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Washington, DC 20529

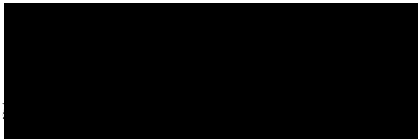
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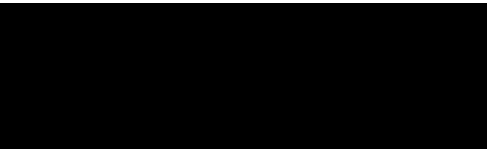


FILE: EAC 03 012 50607 Office: VERMONT SERVICE CENTER Date: JUN 13 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

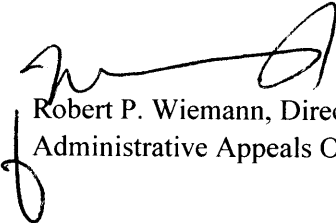
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Director  
Administrative Appeals Office

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

According to the documentary evidence contained in the record, the petitioner was incorporated September 13, 2002, and claims to be a music event organizer. The petitioner claims to be a subsidiary of Inbar Musical Ensembles Ltd., located in Tel Aviv, Israel. The petitioner seeks to employ the beneficiary temporarily in the United States as the president of its new office for a period of two years, at an annual salary of \$45,000.00. The director determined that the petitioner had submitted insufficient evidence to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity and that the entity would be able to support such a position within one year of operation.

On appeal, counsel disagrees with the director's decision and asserts the evidence submitted is sufficient to establish that the beneficiary will be employed by the U.S. entity in a primarily executive capacity and that the organization will be able to support an executive position within one year of operation.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

*Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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 with 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 serves 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(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

The issue in this proceeding is whether the evidence submitted is sufficient to demonstrate that the beneficiary will be employed by the U.S. entity 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.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The petitioner initially stated that the beneficiary, as president of the U.S. entity, would manage all of its administrative and operational activities. In a letter of support, dated September 26, 2002, the petitioner stated the beneficiary would be responsible for overseeing the operational, financial, and managerial transactions of the U.S. entity. The petitioner further described the beneficiary's proposed duties as:

- Plans, develops, and establishes policies and objectives of business organization [sic];
- Develops business objectives, to develop organizational policies to coordinate functions and operations, and to establish responsibilities and procedures for attaining objectives;

- Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions;
- Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity;
- Gives work directions, resolves problems, prepares schedules, and sets deadlines to ensure timely completion of work;
- Monitors and analyzes costs and prepares budget; [and]
- Initiates and authorizes employee hire, promotion, discharge, or transfer.

In response to the director's request for evidence on this subject, the petitioner described the preliminary organization of the business. The petitioner further described how the U.S. company would be of a sufficient size to support a managerial or executive position within one year of operation by stating in part:

Within one year of operations, [the beneficiary] plans to be relieved from performing the non-managerial, day to day [sic] operations of the business. . . . [The beneficiary] plans to hire and train three employees during the first year of operation, including a secretary, an event producer, and a marketing manager. The responsibilities of the additional employees will be such that [the beneficiary] will be relieved of the day-to-day duties of the organization. . . .

The petitioner submitted a time schedule for the U.S. entity's development covering the years 2003 through 2005. The petitioner also submitted a revised copy of the U.S. entity's business plan. In the plan, the petitioner described the job duties of the proposed employees to be hired during the entity's first business year. The descriptions are as follows:

SECRETARY – "Operate the office: answer phone calls, book appointments, type letters, update the computer with the daily information, etc."

EVENT PRODUCER – "Part time in the office and part time at event sites. Controlling the musicians, the sound technicians and other freelancers hired for the specific event which he/she is producing."

MARKETING MANAGER – "Market study and analysis, preparation of advertising and sale[s] strategies, in charge of advertising, [and] in charge of all event sales for 2004: meeting with customers and connecting between them and the event producer."

The petitioner also described the proposed job duties of the musicians and sound technicians. The petitioner submitted an organizational chart of the U.S. entity's hierarchy structure, which included the beneficiary as president, with a secretary, event producer, marketing manager, musicians, and freelance sound technicians under his direction.

The director subsequently denied the petition. The director noted that the description of the job duties was vague and did not expound on the day-to-day activities of the beneficiary. The director further noted that the U.S. entity, as a music event planner with five to ten proposed employees, would not be able to realistically utilize the beneficiary as a manager within one year of operation. The director also noted that the petitioner's business plan did not clearly identify potential professional subordinates to relieve the beneficiary from performing non-qualifying duties. The director stated that with the size of the U.S. entity and the nature of its

services, it did not appear that its organization would require the beneficiary to perform primarily executive or managerial duties. The director further stated that it appeared the beneficiary would be engaged primarily in non-managerial, day-to-day operations of the entity.

On appeal, counsel disagrees with the director's decision and asserts the director applied an incorrect standard of proof to the beneficiary's proposed position, in that the managerial capacity standard was applied to an executive position. Counsel further asserts that the term president, as described in the company's business plan, will be the highest position within the hierarchy of the organization. Counsel reiterates the duty descriptions given in the letter of support, dated September 26, 2002, and claims that such duties clearly demonstrate the "president" directs the management of the organization, and that the beneficiary as president will be developing the business policies, objectives, and procedures for the organization. Counsel further contends the company's organizational chart coupled with its business plan demonstrates that the beneficiary will be the highest ranking employee of the company, and as such he will be given complete latitude to set the direction of the company, and will report only to the company's board of directors and stock holders. Counsel claims that the U.S. entity will be able to support an executive position within one year of operation and that this has been substantiated by the company's business plan, the letter submitted from Citibank demonstrating the company's financial viability, and other business documents submitted.

The petitioner claims that the U.S. entity is a newly established music event planner business. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

In the instant matter, the business plan submitted by the petitioner fails to detail accurate, realistic projections to establish that the U.S. entity will realize growth within one year. Although the business plan and organizational chart demonstrate that the U.S. entity intends to hire new employees, it has not provided detailed position descriptions to show how their positions will interrelate with that of the beneficiary, the percentage of time to be spent performing said duties, or that the positions are anything other than non-professional positions. Furthermore, neither the business plan nor the organizational chart depicts realistic projected dates of hire.

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). In this matter, counsel claims the beneficiary's duties will be primarily executive in nature. The beneficiary's duties are described in part as overseeing operational, financial, and managerial transactions, analyzing market conditions, discerning growth opportunities, managing musician's contracts, and analyzing international markets. This description is insufficient to show that the beneficiary will primarily perform qualifying executive duties rather than spending the majority of his

time analyzing market conditions, marketing the organization's product and services, discerning growth opportunities, and managing musician's contracts. In the instant matter, the petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he will direct the management of the organization or a major component or function of the organization, establish goals and policies, exercise a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Paraphrasing the regulations as a substitute for a day-to-day description of the beneficiary's job duties is insufficient to demonstrate the beneficiary is acting in an executive or managerial capacity. *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); *Avyr Associates, Inc. v. Meissner*, 1977 WL 188942 at \*5 (S.D.N.Y.). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. supra*. There has been no evidence presented to demonstrate what goals and policies have been and will be established by the beneficiary in his capacity. 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, supra*.

Based on the current record, the AAO is unable to determine whether the claimed executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary will primarily perform non-qualifying, administrative, or operational duties. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). The petitioner lists the beneficiary's duties as including both administrative and operational tasks, but fails to quantify the time the beneficiary will spend on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as sales, marketing, and administration do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary will be primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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. For example, the petitioner states that the beneficiary's duties will consist of marketing the company's product and services, managing music contracts, and performing administrative tasks. The petitioner did not, however definitively define the marketing and administrative tasks to be performed by the beneficiary. 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, id.* at 190. 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, supra*.

Although the petitioner asserts that the beneficiary will be managing a subordinate staff, in that he will be managing the business operation, the record does not establish that the subordinate staff will be composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. In this matter the subordinates are described as secretary, even producer, marketing manager, musicians, and sound technicians. 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. Because the beneficiary will be primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

Based upon the evidence presented, the petitioner has failed to demonstrate that the beneficiary will be employed primarily in an executive capacity or that the U.S. entity will be able to support such a position within one year of operation. Further, the petitioner has failed to submit evidence rebutting the director's

denial based on the absence of evidence to demonstrate that the beneficiary would be employed in a managerial capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the minimal documentation of the foreign entity's business operations raises the issue of whether the foreign entity will continue to be engaged in the regular, systematic, and continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) during the beneficiary's stay in the United States. The petitioner indicated that the beneficiary and his partner were the majority owners of the foreign entity. There is nothing in the record to indicate that the foreign entity will continue doing business in the absence of a majority owner. For this additional reason, the petition may not be approved.

Another issue in this proceeding, also not raised by the director, is whether the employment offered to the beneficiary is temporary. Generally, the petitioner for an L-1 nonimmigrant classification need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovich*, 18 I&N Dec. 361 (Comm. 1982); *see also* 8 C.F.R. § 214.2(l)(3)(vii). In the instant matter, the petitioner indicated that the beneficiary is a major stockholder of the foreign entity. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States. For this additional reason, the petition may not be approved.

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 sustained that burden.

**ORDER:** The appeal is dismissed.