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U.S. Citizenship
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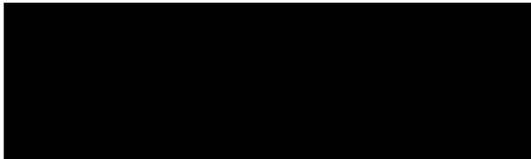


File: WAC 01 175 53147 Office: CALIFORNIA SERVICE CENTER Date: **AUG 01 2008**

IN RE: Petitioner: 
Beneficiary: 

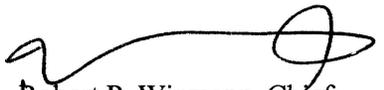
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. 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 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, a California corporation, states that it operates a used car dealership. The petitioner claims to be a subsidiary of Noorsons Associates, located in Mumbai, India. The beneficiary was initially granted a one-year period in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend his status.¹

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in a managerial or executive capacity.

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. On appeal, counsel for the petitioner asserts that the petitioner submitted "an abundance of evidence" to establish that the beneficiary is in fact employed in an executive capacity. Although counsel indicated for the Form I-290B, Notice of Appeal, that he would supplement the appeal with a brief and/or evidence within 30 days, no additional documentation has been incorporated into the record as of this date. Accordingly, the record will be considered complete.

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 The petitioner indicated on Form I-129 that the beneficiary is coming to the United States to open a new office, notwithstanding the fact that he has already been employed by the petitioning company in L-1A status under a new office petition filed pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C). The petitioner may not be granted a second "new office" L-1A visa approval. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii).

- (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 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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The primary issue in this matter is whether the petitioner established that the beneficiary will be employed by the United States entity 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 nonimmigrant petition was filed on April 23, 2001. The petitioner indicated on Form I-129 that it has two employees and gross annual sales of \$1,759,752. The petitioner stated that the beneficiary, in his role as president, "plans, develops and establishes policies and objectives; plans day to day business."

The petitioner submitted an organizational chart depicting the beneficiary and two salespersons. The petitioner also provided a copy of its California Form DE-6, Quarterly Wage Report, for the fourth quarter of 2000, which indicated that the beneficiary was the company's only employee as of December 2000.

The director determined that the evidence submitted was insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the director issued a request for evidence (RFE) in which he instructed the petitioner to submit, *inter alia*, the following: (1) a list of all U.S. company employees including names, job titles, position descriptions, beginning and end dates of employment, wages per week and source of remuneration; (2) a more detailed description of the beneficiary's duties in the United States, including a list of specific duties and the amount of time the beneficiary spends in each of the listed duties; and (3) copies of the company's Forms DE-6 for the last three quarters.

In response to the RFE, counsel for the petitioner described the beneficiary's role as president as follows:

The company is a wholesale automobile dealership. The company purchases its cars from auction dealers. The president is the only individual who has the capacity and authority to make the ultimate decision whether or not to purchase the vehicle only if it is financially feasible and whether the transaction makes viable economic sense.

In this capacity, the president must determine through a cost/benefit analysis whether each purchase will improve the company's overall financial position. Therefore, the president has the ultimate authority in decision making. Subordinate authorities do not have such authority.

Counsel provided a list of the petitioner's employees, which included two purchasers, a "recon-man" and a clerk. The petitioner indicated that it also employed a salesperson from January 2000 until December 2000. One of the purchasers was identified on the petitioner's previously submitted organizational chart as a salesperson. The other individual who was identified as a salesperson on the petitioner's organizational chart did not appear on the employee list, although the petitioner was instructed to list all employees who have worked for the company since it commenced operations.

The petitioner also submitted copies of the petitioner's California Forms DE-6 Quarterly Wage and Withholding Report, for the first two quarters of 2001, which indicate that the beneficiary was the only employee of the company during that time period.

The director denied the petition on June 21, 2002, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director noted that the petition failed to submit a detailed description of the beneficiary's proposed duties. The director found that the beneficiary's duties appear to be more of a car salesman/buyer, appraiser or financial officer, rather than those of an executive or manager. In addition, the director noted that while the petitioner claims to employ four workers, its Forms DE-6 showed that only the beneficiary has received any wages in the past four quarters. Therefore, the director concluded that the beneficiary would necessarily be required to perform many duties that are not normally associated with a managerial or executive position.

On appeal, counsel for the petitioner asserts that the director's decision was arbitrary and capricious, and contends that the petitioner has submitted sufficient evidence to establish that the beneficiary is employed in an executive capacity.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial capacity under the extended petition.

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(1)(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.*

Here, the petitioner failed to submit a detailed description of the beneficiary's duties with the initial petition, but rather, indicated that he would "plan, develop and establish policies and objectives," and "plan day-to-day business." These broad statements offer little insight as to what the beneficiary would do on a day-to-day basis as the president of a used car dealership. Reciting the beneficiary's vague job responsibilities or broadcast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner 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).

Accordingly, the director requested that the petitioner submit a more detailed description of the beneficiary's duties as president. The director explicitly instructed the petitioner to be specific in listing the duties performed by the beneficiary, and to indicate the amount of time the beneficiary devotes to each duty. The petitioner failed to provide the required level of detail in describing the beneficiary duties, and did not provide the requested information regarding how the beneficiary allocates his time among various duties. 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). Furthermore, on appeal, counsel for the petitioner does not even acknowledge the director's finding that the position description was inadequate to establish the beneficiary's claimed employment in a managerial or executive capacity. The petitioner's failure to submit the evidence requested by the director is sufficient grounds for dismissal of the appeal.

As noted by the director, the limited information the petitioner submitted in response to the RFE was inadequate to establish that the beneficiary will perform primarily managerial or executive duties. Counsel for the petitioner indicated that the president has the authority to make final decisions regarding the purchase of automobiles based on a cost/benefit analysis, a level of decision-making authority not possessed by his alleged subordinates. Counsel did not explain how the beneficiary's responsibility for performing financial analysis and purchasing used automobiles rises to the level of managerial or executive capacity. Furthermore, as discussed further, *infra*, the petitioner has not established that it employs any lower-level employees to perform the day-to-day tasks of the purchasing function for the company, or, for that matter, any other aspects of the company's day-to-day operations, such as routine sales, marketing, administrative and clerical tasks. Since the petitioner has failed to establish that it employs anyone other than the beneficiary, it has not been demonstrated that he is relieved from performing these non-qualifying duties on a regular basis. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Although the petitioner indicates that the U.S. company requires the services of an experienced manager or executive, the petitioner did not specify what qualifying duties the beneficiary would perform on a day-to-day basis. The fact that the beneficiary is the sole employee of the U.S. office and has been given a managerial job title is insufficient to meet the petitioner's burden to establish that the beneficiary's actual duties are primarily managerial or executive in nature. While the beneficiary would evidently exercise some discretion over the U.S. office as its president, owner, and apparently, its sole employee, the petitioner is required to establish that his actual duties are primarily at the managerial or executive level. 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). Based on the limited evidence in the record, it is more likely than not that the beneficiary, while having general authority over the U.S. company, would perform primarily non-qualifying duties related to sales and purchasing.

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including 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. The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D) requires the petitioner to submit 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.

Here, the petitioner indicated on the Form I-129 that it employed two employees, and indicated on its organizational chart that its staff included the beneficiary and two sales people. The director requested additional information regarding the number of staff and their job duties, and also requested evidence of wages paid to employees. In response, the petitioner indicated that it employed two purchasers, a clerk and a "recon-man" as of the date the petition was filed, information which is clearly inconsistent with what was indicated on the organizational chart submitted with the petition. Furthermore, the petitioner failed to establish through documentary evidence that the company has employed anyone other than the beneficiary since it was established. As noted above, the petitioner's California Forms DE-6 through the second quarter of 2001 identify the beneficiary as the only employee of the company. 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). 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 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. Here, the petitioner has failed to establish that the beneficiary supervises any employee, and thus he cannot qualify as a "personnel manager."

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an

essential function, the petitioner must clearly describe the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. As discussed, the petitioner has not provided a detailed description of the beneficiary's duties sufficient to establish that such duties are primarily managerial in nature, nor has it claimed or otherwise attempted to establish that he would qualify as a function manager. In view of the size and nature of the petitioner's business, it appears that the beneficiary will more likely than not perform the tasks related to the company's functions rather than truly managing any functions. See generally *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006).

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). 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 at 1316 (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).

Moreover, in the present matter, 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. There is no provision in CIS 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. As discussed, the petitioner has not documented the employment of any workers who would relieve the beneficiary from performing the non-managerial tasks associated with operating a used car dealership on a day-to-day basis. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

While it is true that a beneficiary employed by a small company or even as the sole employee of a company can qualify for L-1A classification, such petitioning companies are not exempt from establishing that the beneficiary will perform primarily managerial or executive duties. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See

52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; however, the petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. Here, the petitioner has not met that burden.

Based on the foregoing discussion, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

It is noted that the director also found that "the foreign entity has not invested funds into the U.S. entity as required by the regulations." It appears that the director was applying the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(2), which requires the petitioner to submit evidence of the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business. As discussed above, the regulations pertaining to "new office" petitions are inapplicable in this matter and therefore the director's findings will be withdrawn. The AAO notes for the record that the petitioner has established that the petitioner and the foreign entity have an affiliate relationship based on common ownership by the beneficiary, and there is thus no requirement to show that the foreign entity directly invested any funds into the U.S. company.

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.