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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

PUBLIC COPY



**U.S. Citizenship
and Immigration
Services**



D7

DATE: **DEC 29 2011** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner stated that the United States entity is engaged in the “manufacture and distribution of military boots and sales through post exchanges.” The petitioner claims to be a branch of Bum-U Corporation, located in Korea. Accordingly, the United States entity petitioned U.S. Immigration and Citizenship Services (USCIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The beneficiary was initially granted a one-year period of stay to open a new office, and the petitioner now seeks to extend the beneficiary's stay as director and executive manager as a new office petition. *See* 8 C.F.R. § 214.2(l)(14)(ii).

The director denied the petition concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a managerial or executive capacity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states:

New offices. 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 (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 AAO will affirm the decision of the director. As presently constituted, the record does not demonstrate that the beneficiary has been or will be employed in a primarily managerial or executive capacity, as defined by the Act.

The nonimmigrant petition was filed on March 16, 2009. The petitioner indicated on the Form I-129 that the beneficiary will continue to fill the position of director and executive manager. In a letter dated March 12, 2009, the petitioner stated that the beneficiary "has been placed in charge of building a network of concessions with AAFES, Army & Air Force Exchange Service, to sell specialized military boots and plaques in army and air force post exchanges." The petitioner further stated that "changes in the United States economy has profoundly affect[ed]" the petitioner. The petitioner also stated that "even though business is not good," it still needs a "director in the field to faithfully adhere to plans made with AAFES."

The petitioner submitted a document entitled, "Results of Year One Corporation," for 2008 that indicated a net income of negative \$341.15. The petitioner also submitted a contract between the petitioner and the Army and Air Force Exchange Services (AAFES) for "concessionaire exhibiting and selling cash-and-carry merchandise to AAFES customers at [REDACTED] The agreement is valid for one year from January 1, 2009 until December 31, 2009. The petitioner provided a second agreement between the same parties from January 1, 2008 until December 31, 2009. In addition, the petitioner submitted a short term commodity concessionaire agreement with AAFES Hawaii Services from November 20, 2006 until November 20, 2009. The petitioner also submitted a short term commodity concessionaire agreement with Colorado Springs Exchange from January 1, 2008 until December 31, 2008.

The petitioner submitted an employee chart listing five individuals, not including the beneficiary. In addition, the petitioner submitted a 2008 Form W-2 for the beneficiary indicating a compensation of \$29,269.22. In addition, the petitioner submitted several receipts from sales made throughout 2008. The petitioner also submitted invoices indicating the petitioner as the buyer and [REDACTED] USA as the seller for "Footwear – Military Boots." The seven invoices indicate a total sale of military boots to the petitioner in the amount of \$92,418.00.

On March 23, 2009 the director determined that the petitioner did not submit sufficient evidence to process the petition and the director requested that the petitioner submit: (1) copies of the U.S. company's IRS Form 941, Employer's Quarterly Federal Tax Return, for all employees for the last four quarters; (2) an organizational chart for the U.S. company; (3) a list of all employee positions, qualifications and duties; (4) a list of the beneficiary's duties and percentage of time spent on each duty; and (5) evidence to establish that the beneficiary is in a managerial capacity.

In the response to the director's request for evidence, dated April 9, 2009, counsel for the petitioner stated the following:

[The beneficiary] has been on the job for about eight months. Much to the surprise of [the petitioner], the United States subsidiary of [the foreign company], the downturn in the U.S. economy has spilled over to U.S. military personnel. Soldiers who used to buy two pairs of boots in preparation[sic] for deployment are coming to [the petitioner] to ask about fixing their old boots.

[The petitioner] considered pulling out of post exchanges in total, but the [petitioner] believes that the problem with the U.S. economy is temporary, and business will return to earlier levels. [The petitioner] asks for at least one more year to see if the situation can be turned around.

[The petitioner] has five current employees. See Exhibit A. [The beneficiary] is the manager in charge of operations. [redacted] and [redacted] have been hired to manage Hawaii and Colorado operations. [redacted] have been hired to run boot concessions at [redacted] Air Force Base and [redacted] Hawaii. Plans are under-way to expand in the short run to either Texas and Washington or both. Plans have been put together to hire many more employees in the next year. [The petitioner's] business in the United States is labor intensive. Many more managers and clerks will be needed if [the petitioner] is to succeed.

The petitioner submitted a second employee list. According to the list, the beneficiary holds the position of general manager-sales and marketing. The petitioner also hired a concession manager and concession sales clerk. The list provided by the petitioner also has one individual who is the concession manager that is "pending rehire" and two other individuals that are "pending." The petitioner also submitted the quarterly wage reports for the second, third and fourth quarters of 2008. The second and fourth quarters of 2008 indicate two employees, including the beneficiary, and the third quarter indicates the beneficiary as the only employee. The petitioner also submitted the quarterly wage reports for 2009. The first, second and fourth quarters had two employees and the third quarter had one employee. Furthermore, the petitioner submitted Form W-2 for 2008 for three employees. In 2008, one employee received \$3,344.00, the second received \$600.00, and the beneficiary received \$29,269.00. In addition, the petitioner submitted Form 1099 for 2008 for one individual that received \$5,749.00 for the year.

The petitioner also provided the following job description for the position offered to the beneficiary:

U.S. Branch Manager – control

(operating, developing contacts, expansion of concessions, human resources management)

- Control logistics – importing, transporting, warehousing, stocking, distributing
- Communication with Korea – working with AAFES post exchange management, customer satisfaction assurance, providing marketing information to main office in Korea
- Operating concessions – employee control, employee education, customer service
- Administrative – accounting, monitor payment to AAFES, purchasing, human resource
- Marketing – develop new markets with AAFES network of post exchanges throughout the U.S.

On appeal, counsel for the petitioner contends that the petitioner is eligible for an L-1 extension under the new office regulations at 8 C.F.R. § 214.2(l)(14)(ii).

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

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.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. The beneficiary's proposed job description includes vague duties such as the beneficiary will "control logistics – importing, transporting, warehousing, stocking, distributing; and, have "communication with Korea – working with AAFES post exchange management, customer satisfaction assurance,

providing marketing information to main office in Korea.” 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 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).

In the request for evidence, the director requested that the petitioner submit additional evidence to establish that the beneficiary would serve in a primarily managerial capacity including evidence that the beneficiary would supervise managerial, supervisory or professional personnel, or an essential function, and a breakdown of the percentage of time spent on each duty. The petitioner provided a brief description without a breakdown of the percentage of time spent on each duty and without evidence that the beneficiary would supervise managerial, supervisory or professional personnel, or an essential function. This evidence is critical to determine if the beneficiary will perform primarily managerial or executive duties while employed by the U.S. company. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The 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). In the instant matter, the petitioner did not submit a detailed job description of the duties the beneficiary will perform at the U.S. entity and therefore the petitioner has not established that the beneficiary will be employed by the U.S. entity in a managerial or executive capacity. 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. at 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, the job duties required of the beneficiary include non-qualifying duties such as the beneficiary will be responsible for “customer satisfaction assurance,” “providing marketing information to main office in Korea,” “employee education,” “accounting,” “purchasing,” “human resource,” and “develop new markets.” Since the petitioner has not confirmed that the beneficiary will supervise a support staff in the sales and financial department who are in charge of accounting, negotiations, marketing, sales and or financial development, it appears that the beneficiary will be providing the services of accounting, sales and market operations and preparing financial statements and budgets, rather than directing such activities through subordinate employees. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

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). 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 regulation at 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. There is no provision in UCIS regulations that allows for an extension of this 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 matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Second, the petitioner indicates on the Form I-129 that it employs six individuals. However, the record does not substantiate that claim. As noted above, the petitioner submitted an employee list with the beneficiary as general manager-sales and marketing, one concession manager and one concession sales clerk. The list provided by the petitioner also has one individual who is the concession manager that is "pending rehire" and two other individuals that are "pending." In addition, in reviewing the petitioner's quarterly wage reports for 2008, the petitioner employed two individuals, including the beneficiary, for the second and fourth quarters of 2008, and the beneficiary was the only employee in the third quarter of 2008. The petitioner also submitted the quarterly wage reports for 2009 which indicated that in the first, second and fourth quarters, the petitioner employed two individuals, and one individual in the third quarter of 2009. Furthermore, the petitioner submitted Form W-2 for 2008 for three employees. In 2008, one employee received \$3,344.00, the second received \$600.00, and the beneficiary received \$29,269.00. In addition, the petitioner submitted Form 1099 for 2008 with one individual that received \$5,749.00 for the year. Thus, the evidence indicated that the petitioner employed a maximum of three individuals and one contractor. In addition, one employee received \$3,344.00 and the other employee received \$600.00 for the year so it does not appear that these are full-time positions. The same is true with the contractor that received \$5,749.00 for 2008. The evidence does not substantiate the claim that the petitioner has six employees. 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).

To establish that the petitioner has staffed the new operation in the previous year, the petitioner must submit an accurate description of staffing, including the number of employees and the types

of positions, as well as evidence of the wages paid to the employees. 8 C.F.R. § 214.2(l)(14)(ii)(D). The petitioner has failed to satisfy this requirement. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily perform the petitioner's operational tasks. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

While the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Given that the employees did not work a full-time schedule, and the positions were sales clerk and sales manager, the beneficiary could not be deemed to be primarily acting in a managerial capacity because he would be primarily supervising a staff of non-professional employees.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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.

Counsel for the petitioner also implies that the petitioner is not fully operational because of difficult economic circumstances.

Despite the petitioner's unfortunate setbacks, the regulations provide no exceptions for the new office extension requirements. The regulation at 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. 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 not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

Counsel contends that the petitioner was not doing business for one year since it commenced operations on June 1, 2008, and thus, should receive an extension of the L-1A nonimmigrant visa since it is still a new office. The petitioner was granted L-1A nonimmigrant status from May 22, 2008 until May 21, 2009. If a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). Even if the petitioner commenced operations one month after the approval date, the petitioner must demonstrate that the business is sufficiently operational after one year in order to be eligible for an extension.

The petitioner has not submitted evidence that the United States and foreign entities are still qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner submitted several documents of the foreign company but they were all dated prior to 2008, thus there is not sufficient evidence to establish that the foreign company is still operating. On appeal, counsel for the petitioner stated that "[the foreign company] has employees who manufacture and distribute military boots," to the petitioner. However, the record contains several invoices from the petitioner, as the buyer, and [REDACTED] USA, as the seller, for "Footwear – Military Boots." The seven invoices indicate a total sale of military boots to the petitioner in the amount of \$92,418.00. It is not clear why the foreign company is not providing the military boots to the petitioner as stated in the record and it may indicate that the foreign company is no longer operating. 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)).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

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 met this burden.

ORDER: The appeal is dismissed.