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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



U.S. Citizenship
and Immigration
Services



87

DATE: OCT 14 2011

OFFICE: VERMONT 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a [REDACTED] corporation, claims that it is engaged in retail and distribution of automotive, gas and household products. The petitioner states that it is a subsidiary of [REDACTED], located in [REDACTED]. Accordingly, the United States entity petitioned Citizenship and Immigration Services (UCIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 seeks to employ the beneficiary to fill the position of President/CEO for a one-year period.

The director denied the petition on June 17, 2009, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that it did not appear that the beneficiary supervises a staff of professional, managerial or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, and thus the beneficiary will be primarily involved in performing the day-to-day services essential to running a business.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue raised by the director 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.

The nonimmigrant petition was filed on November 21, 2008. The Form I-129 indicates that the beneficiary will be employed in the position of president/chief executive officer for the petitioner which claimed to have six employees. In a support letter dated November 18, 2008, the beneficiary and president/CEO of the petitioner stated that the “directors and shareholders of [the petitioner] therefore desire to establish business presence in U.S. market by establishing retail locations to market gas, automotive, and household items.”

The petitioner explained the duties the beneficiary will be responsible for in the position of president/CEO as follows:

At [the petitioner], [the beneficiary] will hold the position of President and CEO. In that capacity, [the beneficiary] will have overall executive responsibility for developing, organizing, and establishing the purchase, sale, and marketing of merchandise for sale in the U.S. market. His [sic] other duties will include: (i) identifying, recruiting, and building a management team and staff with background and experience in the U.S. retail market; (ii) negotiating and supervising the drafting of purchase agreements; (iii) marketing products to consumers according to [the parent company's] guidelines; (iv) overseeing the legal and financial due diligence process and resolving any related issues; (v) developing trade and consumer market strategies based on guidelines formulated by [the parent company]; (vi) developing and implementing plans to ensure [the petitioner's] profitable operation; and (vii) negotiating prices and sales terms, developing pricing policies and advertising techniques.

The petitioner also explained the percentage of time spent on each duty as follows: Management Decisions (40%); Company Representation (15%); Financial Decisions (10%); Supervision of day-to-day company functions (10%); Business Negotiations (15%); and, Organizational Development of Company (10%).

The petitioner also submitted a business plan that stated the petitioner's short-term goal is to "successfully establish retail sales of gas, automotive and household items that has been purchased with an initial investment of \$100,000.00," and the petitioner "expects to generate revenues of \$1.2 million annually." The business plan also stated a long-term goal of diversifying into other demographic areas and the beneficiary is "investigating the possibility of establishing additional locations."

In addition, the petitioner submitted a list of current and proposed employees and a brief job description for each position. The current and proposed employees are the president/CEO, a Vice President and General Manager, a Sales and Marketing Manager, a Purchase Agent and a Staff Accountant, a Retail Manager, an Assistant Manager, Cashiers, Clerks, and a Bookkeeper. The petitioner indicated that the Vice President and General Manager has a college degree and 5 years experience in operations management, and the Retail Manager has a college degree or five years of experience in sales management. In response to the request for evidence, the petitioner submitted an organizational chart that indicated the petitioner currently employed the President and CEO, Vice President and General Manager, a Sales Manager, Manager – Retail, Accountant, Assistant Manager and Cashier.

In response to the director's request for additional evidence to establish that the beneficiary will be employed in an executive or managerial capacity, counsel for the petitioner stated the following:

[The beneficiary] serves as the President and CEO of our U.S. subsidiary, [the petitioner] and continues to establish our U.S. operations. He [sic] is responsible for all our planning, expansion, banking, budgeting, and marketing. In addition, he [sic] hires and trains other managers and employees and is in charge of increasing the sales of the company. He [sic] is employed at the highest executive level and has complete authority to establish goals and policies and exercises discretionary decision-making authority based upon policies and

procedures developed by shareholders. [The beneficiary] assumes sole responsibility of all discretionary actions taken by the U.S. entity to ensure its profitable operation.

On appeal, counsel for the petitioner reiterates the duties of the beneficiary in the position of President/CEO of the petitioner. Counsel also states that the beneficiary will supervise other professional and managerial employees. Counsel states that the petitioner has six employees, two of which are in the executive level, three that are first line managers, two clerical staff and one labor staff. Counsel explained that the vice president and general manager and the accountant are degreed individuals and report directly to the beneficiary.

In addition, the petitioner described the duties of the General Manager as “establishes and implement policies, goals, objectives, and procedures for the company operations,” “determine the demand for products and services offered;” “oversee product development or monitor trends that indicate the need for new products and services;” “develop pricing strategies,” “preparing cost estimate reports;” and, “producing and analyzing monthly budgets and activity reports.” The petitioner also described the duties of the accountant as responsible for “compiling and analyzing financial information and preparing financial reports;” “preparing entries and reconciling general ledger accounts;” “auditing orders, contracts, individual transactions and preparing depreciation schedule to apply to capital assets;” and, “analyzing operating statements, review cost control programs, and make strategy recommendations to management.”

The director denied the petition on June 17, 2009 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. 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 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 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).

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.* An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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. at 604.

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner's description of his proposed duties suggest that the beneficiary's actual duties include a number of non-managerial and non-executive duties.

The beneficiary's proposed job description includes vague duties such as "planning, expansion, investment, budgeting and marketing"; "exercises discretionary decision-making authority based upon policies and procedures developed by shareholders"; "negotiating and supervising the drafting of purchase agreements"; "developing trade and consumer market strategies"; and, "negotiating prices and sales terms, developing pricing policies and advertising techniques." 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 addition, the job duties required of the beneficiary include non-qualifying duties such as "negotiate pricing," "develop trade and consumer market strategies," and, "preparing and analyzing reports on labor cost and production operations." Since the petitioner has not explained that the U.S. company has hired any employees in marketing and public relations, it appears that the beneficiary will be providing the services of market research and operations rather than directing such activities through subordinate employees. Again, 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).

The petitioner further states that the beneficiary will spend his time negotiating and drafting service agreements. Without additional clarification from the petitioner regarding the managerial or executive duties involved, the AAO cannot distinguish this vague responsibility from routine administrative tasks. If the beneficiary is in fact researching the distributors and vendors, and negotiating the contracts, or simply ordering inventory from suppliers, these duties have not been shown to be managerial or executive in nature. 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)).

The job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform or how her time will be divided among managerial and non-managerial duties. Thus, the AAO must attempt to glean the nature of the beneficiary's proposed duties from the vague descriptions submitted.

On appeal, counsel asserts that the position offered to the beneficiary is in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. §

1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the petitioner provided only a vague description of the duties performed by the beneficiary, the petitioner has not established evidence that the beneficiary will serve in an executive capacity with the U.S. entity.

As discussed above, the beneficiary's job description was not sufficient to establish that she would be employed in a primarily managerial or executive capacity, and the petitioner has not identified sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate her position to that of an executive or manager as contemplated by the governing statute and regulations.

Beyond the decision of the director, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner's description of the stock distribution of the companies does not meet exactly the definitions constituting a qualifying relationship between the United States and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). On the Form I-129, the petitioner stated that the petitioner was 50 percent owned by the foreign company, Harsh Collections, located in India. As the foreign company owns 50 percent of the petitioner, no individual or entity owns more than 50 percent of the U.S. company. The ownership of the foreign entity and the U.S. company is not a qualifying relationship.

In addition, the petitioner submitted the Certificate of Formation For-Profit Corporation, filed on July 30, 2007. According to that filing, the petitioner has 1000 shares and the distribution of shares include [REDACTED] (333.5 shares); [REDACTED] (333.5 shares) and [REDACTED] (333.5 shares). The petitioner also submitted the Minutes of Reorganizational Meeting, dated October 1, 2007, that stated that the petitioner will issue 50% (500 shares) of its authorized stock to [REDACTED] 33% (330 shares) of its authorized stock to [REDACTED] and 17%(170) of its authorized stock to [REDACTED]. Even with this new distribution, the foreign company is not the majority owner of the petitioner and thus, does not establish a qualifying relationship. Furthermore, as general evidence of a petitioner's claimed qualifying relationship, the minutes of a meeting alone is not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, and corporate bylaws must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating

to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, UCIS is unable to determine the elements of ownership and control.

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).

The petition will be denied 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.