



U.S. Citizenship  
and Immigration  
Services

D7



File: WAC 08 241 51933 Office: VERMONT SERVICE CENTER Date: DEC 08 2009

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)

IN 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 reopen or reconsider, as required by 8 C.F.R. §103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the petition for a nonimmigrant visa.<sup>1</sup> The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its president 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 is a Delaware corporation engaged in the business of importing and selling eyewear. 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.

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. On appeal, counsel asserts that the petitioner's prior counsel submitted deficient supporting evidence and information and asserts that the beneficiary's duties are primarily those of an executive or manager.

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.

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<sup>1</sup> The petition was denied in November 2008 and the appeal was received by the California Service Center in December 2008. However, CSC did not forward the appeal to the AAO until eight months later, contrary to the requirements of 8 C.F.R. § 103.3(a)(2)(iv). The director provides no explanation for the inordinate delay.

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 primary issue in the present 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.

In support of the Form I-140, the petitioner submitted a letter dated September 3, 2008, stating that the staffing at the time of filing was comprised of four employees and three independently contracted sales representatives. The petitioner also provided the following description of the beneficiary's proposed employment in the United States:

[The beneficiary]'s current duties at [the U.S. entity] include: [a]s part of the company executive team responsible for overall company strategy and operation including oversee[ing] the development and expansion of business in [sic] worldwide, focusing in the U[.]S[.]A[.]; plan[ning] long and short term goals; review[ing] budgets and financial forecasts; and liaison [sic] with parent company, vendors, subsidiaries, and clients; [d]irect[ing] and coordinate[ing] activities of departments and formulat[ing] and administer[ing] organization policies; [r]eview[ing] analyses of activities, costs, operations, and forecast[ing] data to determin[ing] company progress; [s]erv[ing] as [a] member of [the] management committee; [p]lan[ning] and coordinat[ing] activities to provide for orderly development and improv[ing] operating efficiency of [the] company; [e]valuat[ing] analyses and recommend[ing] changes to meet requirements of [the] company; and [o]verse[ing] quality assurance.

The petitioner also provided its organizational chart, which depicts a hierarchy consisting of three levels. The beneficiary was depicted at the top of the hierarchy as the petitioner's general manager; his two immediate subordinates—an office and an account manager—are depicted at the second level of the hierarchy; and a secretary and three commercial representatives are depicted at the third level of the hierarchy, the latter three being supervised by an account manager and the position of secretary being overseen by the office manager. It is noted that the only employee identified by name was the beneficiary. Additionally, while the petitioner's support letter included a job description for a sales manager, the organizational chart does not include a sales manager's position within the hierarchy at the time of filing.

On September 19, 2008, U.S. Citizenship and Immigration Services (USCIS) issued a request for evidence (RFE), which instructed the petitioner to provide a more detailed description of the beneficiary's U.S. job duties, listing specific job duties and the percentage of time that would be spent on each duty.

In response, the petitioner submitted a letter from counsel dated October 28, 2008. Counsel stated that the

petitioner currently has five employees and six independent contractors and provided the names, sources of remuneration, and educational levels for ten of the employees. Counsel also provided an additional job description with a percentage breakdown for the beneficiary, the eleventh employee. As the director included counsel's statements in the denial, this information need not be repeated in the instant decision.

Additionally, the petitioner provided an updated organizational chart to reflect the new employees that were hired since the date the petition was filed. The new organizational chart depicts the beneficiary at the top of the hierarchy as head of the organization; an office manager, a bookkeeper, and two sales managers are depicted at the second tier of the hierarchy; the third tier shows a secretary being supervised by the office manager and three sales representatives being supervised by one of the sales managers; and the fourth tier identifies an hourly employee in charge of expedition and supervised by the secretary.

On November 7, 2008, the director denied the petition, finding that the petitioner's description of the proposed employment was vague and lacking in sufficient information about the beneficiary's actual day-to-day job duties. The director concluded that the lack of sufficient information about the beneficiary's job duties warrants a denial of the petition, as USCIS is unable to determine whether the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel asserts that the director's decision is based on deficient information that was provided by prior counsel, who failed to consult with the petitioner for input as to the beneficiary's proposed job duties. Counsel refers to the petitioner's December 18, 2008 letter submitted on appeal, claiming that the petitioner's new submission includes an accurate description of the beneficiary's proposed employment. Counsel urges the AAO to consider this information prior to rendering a final decision regarding the petitioner's eligibility for the immigration benefit sought herein.

The petitioner asserts that the beneficiary will direct the management of the U.S. organization in his proffered position, which the petitioner claims is within an executive capacity. The petitioner stresses the beneficiary's high degree of discretionary authority with regard to all business decisions involving the use of corporate resources in the areas of sales, marketing, commercial terms and pricing, and distribution. The petitioner also states that the beneficiary "dictates the manner in which his policies [sic] and goals will direct [the] U.S. operations."

In light of the beneficiary's placement within the petitioner's organizational hierarchy, the petitioner has satisfied the criteria of the statutory definition where discretionary authority and decision-making is expressly required. However, the petitioner must do more than show the beneficiary at the top of an organizational chart to establish that the proffered position meets all of the statutory requirements. First, per 8 C.F.R. § 214.2(l)(3)(ii), the petitioner must provide a detailed description of the beneficiary's proposed duties, as the actual duties themselves 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). Second, the petitioner must establish that the beneficiary's proposed employment is primarily comprised of tasks within a qualifying managerial or executive capacity. This component requires the petitioner to establish that it was adequately staffed at the time of filing to relieve the beneficiary from having to primarily perform non-qualifying tasks. It is noted that 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In the present matter, while the petitioner supplemented the record with a job description that contains considerably more information than the job description provided by prior counsel, the newly submitted job description is too vague to convey a meaningful understanding of exactly what tasks the beneficiary would carry out on a daily basis. Nor does the petitioner's description establish who was available to relieve the beneficiary from the daily operational tasks at the time of filing. With regard to the job description, the director's RFE expressly instructed the petitioner to provide a list of specific job duties and to assign a percentage of time to each item on the list. However, the petitioner presents the beneficiary's job description in a different format in which a percentage of time has been assigned to a broad category, where only few specific duties were mentioned and no indication was given as to the amount of time to be spent performing specific tasks. For instance, the petitioner indicates that 50% of the beneficiary's time would be allotted to the sales and marketing category. In its discussion of the beneficiary's role with regard to sales and marketing, the petitioner states that the beneficiary would focus his efforts on directing and overseeing two sales managers, whose responsibilities include collecting sales data from the sales people they supervise. Despite this claim, the petitioner neglects to explain exactly what tasks the beneficiary would perform in his directorial and supervisory role. The petitioner further states that the beneficiary would set the marketing and sales goals based on information he would obtain from retailers at industry shows and from the sales staff at monthly meetings. However, the petitioner neglects to explain the degree of the beneficiary's involvement with retailers at industry shows, thus failing to establish how this fits the definition of a qualifying task. The petitioner also fails to establish how gathering information at monthly sales meetings translates into specific daily tasks or what those specific tasks are in the context of setting marketing and sales goals.

Moreover, aside from the lack of specific information about the beneficiary's daily tasks, the record lacks sufficient evidence to establish that the petitioner was adequately staffed at the time of filing such that it was capable of relieving the beneficiary from having to primarily perform non-qualifying tasks. While the AAO takes notice of the more recent organizational chart that was submitted in response to the RFE, this chart appears to reflect a staffing structure that was not in place at the time the Form I-129 was filed. 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).

According to the organizational chart that was submitted in support of the initial petition, the petitioner did not employ any sales managers. Rather, the petitioner included the position of account manager as one of the beneficiary's two direct subordinates. However, there is no indication that the position of an account manager is similar to or interchangeable with that of a sales manager. This leaves the AAO to question who within the petitioner's organization would have direct contact with the independently contracted sales personnel. That being said, the petitioner also provided no evidence to establish exactly whom it contracted to sell its merchandise at the time of filing. With these key questions unanswered and in light of the deficient job description provided on appeal, the AAO is unable to determine what specific tasks the beneficiary would have been performing at the time of filing. Therefore, the AAO is also unable to affirmatively conclude that the beneficiary would be employed primarily in a qualifying managerial or executive capacity.

Title 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. 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. In the instant matter, the petitioner has failed to establish that at the time of filing the United States operation had reached a stage of development that would enable it to employ the beneficiary in a primarily managerial or executive capacity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.