



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent disclosure of unwarranted
invasion of personal privacy

PUBLIC COPY

D7



File: EAC 08 202 51233 Office: VERMONT SERVICE CENTER

Date:

OCT 16 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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, denied the nonimmigrant visa petition. 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 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, a Florida corporation, is engaged in the retail sale of women's leather accessories. The beneficiary has been employed by the petitioner in L-1A status since January 2007 and the petitioner now seeks to extend his employment for two additional years.

The director denied the petition on October 30, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director observed that the petitioner failed to substantiate its claim that it employs or has ever employed the majority of the employees identified on the petitioner's organizational chart.

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. The petitioner provided a brief statement as an attachment to Form I-290B, Notice of Appeal or Motion, in which it states that the beneficiary is not a first-line supervisor and that he is not engaged in the day-to-day work of the company. The petitioner indicated on Form I-290B that it would forward a brief and/or evidence to the AAO within 30 days. As of this date, no additional evidence has been incorporated into the record of proceeding. Accordingly, the record will be considered complete.¹

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.

¹ On September 21, 2009, the AAO contacted the petitioner by facsimile to advise the petitioner that no brief or additional evidence had been received in support of the appeal as stated on the Form I-290B, and to allow the petitioner an opportunity to re-submit any timely filed evidence within five business days. The petitioner has not responded to this correspondence.

- (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 sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed 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 petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 16, 2008. The petitioner stated on Form I-129 that it is engaged in wholesale and retail activities, and that it has a staff of ten employees. According to the submitted lease agreements, the petitioner rents two adjacent carts or kiosks in a shopping mall totaling 64 square feet in area, and is engaged in the retail sale of belts and handbags.

In a statement submitted at the time of filing, the petitioner indicated that the beneficiary performs the following duties in his role as chief executive officer:

1. Planning, developing, and establishing long-range goals and objectives of business organization in accordance with board directives and corporation charter. (Planning, developing and implementing company strategy, Planning future expansion of the business)
2. Conferring with advisors to plan business objectives, to develop organizational policies to coordinate functions and operations, and to establish responsibilities and procedures for attaining objectives, and also in then implementing goals through subordinate administrative personnel and sub-contractors.
3. All aspects of the Company's finance (budget and accounts receivable), administration, and marketing. (Managing finances, insure profit based on estimated budget, profit goals).
4. Reviewing activity reports and financial statements to determine progress and status in attaining objectives and revising objectives and planning in accordance with current conditions.
5. Directing and coordinating formulation of financial program to prove funding for new or continuing operations to maximize returns on investments, and to increase productivity.
6. Liaison activities with the accountants and lawyers who contract with the Company.
7. Hiring staff and other personnel actions, including promotions, transfers, discharges, or disciplinary measures.
8. Administrative control and conformance with legal requirements of the firm.
9. Negotiate and deal with suppliers, providers, general manager, accountants, agents and legal counsel of the company.

The petitioner submitted a list of eight subordinate employees by name, job title and job duties. The petitioner indicated that it employs: (1) a secretary, [REDACTED] who performs clerk duties, filing, customer service and taking phone calls; (2) six sales personnel whose duties include "take care of the locations at the Shopping Mall, assistance to customers, credit card transactions, etc."; and (3) a general manager, [REDACTED], who is "in charge of general operations of the company," "supervises sales persons in six locations,"

establishes goals and policies, exercises control over all departments or divisions, and reports to the company president, who is identified as ' [REDACTED] '.

The petitioner submitted copies of its IRS Forms W-2, Wage and Tax Statement, for 2007. During 2007, the petitioner paid wages of \$26,666.60 to the beneficiary and \$33,600.00 to [REDACTED]. According to the petitioner's IRS Form W-3, Transmittal of Wage and Tax Statements, the petitioner paid total wages of \$62,266.60 during 2007 and issued three Forms W-2.

The director issued a request for additional evidence (RFE) on August 25, 2008, in which he instructed the petitioner to submit: (1) a comprehensive description of the beneficiary's proposed duties; (2) a description of the staff of the U.S. company including the number of employees, their job titles and duties, and the salaries and wages paid to each employee; (3) copies of all IRS Forms 1099 issued by the petitioner during 2007; and (4) complete copies of the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Return, for all four quarters of 2007 and the first two quarters of 2008.

In response to the RFE, the petitioner submitted the following description of the beneficiary's duties:

He manages, controls and coordinates our projects. Participation with other members of the organization, Manages and organizes the work of the employees under his supervision; He hires employees for the correct functioning of the enterprise, he names and fixes salaries and bonuses; He directs sales and service outlets of the organization; He negotiates contracts with foreign and national sales. He reports to the Board of Directors his yearly actions, and present the Balance Sheet and a project of the distribution of the utilities. He arranges shipping details, such as licenses, customs declarations, and packing and shipping, and routing of products. He identifies potential trading deals. He coordinates sales distribution by establishing sales territories, quotas, and goals and advises dealers, distributors, and clients concerning sales and advertising techniques. He supervises a team of top management personnel who run the day-to-day operations at the Corporation in the United States. He sets guidelines for quality management, technical support management, and attends trade shows. He identifies potential trading deals. He directs and controls work flow, setting the standards for the general guidelines.

In addition, the petitioner submitted a letter dated October 6, 2008, in which it stated that the beneficiary allocates his time among the following responsibilities:

1. Setting strategy and vision – 20%
2. Building culture – 5%
3. Personnel Building – 10%
4. Capital allocation – 10%
5. Entering and negotiating contracts on behalf of the company – 15%
6. Conferring with advisors to plan business objectives, develop policies and coordinate functions – 5%
7. All aspects of the company's finance (budget and accounts receivable), administration, and marketing. – 10%

8. Directing and coordinating formulation of financial program to prove funding for new or continuing operations to maximize returns on investments, and to increase productivity. – 10%
9. Liaison activities with the accountants and consultants who contract with the company – 10%
10. Administration, control and conformance with legal requirements of the firm. – 5%

The petitioner provided a revised organizational chart for the U.S. company which indicates that the beneficiary directly supervises the accountant and the general manager, [REDACTED]. The chart indicates that [REDACTED] supervises an accountant and a store manager, who in turn supervises six sales personnel. The petitioner submitted position descriptions for the "administration manager" (identified on the organizational chart as accountant), the sales personnel, and the general manager. The petitioner did not provide a description of the "store manager" position.

Finally, the petitioner submitted copies of its IRS Forms 941, Employer's Quarterly Federal Tax Returns, for the requested periods, and also included copies of its Florida Forms UCT-6, Employer's Quarterly Report, for all four quarters of 2007 and the first quarter of 2008. According to the submitted documentation, the beneficiary and [REDACTED] have been the only employees of the petitioning company since the third quarter of 2007. During the first four months of 2007, the petitioner paid a total of \$2,000 to one of the individuals identified as a sales representative. No other employees were listed on any of the submitted federal or state wage reports. The petitioner did not submit copies of Forms 1099 or any other evidence of wages paid to contractors in 2007 or 2008.

The director denied the petition on October 30, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director observed the significant discrepancy between the petitioner's organizational chart, which listed ten positions subordinate to the beneficiary, and its Forms W-2 and Forms 941, which indicate that the petitioning company has only two employees, including the beneficiary. The director concluded that the petitioner had not established how the beneficiary is relieved from performing the day-to-day non-managerial duties of the petitioner's business.

On appeal, the petitioner "strongly disagrees" with the director's determination and asserts that the beneficiary performs duties that are both managerial and executive in nature. The petitioner contends that the beneficiary supervises professional employees, is not a first-line supervisor, and is not engaged in the day-to-day work of the petitioning company.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.* The AAO will then consider this information in light of the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing

operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

Here, the petitioner has failed to provide a sufficiently detailed description of the beneficiary's day-to-day duties. The initial position description, despite being quite lengthy, failed to specify any specific tasks the beneficiary performs on a daily basis as the chief executive officer of a retail business. For example, the petitioner stated that the beneficiary is responsible for "planning, developing and establishing long-range goals and objectives," "conferring with advisors to plan business objectives" and "develop organizational policies," and generally overseeing "all aspects of the operation." Such duties provide little insight into the nature of the beneficiary's day-to-day duties. 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 director therefore requested a comprehensive description of the beneficiary's duties. As noted above, the RFE also included a request for a complete description of all employees' duties, and a breakdown of the number of hours devoted to each employee's duties on a weekly basis. While the petitioner submitted a slightly lengthier description of the beneficiary's duties in response to the RFE, it largely restated the initial job description and provided little additional explanation as to what the beneficiary primarily does on a day-to-day basis. For example, the petitioner added that the beneficiary will be responsible for "building culture" and "strategic vision." 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 has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Furthermore, the AAO notes that the petitioner submitted two completely different position descriptions for the beneficiary in response to the RFE. In addition to the above-referenced position description, the petitioner indicated that the beneficiary "negotiates contracts with foreign and national sales," "arranges shipping details, such as licenses, customs declarations, packing and shipping and routing of products," "establishes sales territories, quotas," "advises dealers, distributors and clients concerning sales and advertising techniques," and sets guidelines for "technical support management." Not only do these duties bear little resemblance to the duties outlined in the other position descriptions, they are not credible when considered in light of the nature of the petitioner's business. The petitioner leases two 32 square foot "carts" or kiosks at a shopping mall and is engaged in the sale of women's belts and handbags, which appear to be purchased from local wholesalers of these products. As such it has no apparent need for an employee to perform any of the above-described duties. It does not import or export products, work with distributors, have sales territories or provide technical support for the products it sells. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to his position merely on the basis of the beneficiary's job title, placement on a general organizational chart or broadly-cast business responsibilities. Furthermore, while the petitioner's descriptions of the beneficiary's duties suggests that he holds the highest level of authority within the company, the AAO

cannot overlook the fact that there is evidence in the record suggesting that [REDACTED] is the company's president and chief executive officer. The AAO notes that [REDACTED] signed the petitioner's current lease agreements in his capacity as the petitioner's president. The position description for the general manager, submitted at the time of filing, referred to [REDACTED] as the company's president. In response to the RFE, the petitioner removed this reference from the job description for the position, and indicated that Mr. [REDACTED] is the company's general manager. The petitioner provided no explanation for this change. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Overall, based on these deficiencies and unresolved discrepancies, the petitioner's description of the beneficiary's duties is insufficient to establish that the beneficiary would be performing primarily managerial or executive duties.

As noted above, when examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including 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.

Here, the petitioner claims that the beneficiary oversees a multi-tiered organizational structure consisting of a general manager, a store manager, and six sales personnel, as well as a secretary and an accountant. As noted by the director, the record is devoid of evidence of payments to the majority of employees on the petitioner's organizational chart, with the exception of the beneficiary and Jose Contreras, who was not even claimed as an employee at the time the petition was filed. The petitioner provided evidence that it employed one part-time sales person during the first half of 2007, and it appears that the secretary received wages during 2006. There is no evidence that the petitioner employs or ever employed the remaining five salespeople, the store manager, the "administration manager"/accountant, or the person claimed to hold the position of general manager at the time the petition was filed. (Jeffrey Budge). 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)).

Although the unresolved discrepancies in the petitioner's staffing levels and the petitioner's failure to document the claimed employees constituted the primary basis for denial of the petition, the petitioner does not address these discrepancies on appeal. Therefore, in the absence of persuasive evidence to the contrary, the AAO concurs with the director's determination that the petitioner's only employees are the beneficiary and Jose Contreras.

On appeal, the petitioner claims that the beneficiary manages professional employees and is not a first-line supervisor. It appears that the petitioner is claiming that the beneficiary is employed in a managerial capacity as a "personnel manager." The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The AAO acknowledges that the petitioner has assigned the only other employee of the company the position title "General Manager," and indicates that he possesses a bachelor's degree. The petitioner claims that the general manager oversees sales staff in six locations when, in fact, the petitioner has not documented that it employs any sales staff and it has only one retail location, or, at most, two locations if one counts the adjacent kiosks as two separate units. The petitioner's 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. In the present matter, the totality of the record does not support a conclusion that the beneficiary's sole documented subordinate is a supervisor, manager, or professional. As discussed above, the evidence of record does not even persuasively document that the petitioner's second employee is subordinate to the beneficiary.

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, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS 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).

At the time of filing, the petitioner was a six-year-old company engaged in the operation of a small retail operation in a shopping mall. The terms of the lease agreement require the petitioner to keep its store open for business during the mall's regular operating hours, likely at least 60 hours per week. The company employed the beneficiary as chief executive officer and one general manager, both of whom are claimed to be engaged in managerial duties. The petitioner has a reasonable need for employees to purchase inventory and supplies, greet customers, handle retail sales transactions, operate a cash register and perform day-to-day finance and administrative functions. The petitioner has not established how one managerial employee could relieve the beneficiary from participating in the day-to-day, non-managerial functions of the store. Rather, it is evident that the petitioner would require the beneficiary's and the general manager's regular participation in such non-qualifying functions in order for the business to remain operational. The petitioner has not established that it has a reasonable need for the beneficiary to be primarily engaged in the claimed 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

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.