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U.S. Citizenship
and Immigration
Services

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File: WAC 04 012 51255 Office: CALIFORNIA SERVICE CENTER Date: JUL 05 2007

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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation, states that it was initially engaged in fine art reproduction and now operates as an import and export company. The petitioner claims to be a subsidiary of Prehard Co., Ltd., located in Tokyo, Japan. The beneficiary was transferred to the United States in L-1A status in December 2001 in order to establish a new office, and the petitioner now seeks to extend the beneficiary's L-1A status for one additional year.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

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 decision of the director was arbitrary, capricious, and ignored relevant evidence. Counsel submits a brief, but no 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 beneficiary will be employed by the United States entity in a primarily 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 October 17, 2003. In an appended letter dated October 7, 2003, the petitioner described the beneficiary's duties as follows:

As President, [the beneficiary] will continue to be responsible for the establishment and implementation of all policies and goals of our company's business. He will continue to examine and review new market expansion opportunities, and develop present and future business plans in the United States. He will also review and analyze new customer needs and business trends in the United States based on his knowledge of the art industry and artistic aesthetics, as well as our parent company's proprietary industry contacts and business relationships, and he will be expected to recruit and hire additional managerial and operational staff as necessary to perform the daily functions of the business. [The beneficiary] will exercise wide discretionary authority in negotiating the terms and conditions of our contractual agreements as well as the pricing of our products, taking into consideration market trends and the profit margins [the beneficiary] will establish. [The beneficiary] will also develop our business' sales and marketing strategies by evaluating various promotional activities and opportunities. In addition to establishing the foundations for our company's current business, he will analyze the U.S. market, examine the preferences of our existing as well as potential customers, and establish medium and longer-term business plans for our company's growth and expansion into other business opportunities in the United States.

The petitioner noted that the beneficiary had hired an American worker to assist in the day-to-day operations of the U.S. company's business. The petitioner explained that the U.S. company's business model is "based on the diversified international trade of specialty art paper and printing equipment and supplies between the United States and Japan." Specifically, the petitioner indicated that it exports large format printers and solvent inkjet media, used for the manufacture of commercial and industrial signs, to Japan, and imports "Okamoto Washi" decorative paper to the United States for sale to the wholesale arts and crafts market.

On December 3, 2003, the director requested additional evidence. Specifically, the director instructed the petitioner to submit: (1) an organizational chart for the U.S. company, which clearly depicts the beneficiary's position and those of his subordinate employees; (2) brief descriptions of job duties, educational level and annual salaries/wages for all employees under the beneficiary's supervision; (3) copies of the petitioner's

quarterly wage reports for the last four quarters; and (4) the petitioner's payroll summary and IRS Forms W-2 and W-3, evidencing wages paid to employees.

In response, the petitioner provided an organizational chart for the U.S. company which indicates that the beneficiary supervises a general manager. The chart also depicts two vacant positions beneath the general manager, a sales representative and an administrative assistant. In a letter dated February 5, 2004, the petitioner stated that the beneficiary "directs the overall activities" through the general manager, who is described as being responsible for the day-to-day operation of all business activities, administration, sales, and customer service, as well as handling corporate and accounting matters, taking and placing orders, and providing information to customers. The petitioner stated that the proposed sales and administrative positions would be filled by the beneficiary upon approval of the petition and would be supervised by the general manager.

With respect to the beneficiary's duties the petitioner emphasized that the beneficiary is the senior officer of the company and is not supervised by higher level executives. The petitioner further stated:

It is [the beneficiary's] responsibility to ensure the success of our United States venture by establishing all business policies and goals. [The beneficiary's] continuing duties include evaluation of additional business opportunities by analyzing market conditions in the United States and Japan, and by negotiating with our suppliers in the United States and Japan. Furthermore, [the beneficiary] has absolute discretion over personnel matters including the power to hire and fire employees as well as responsibility for determining our staffing needs and delegating business duties.

The director denied the petition on February 26, 2004, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that given the diversity of the petitioner's business activities, and the fact that the company employs only one worker in addition to the beneficiary, the beneficiary "must have been engaged in the petitioner's daily business activities." The director noted that the beneficiary would not supervise a subordinate staff of professional, managerial or supervisory personnel who would relieve him from performing non-managerial duties.

On appeal, counsel for the petitioner asserts that the director's decision was "arbitrary, capricious and an abuse of discretion because the denial improperly formulated conclusions about the Beneficiary's executive/managerial job duties based on staff level without a reasonable basis for finding the Petitioner's staffing level unreasonable." Counsel states that the director characterized the beneficiary's job description as vague and general, but failed to take into consideration the other descriptions and evidence submitted regarding the petitioner's other employee and the petitioner's business.

Counsel further contends that the director's decision "provides no reasonable basis for finding that because the Petitioner has only one other employee, the Beneficiary must be performing non-qualifying duties." Counsel asserts that the director placed undue emphasis on the number of employees hired by the petitioner, but failed to take into account such other factors as the petitioner's significant growth in cash flow over the previous

year. Counsel contends that such growth "warrants the need for an executive/managerial position to direct the activities of the business, and to guide the policies and goals of the organization." Counsel further emphasizes that a two-person staff is reasonable for a trade company at the petitioner's current stage of development, particularly as the petitioner provided evidence that the company's one other employee handles the day-to-day business activities including customer service and order processing, the petitioner's "main activities." Counsel again stresses that the beneficiary "is primarily concerned with establishing the organization's policies and goals including market development, formulating the product mix, and evaluating business opportunities."

Upon review of the petition and the supporting evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a qualifying 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.* Furthermore, the definitions of executive and managerial capacity have two specific requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show 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).

In this matter, the position descriptions provided, considered within the context of the totality of the record, do not sufficiently demonstrate that the beneficiary's tasks will be primarily the high-level responsibilities that are specified in the definitions of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). While the beneficiary evidently exercises discretion over the day-to-day operations of the company as its minority shareholder and as the senior member of its two-person staff, the record does not establish that his typical duties will be primarily managerial or executive in nature.

The petitioner's descriptions of the beneficiary's duties are vague, repetitive and lack the requisite detail to establish what the beneficiary does on a day-to-day basis. For example, the petitioner indicated that the beneficiary's main duties include: "responsible for the establishment and implementation of all policies and goals of our business," "establish medium and long-term business plans," "evaluating business opportunities," "market development," and "develop present and future business plans." The petitioner represents the beneficiary as being primarily responsible for the planning and development of the organization but fails to articulate the tasks the beneficiary performs on a day-to-day basis within the scope of the petitioner's international trade business. The AAO cannot speculate as to the managerial or executive job duties to be performed by the beneficiary in connection with such broad responsibilities as "evaluating business opportunities." 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 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).

Furthermore, many of the beneficiary's responsibilities, without additional detail, suggest his involvement in market research, promotion and purchasing activities which do not fall under traditional definitions of managerial or executive capacity. For example, the petitioner indicates that the beneficiary will "examine and review new market expansion opportunities," "review and analyze new customer needs and business trends in the United States," "analyze the U.S. market," and "examine the preferences of our existing as well as potential customers." The petitioner has not indicated that any of these market research and analysis duties would be delegated to the beneficiary's sole subordinate employee. Furthermore, these duties, which have not been shown to be managerial in nature, encompass a significant portion of the beneficiary's job description. Similarly, the petitioner indicates that the beneficiary "negotiates the terms and conditions of our contractual agreements," and is responsible for "negotiating with our suppliers in the United States and Japan." Based on the petitioner's representations, and the lack of subordinate staff to perform these duties, it is evident that the beneficiary is also responsible for procurement and purchasing of goods to be sold to U.S. and Japanese customers. Again, purchasing and market research tasks are generally not considered to be managerial or executive in nature.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his 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 lists the beneficiary's duties as including both managerial and operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's described responsibilities, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See, e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Contrary to counsel's assertions on appeal, the beneficiary's job description alone, which is overly vague and includes non-qualifying duties, is not sufficient to establish the beneficiary's employment in a primarily managerial or executive capacity.

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. Therefore, when examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews descriptions of a beneficiary's duties and those of 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.

Here, while the beneficiary's sole subordinate holds the position title of "general manager," the petitioner indicates that his duties include administration, sales, customer service, and accounting matters, rather than any duties that would be considered managerial, professional or supervisory in nature. Counsel correctly

states that the beneficiary does not need to manage a subordinate staff of managerial, supervisory or professional employees in order to be employed in a qualifying capacity. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). Therefore, the beneficiary will not be considered to be employed in a managerial capacity based on his supervision of the general manager.

Further, the petitioner still has the burden of establishing that someone other than the beneficiary performs the majority of the non-qualifying administration, clerical and operational tasks associated with operating the petitioner's business, thus freeing the beneficiary to perform primarily 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).

Counsel correctly observes that 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). Further, in the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS 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.¹ There is no provision in USCIS 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.

At the time of filing, the petitioner was a two-year-old trade company engaged in import and sale of Japanese paper products and purchase and export of printing equipment and supplies to Japan. As such, the petitioner has a reasonable need for employees to perform market research in its international markets, sell the petitioner's products to existing customers, market the products to new customers, procure products from North American and Japanese suppliers, arrange international transport of the products, arrange domestic shipping of products sold in the U.S., and perform bookkeeping, administrative and clerical tasks associated with operating any business, such as payroll, invoicing, payment collection and other routine duties. The petitioner employs the beneficiary as president, and a general manager who is described as being responsible

¹ In this matter, the initial petition granted the beneficiary a two-year period in which to open the new office. The AAO notes that the validity period of the initial petition, by regulation, should have been limited to a period not to exceed one year pursuant to 8 C.F.R. § 214.2(l)(7)(i)(A)(3).

for administration, customer service and order processing. There is evidence in the record confirming the general manager's involvement in sales and customer service with respect to the petitioner's Japanese art paper sales activities. However, as discussed above, the beneficiary's job description indicates his involvement in non-qualifying market research and purchasing activities, duties which have not been attributed to his subordinate. Further, contrary to counsel's assertions, the brief job description provided for the general manager, falls significantly short of establishing that he in fact performs essentially all of the day-to-day non-managerial duties associated with operating the petitioner's business. The record does not establish that the petitioner's general manager possesses the language skills to sell printing equipment and supplies to the petitioner's Japanese customers or that he is otherwise involved in this area of the business. The record also fails to demonstrate who is responsible for coordinating import, export and customs activities, or arranging for shipping of products sold domestically. 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)).

Upon review of the record as a whole, the AAO finds it implausible that a company with \$850,000 in sales reasonably requires one employee to perform primarily managerial or executive duties related to business planning and market development, while the only other employee performs all administrative, operational and clerical tasks associated with operating an international import, export and sales business involving both Japanese and U.S. customers and a diverse product offering. Although the beneficiary is responsible for making any managerial or executive decisions required to operate the business and establish its overall objectives, the record does not support that his actual duties are primarily at the managerial or executive level. Rather, the totality of the record supports a conclusion that the petitioner would require the beneficiary's participation in operational tasks in order for the company to function efficiently. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Counsel asserts on appeal that the petitioner is in a "period of significant growth" and that the company intends to hire additional personnel upon approval of the beneficiary's request for an extension of status. However, as stated above, 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. Here, the beneficiary was granted two years to establish the new U.S. office, but has hired only one employee, who, as discussed above, has not been shown to be capable of relieving the beneficiary from performing non-qualifying duties. 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). In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive capacity.

Although counsel emphasizes the petitioner's healthy financial performance as evidence of its ability to support the beneficiary in a managerial or executive position, it is the beneficiary's actual duties that reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The beneficiary cannot be deemed to be employed in a qualifying capacity based on the petitioner's sales figures. The petitioner has not demonstrated that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *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. 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 limited documentation furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying 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.