinois corporation, states that it is engaged in the marketing, sales and distribution of pet toys. The petitioner claims that it is a subsidiary of [REDACTED] located in the Philippines. The beneficiary was initially approved for a one-year period of L-1A classification in order to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's status for two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director observed that the petitioner had failed to submit requested evidence regarding the petitioner's staffing levels.

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, the petitioner clarifies that the petitioner "has not yet finalize[d] its organizational structure," and confirms that the beneficiary is currently the company's only employee. The petitioner asserts that the beneficiary manages the operation and is in the process of hiring additional personnel/staff to support the beneficiary under the extended petition. The petitioner submits a brief and additional evidence 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 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 sole issue addressed by the director is whether the petitioner established that 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.

The nonimmigrant visa petition was filed on April 28, 2004. The petitioner stated on Form I-129 that the beneficiary, as the president and chief executive officer of the company, would "direct the startup operations of this new subsidiary in the U.S. aimed at the marketing, sales and distribution of [the foreign entity's] pet toy and related products to distributors, dollar stores, and Petsmart and other pet stores in the USA." The petitioner stated that the company employs 300 workers "worldwide." The petitioner submitted a letter dated March 25, 2004, in which it stated "the terms and conditions of employment have not changed since the original L1A Application was approved on April 30, 2003." The petitioner did not submit supporting documentation as required by the regulation at 8 C.F.R. § 214.2(1)(14)(ii).

Accordingly, the director issued a request for additional evidence on June 14, 2004, instructing the petitioner to submit, in part: (1) a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition; and (2) 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.

In a response dated September 2, 2004, the petitioner submitted the following description of the beneficiary's duties, and noted that he would perform the same duties under the extended petition:

1. Oversee the day-to-day operations of the company.
2. Implement the company's Sales and Marketing Program which basically covers the following:
  - a. Implement the company's two-tiered marketing plan and strategies. At the first level, job orders from direct importers and local sales will be handled by [the foreign entity]. At the second level, marketing and sales to Dollar Stores and agents/distributions in the United States will be handled by [the petitioner]. With a different target market, both companies can remain focus [sic] on their sales targets and strategies.

- b. Expand its market base through the appointment/hiring of sales agents/distributors in various parts of the United States, with Gurnee, Illinois as its base of operations.
  - c. To tap the E-mail marketing the United States through having its own website and subscription to other websites e.g., Wholesale Central.com.
3. To keep its mother company . . . well informed of the current toy pets, designs, trends and new products in the United States.
  4. To keep [the foreign entity] updated with the foregoing through submission of regular reports.

The petitioner did not address the director's request for a statement regarding the staffing of the company, or provide evidence of wages paid to employees.

The director denied the petition on November 17, 2004, concluding that the petitioner had failed to establish that the beneficiary would be employed in a managerial or executive capacity under the extended petition. The director observed that, without comprehensive position descriptions for all of the U.S. entity's employees, it cannot be determined that the beneficiary will perform primarily managerial or executive duties. The director further noted that the petitioner had not provided a detailed description of the beneficiary's duties, and had failed to demonstrate that the petitioner employed a subordinate staff of professional, managerial or supervisory personnel who would relieve the beneficiary from performing non-qualifying duties.

On appeal, the petitioner asserts the following:

On the organizational structure and staffing requirements, we must admit that at present, [the petitioner has not yet finalize [sic] its organizational structure, e.g., staffing of the new operation, including the number of employees and types of position[.] However, it should be noted that market development is the most crucial/difficult area of consideration as far as the operation of any business entity is concerned. Albeit equipped with the required marketing skills to meet the said objective, it is imperative that proper funding be provided to realize the same.

[The beneficiary] . . . is well cognizant of the fact that organizing and staffing should go hand in hand with the requirements of the market, so that in order to cut cost, while the volume of business generated and transaction package are still marginal to warrant the hiring of additional staff, [the beneficiary] has perfectly managed to run the overall operations of [the petitioner].

The petitioner provides a list of existing customers and potential buyers of the petitioner's product, and states "with the development of this new markets/customers in the U.S.A., we are now in the process of hiring/selecting the most qualified and competent personnel/staff that will relieve/support [the beneficiary] in the operations of [the petitioner]." The petitioner requests that the extension be granted to allow the company additional time to "comply with your requirements of hiring/selecting and training qualified and competent personnel."

Upon review of the petition and supporting evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. 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 nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. Initially, the petitioner merely indicated that the beneficiary's position would "oversee the day-to-day operations," "implement the company's...marketing plan and strategies," and inform the petitioner's parent company regarding U.S. product and market trends. The petitioner did not, however, indicate the specific managerial or executive duties the beneficiary would perform to oversee the operations, or provide evidence that someone other than the beneficiary would be responsible for implementing the marketing plan, i.e., marketing, promoting and selling the products in the United States, or performing market research. Reciting the beneficiary's vague job responsibilities or broadcast 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).

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 activities of the U.S. company as its president and sole employee, it is clear that he must also be responsible for all operational tasks associated with operating an import and wholesale business, including duties associated with market research, promotion, sales, submitting purchase orders to the parent company, arranging import of products from overseas and domestic distribution of goods to U.S. customers, handling the day-to-day finances of the company, and other administrative, operational and clerical tasks, thus bringing into question how much of the beneficiary's time can realistically be devoted to managerial or executive duties. Although the petitioner referenced the beneficiary's responsibility for appointing and hiring sales agents around the United States, the petitioner later confirmed that no additional employees had been hired as of the date the petition was filed. Accordingly, the petitioner has failed to establish that non-qualifying duties will not require the majority of the beneficiary's time. 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).

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, 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. The one-year "new office" provision is an accommodation for newly established enterprises, provided for by CIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

However, 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. Therefore, the petitioner's statement on appeal that it is in the process of hiring staff to assist the beneficiary has no bearing on a determination of the beneficiary's eligibility as of the date the petition was filed. 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). In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

In sum, the petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or managing an essential function of the U.S. company. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Further, regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy, or primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise in an executive capacity. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). 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.