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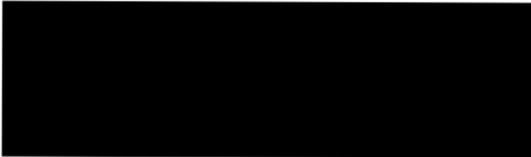
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

COPY

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FILE: EAC 02 206 53494 Office: VERMONT SERVICE CENTER Date: APR 27 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.¹

According to the documentary evidence contained in the record, the petitioner was incorporated in 2001 and claims to be an importer, exporter, and wholesaler of garments and engineering equipment. The petitioner claims that the U.S. entity is a subsidiary of [REDACTED] Trading & Contracting Co. The petitioner claims four proposed employees with a projected gross annual income of \$2.5 million. The petitioner seeks to extend the employment of the beneficiary temporarily in the United States as chief executive officer for a period of two years, at a yearly salary of \$30,000. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary has been or would continue to be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will continue to be managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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:

¹ The AAO notes that the appeal appears to be moot, as the petitioner is no longer an active corporation. According to the New York State Department of State, is inactive and no longer doing business in the state. See New York State Department of State, Division of Corporations, Entity Information Search <http://appsex8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=2645538&p_corpid=2618698&p_entity_name=%67%6C%61%78%79&p_name_type=%25&p_search_type=%42%45%47%49%4E%53&p_srch_results_page=0> (Accessed April 22, 2009) (copy incorporated into record). Accordingly, even if the petition were approved, the approval would be subject to immediate revocation. See 8 C.F.R. § 214.2(l)(9)(iii).

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(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 with 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 serves 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) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- 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 to be addressed in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity has been and will continue to be primarily managerial or executive in nature.

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 petitioner stated that the beneficiary has been and will continue to perform managerial and executive duties and specifically describes those duties as:

[The beneficiary] has spent and will spend the number of hour [sic] per week in performing his duties as follows:

- a. Plan and set goals and deadlines making policy decision [sic] regarding the management and operation of the US branch office: 5 hrs
- b. Negotiate deals, quality control, sign contracts, manage cash flows: 5 hrs
- c. Confer managers of parent company, regarding production design and quality in accordance to current American market taste and set price, analyze and evaluate market trends design feasibility and draft, design, [and] report to the board of directors in Sultante of Oman:10 hrs

- d. Supervise, direct personnel and advertising, [sic] promotional activities such as getting in touch with regular and prospective clients direct and through correspondence, telephone, internet, provide samples, observe and participate shows and exhibitions, etc.: 20 hrs
- e. Arrangement of insurance, shipping, distribution and transportation arrangements, keep tracking [sic] goods imported, coordination with custom clearing agents, delivery and receive goods from clearing agents. Console [sic] day-to-day activities of subsidiary companies and report to the CEO

In response to the director's request for additional evidence, the petitioner stated:

Responsibility and duties of the beneficiary . . . primarily are to plan manage and make policy decision regarding activities of the branch office in the United State[s] and secure the growth of the branch office under his management. [The beneficiary] is authorize [sic] to use his 100% discretion to operate and achieve the goal of the US branch office. [The beneficiary] will continue to perform his managerial responsibilities and duties as past which include make policy decision regarding the management and operation of this branch office, under his control. He also, negotiates deals, quality control of services and goods, signing contracts, managing cash flows, making personnel related decisions such as hiring firing, employee benefits and confer directly with managers of parent company, in Oman regarding production, design, and quality in accordance to US Market trend, taste and set price, analyze and evaluate market and report directly to the Board of Directors of parent company in Oman. [The beneficiary] have [sic] provided guidance so that the production targets are met, garments are manufactured as per specification of the various stores such as Wall Mart, Target, J.C. Penny.

The director determined that the record contained insufficient evidence to demonstrate that the beneficiary has been or would continue to be employed primarily in a managerial or executive capacity. The director stated that based upon the evidence presented it appeared that the beneficiary will be providing sales services to the organization rather than directing the management of the same. The director noted that there appeared to be only one other employee, besides the beneficiary, employed by the U.S. entity. The director stated that the evidence failed to show that the beneficiary managed a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing the non-qualifying duties. The director further stated that the record indicated that a preponderance of the beneficiary's duties would be directly providing the services of the business. The director stated that the beneficiary could not be said to be engaged in primarily managerial duties a preponderance of the time as the business had not expanded to the point where the services of a full-time, bona fide chief executive officer would be required. The director concluded that based upon the evidence of record, the beneficiary would be performing the day-to-day functions of the organization rather than managing a function of the U.S. entity.

On appeal, counsel disagrees with the director's decision, and states that the beneficiary secures the U.S. entity's growth under his management. Counsel reiterates the beneficiary's duties and performance responsibilities. Counsel also contends that under the beneficiary's management the U.S. entity has been able to open its own store in Jamaica, New York. Counsel infers throughout his brief that the U.S. entity is still in its developmental stages and continues to experience periods of growth. Counsel further asserts that the U.S. entity has employed a sales person since November 12, 2001, and that the salesperson performs all non-managerial duties offsite. Counsel asserts that as a result of the September 11th terrorist attacks, the

beneficiary has had to travel abroad extensively in an effort to contract business. Counsel also contends that the beneficiary will be hiring other personnel in the future.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been and will be employed primarily in a managerial or executive position.

The record reveals that the petitioner is filing for a new office extension and therefore was required to have been doing business for one year prior to the filing of the petition. Therefore, it is not to be considered a new office pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(F) for purposes of evaluating the beneficiary's proposed position. Counsel infers that the U.S. entity is still in the developmental stages and anticipates growth and further development in the future. However, 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended 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 provisional 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 case, the petitioner has failed to present sufficient evidence to establish that it has reached the point where it can employ the beneficiary in a predominantly managerial or executive position.

The petitioner has not provided a comprehensive description of the beneficiary's job duties. The beneficiary's position description is too general and broad to establish that the preponderance of his duties will be managerial or executive in nature. The following duties are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive: makes policy decisions, develops market strategy, negotiates deals, makes personnel related decisions, analyzes and evaluates market trends in the United States, plans and set goals and deadlines, signs contracts, and manages cash flow. Further, there is insufficient detail regarding the actual duties of the assignment to overcome the objectives of the director. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. V. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id. at 1108*.

The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervising personnel who can relieve him from performing non-qualifying duties. Counsel claims that there is a sales representative who has been employed by the U.S. entity since November 12, 2001. However, a letter written by the claimed employee demonstrates that as of November 13, 2001, the parties were still negotiating the terms of an employment contract. In addition, on appeal counsel admits "according to the petitioner's plan, the petitioner will hire some subordinate employees in the Branch Office . . . who will be under control of the beneficiary . . . and relieve him from performing non-managerial duties . . ."

Based upon the evidence submitted, it does not appear that the reasonable needs of the petitioning company would plausibly be met by the services of the beneficiary as manager or executive. As required by section 101(a)(44)(C) of the Act, 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. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the

petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, 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.

The record does not establish that the beneficiary's duties will be primarily directing the management of the organization. The record indicates that the beneficiary's primary duties have and will consist of maintaining the business operations rather than managing the same. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring and firing of personnel, discretionary decision making, and setting company goals and policies constitute significant components of the duties performed by the beneficiary on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization.

Based upon the record, it appears that the beneficiary will be performing the sales and day-to-day functions of the U.S. entity rather than managing a function of the organization. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the organization. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Accordingly, the petitioner has failed to demonstrate that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

While not directly addressed by the director, the minimal documentation of the foreign entity's business operations raises the issue of whether a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(G). In the instant matter, although requested by the director, the petitioner failed to submit evidence of the foreign entity's business activities. 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). The petitioner has not demonstrated that a qualifying relationship still exists with a foreign entity and has not persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. See 8 C.F.R. § 214.2(1)(1)(ii)(H). For this additional reason, the petition must be denied.

The petition will be denied and the appeal dismissed 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.