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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



AUG 18 2003

FILE: WAC 01 287 57562 Office: CALIFORNIA SERVICE CENTER Date:

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 in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition (L-1A). The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, [REDACTED], claims to be an affiliate of a Colombian business, [REDACTED] S.A. The petitioner describes itself as an importer of leather goods. The U.S. entity is incorporated in the State of California. In August 2000, the U.S. entity petitioned the Bureau to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A). The Bureau approved the petition as valid from September 12, 2000 until September 12, 2001. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for three years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's chief executive officer at an annual salary of \$45,000. On May 31, 2002, the director determined, however, that (1) the beneficiary did not serve in an executive or managerial capacity; and (2) the petitioner had not secured sufficient premises. Consequently, the director denied the petition.

The petitioner submitted a brief to the director captioned "Motion to Reconsider and Reopen and Appeal." In accordance with 8 C.F.R. § 103.3(a)(2)(iv), the director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel asserts that the beneficiary qualifies as an executive and that the petitioner had secured sufficient premises. Counsel submitted additional evidence with the appeal.

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 meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.

Under 8 C.F.R. § 214.2(l)(3), 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii), a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied by:

(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 first question the AAO will address is whether the beneficiary serves in an executive capacity.¹ 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 Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). On Form I-129, the petitioner described the beneficiary's proposed U.S. duties as: "Management and direction of U.S. affiliate." On October 19, 2001, the director issued a Request for Evidence to obtain further information about the beneficiary's duties. In pertinent part, the Request for Evidence stated:

¹ The petitioner makes no claim that the beneficiary serves in a managerial capacity.

2. EXECUTIVE OR MANAGERIAL CAPACITY IN THE U.S.

- The beneficiary's job duties in [detail], including the percentage of time to be spent on each duty.
- A list of employees currently under the beneficiary's supervision The list should include name[s], job title[s] and duties, entry date[s] of employment, education level, annual salaries/wages.
- Clearly indicate whether the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees. If yes, please provide name[s], job title[s] and duties of those employees.

3. OTHER

- Submit the latest Form 1120 U.S. Corporat[ion] Income Tax Return.
- Submit DE-6 for the last 4 quarters to show that the office at [REDACTED] has employees.

On January 3, 2002, the petitioner's counsel responded with a November 15, 2001 statement from the beneficiary. In relevant part, the November 15 statement averred:

2. The Beneficiary is in charge of all marketing, sales calls, collections, and customer contacts in person and by telephone throughout the Southern California area. The Beneficiary has no other employees under his supervision.
3. The Petitioner files no Forms DE-6, as [it] has no employees. The Beneficiary is an officer and an independent contractor.

Additionally, counsel submitted Forms I-9 and W-4 for [REDACTED]. Counsel stated that [REDACTED] is employed at the petitioner's Texas office and is under the beneficiary's supervision.

Initially, the AAO notes that petitioner failed to provide all of the requested documentation. Specifically, the petitioner did not identify the percentage of time the beneficiary would spend on each of his duties. "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition." 8 C.F.R. § 103.2(b)(14). The evidence that the petitioner did not submit was material because it could have established whether the beneficiary would primarily perform executive duties. Moreover, going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Therefore, the lack of evidence in the record precludes the AAO from determining whether the beneficiary will function in an executive capacity.

Despite the lack of percentages, the duties listed on the November 15 statement suggest that the beneficiary spends 100 percent of his time marketing his employer's products. Marketing, by definition, qualifies as performing a task necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The AAO agrees with counsel that a person can qualify as a functional manager without directly supervising other employees. However, as explained above, the evidence demonstrates that, at most, the beneficiary performs tasks necessary to provide a service or produce a product. In short, because the beneficiary primarily performs marketing tasks, he cannot qualify as an executive.

Counsel further states that, when the petition was filed, the beneficiary supervised one employee [REDACTED], and as of September 23, 2002, began supervising a second employee [REDACTED]. Counsel contends that these supervisory duties demonstrate that the beneficiary is an executive. The petitioner did not, however, describe either employee's duties. As established earlier, going on record without supporting

documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, *supra*; *Republic of Transkei v. INS*, *supra*; *Matter of Treasure Craft of California*, *supra*.

Additionally, the AAO notes that the petitioner hired the second employee after the director issued his decision; thus, the director was unable to consider any evidence regarding the second employee. The Bureau may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Moreover, the Bureau will adjudicate the appeal based only on the record of proceedings before the director. See, *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In sum, given the hiring date of the second employee and the petitioner's failure to describe either employee's duties, the beneficiary cannot qualify as an executive.

The AAO now turns to the second issue which the director raised, namely, whether the U.S. entity had obtained sufficient physical premises. See 8 C.F.R. § 214.2(1)(3)(v)(A). The director denied the petition, in part, because the petitioner stated in response to the request for evidence, "[T]he beneficiary actually works at his apartment office." The sufficient physical premises issue arises only during a new office's first year of operation. *Id.* However, in this case, the Bureau has already approved a petition for the beneficiary to open a new office. The question currently before the Bureau is whether to extend the petition's validity and the beneficiary's stay for three years. Therefore, the AAO need not address the physical premises question further.

The AAO notes that, although the beneficiary apparently conducted at least some work at a home/office, the petitioner also obtained an apparently valid warehouse lease as of November 1, 2000. The U.S. entity filed its petition under the new office regulations in August 2000. Therefore, the petitioner established sufficient physical premises, but only for a portion of the first year of operation. Consequently, after providing sufficient notice, the director may begin proceedings to revoke approval of the new office petition. See 8 C.F.R. § 214.2(1)(9)(i).

Beyond the decision of the director, the AAO notes that the petitioner has submitted no evidence conclusively demonstrating

that the U.S. entity has a qualifying relationship with the Colombian entity. See 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner claims that it is the affiliate of a Colombian entity. The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) define an "affiliate" as:

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Counsel's September 10, 2001 letter states that [REDACTED] own 100 percent of the Colombian entity. Additionally, the letter indicates the beneficiary sold his 50 percent interest in the petitioner to [REDACTED]. Finally, the letter reports that the Colombian entity and [REDACTED] each own 50 percent of the U.S. entity. In contrast, the U.S. entity's June 1, 2001 corporate minutes indicate that the Colombian entity and the beneficiary sold all of their shares in the U.S. entity to [REDACTED]. The U.S. entity's stock certificate number three reflects this transaction. Therefore, given these inconsistencies, it is unclear who actually controls the U.S. entity. The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA 1988). In sum, these inconsistencies make it impossible to determine whether the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, controls the U.S. and Colombian entities.

Moreover, counsel asserts but provides no proof that [REDACTED] actually own 100 percent of the Colombian company. Counsel may be suggesting that the two entities are affiliates because [REDACTED] own 100 percent of each company. The assertions of counsel do not, however, constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As set forth previously, going on record without supporting documentary evidence is insufficient to meet the

burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, *supra*; *Republic of Transkei v. INS*, *supra*; *Matter of Treasure Craft of California*, *supra*. The record, therefore, cannot establish that the U.S. entity is an affiliate of the Colombian entity.

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; *Transkei*, 923 F.2d at 178 (holding burden is on the petitioner to provide documentation); *Ikea*, 48 F.Supp at 24-5 (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.