

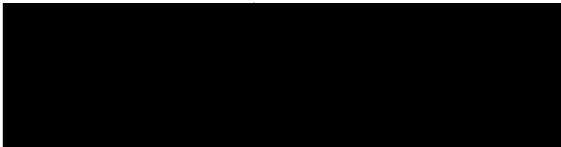
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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



FILE: SRC-02-102-51344

Office: TEXAS SERVICE CENTER

Date: DEC 9 - 2003

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER:



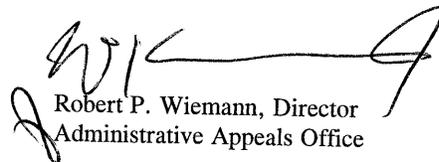
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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, Texas Service Center, denied the petitioner for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a Florida based company engaged in the import and export of merchandise to its parent company in Venezuela. The petitioner, which was incorporated in the United States in July 2000, has employed the beneficiary for one year as its marketing director. The petitioner filed a petition to extend the temporary employment of the beneficiary for two additional years.

The director denied the petition concluding that the petitioner had failed to establish the following: (1) that the foreign and U.S. corporations are qualifying organizations; (2) that the petitioning company had secured premises in the United States sufficient to do business; and, (3) that the beneficiary has been and will be employed in the U.S. company in a primarily managerial or executive capacity.

On appeal, petitioner's counsel refuted the director's decision, and asserted the following: (1) that there is clear evidence to establish a qualifying relationship between the two corporations; (2) that the director misread and misconstrued documentation when concluding that the U.S. company was not engaged in the regular, systematic, and continuous provision of goods and services; and, (3) that the director did not consider or understand the evidence when determining that the beneficiary's job duties are not primarily managerial or executive. Counsel submitted a letter in support of each assertion.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. 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.

Pursuant to the regulation at 8 C.F.R. § 214.2 (l)(14)(ii), a visa petition involving the opening of a new office may be extended by filing a new Form I-129 and submitting the following evidence:

(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 issue in this proceeding is whether the United States and foreign companies are qualifying organizations.

The pertinent regulations at 8 C.F.R. § 214.2(l)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

(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.

In the present case, the petitioner indicated on the petition that the foreign company owned 51% of the U.S. company, or 510 shares of the company's 1000 authorized shares of common stock. A stock certificate was subsequently submitted, which designated the foreign company as owner of 510 shares in the U.S. company. In its response to the director's request for additional evidence, the petitioner also noted that the total number of shares issued by the U.S. petitioning company is 510 of the 1000 authorized shares.

The director concluded that the petitioner had not established a qualifying relationship between the U.S. and foreign companies. In her decision, the director acknowledged the petitioner's claim that the foreign company owned 51% of the U.S. company. However, the director noted that on the year 2001 Corporate Tax return, the petitioner did not answer in the affirmative to the question relating to whether an individual, partnership, estate,

or trust owned 50% or more of a U.S. company's stock. The director considered this response to be inconsistent with other evidence in the record, and therefore determined that the two companies were not qualifying organizations.

On appeal, counsel asserted that the petitioner's response on the corporate tax return was not a discrepancy, as the foreign company is a corporation, not an individual, partnership, estate, or trust, as noted on the tax return. Counsel again declared that a qualifying relationship existed as a result of the foreign company owning 51% of the U.S. petitioning company.

On review, the petitioner has not established that a qualifying relationship exists between the foreign and U.S. companies. In Article IV of the U.S. company's Articles of Incorporation, the company declared 1000 shares of common stock at a value of \$.10 per share. The petitioner has asserted that the foreign company owns 51% of the petitioning company, or 510 shares of the company's common stock. Assuming this is correct, the petitioning company's financial statements should reflect that common stock in the amount of \$51.00 has been issued. In fact, the U.S. company's balance sheet indicates of total of \$1,000 of issued common stock. The petitioner has not provided any clarification as to this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

An additional discrepancy exists in the petitioner's assertion that the foreign company, which the petitioner claims purchased the total amount of shares issued by the petitioning organization, owns 51% of the U.S. organization. The petitioner declared that it issued 510 of the 1000 authorized shares of common stock to the foreign corporation. Therefore, as owner of the total amount of shares issued, the foreign company would be deemed to own and control 100% of the U.S. company, rather than 51% of the company. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, *supra*. Therefore, the record fails to demonstrate that the foreign and U.S. companies are qualifying organizations.

The AAO will next address the issue of whether the petitioning organization has secured premises sufficient for doing business in the United States.

The regulation at § 214.2(l)(1)(ii)(G) defines doing business as:

the regular, systematic, and continuous provision of goods and/or services by a qualifying organizations and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In a request for evidence, the director asked that the petitioner submit evidence that the U.S. company has conducted business during the months of February, 2001 through August, 2001. Specifically, the director requested copies of the petitioner's sales contracts, invoices, bills of lading, shipping receipts, orders, and U.S. customs forms 301, 7501, 7525-V. In response, the petitioner submitted the year 2001 corporate tax return, two Employer's Quarterly Reports for the periods ending December 31, 2001 and March 31, 2002, copies of telephone statements, and copies of invoices beginning in September 2001.

In her decision, the director determined that the petitioning organization had failed to establish that it had been doing business in the United States. The director concluded that the record contained many unexplained inconsistencies, including different mailing addresses for the company, and identifying the president of the petitioning company as a party to the lease rather than the company. In addition, the director noted the petitioner submitted invoices for only four of the twelve months during which the company claimed to be operating.

On appeal, counsel declared that the petitioner has used its business address, as identified in the Articles of Incorporation, and the residential address of its president interchangeably. Counsel asserted that these are not discrepancies in the record, but rather "the right of the petitioner to receive mail where best determined." Counsel emphasized the fact that the petitioner had submitted a copy of its business lease for a new office space, as of January 2002, and that prior to that time, the petitioner had been working from the address noted in the Articles of Incorporation. Counsel also identifies telephone records submitted by the

petitioner, in which the petitioner has underlined all calls made for the purpose of conducting business.

On review, the record contains various inconsistencies which preclude a finding that the petitioner has been doing business, as this term is defined in the regulation at 8 C.F.R. § 214.2(1)(1)(ii)(G). As noted by the director, the petitioner has been using three different addresses for its business: the business address, as identified in the Articles of Incorporation, the residential address of the president of the petitioning company, and the address of new leased premises. Despite counsel's assertion that the petitioner can receive mail where best determined, the petitioner's use of different addresses creates uncertainty that an actual place of business exists.

The petitioner submitted two Employer's Quarterly Tax returns, an Employer's Annual Federal Unemployment Tax return, and the 2001 U.S. Corporation Tax return. Each tax return identifies the petitioning organization; yet, on three returns, the business' address is listed as the residential address of the petitioner's president, while the other return notes the actual business address. There appears to be no consistency in the petitioner's use of either address. This assumption is further supported by the billings statements from the United Parcel Service, which identify the U.S. business' address as the residential address. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, the petitioner's assertion that it entered into a new lease agreement, which was to begin in January 2002, further supports a finding that, in fact, the petitioner has not been doing business the past year. As stated above, the regulation at 8 C.F.R. § 214.2(1)(1)(ii)(H) requires that a business regularly and continuously provide goods and services; the mere presence of an agent or office in the United States is not sufficient. In the present case, the petitioner's failure to establish the existence of an actual place of business, precludes a finding that the company was regularly and continuously doing business in the United States.

Finally, although requested by the director, the petitioner failed to submit any custom forms, which would substantiate its

operating as an import and export business. In the course of examining whether a petitioning company has been doing business as an import and export firm, it is reasonable to request that the company produce copies of documents that are required in the daily operation of the enterprise due to routine regulatory oversight. Upon the importation of goods into the United States, the Customs Form 7501, Entry Summary, serves to classify the goods under the Harmonized Tariff Schedules of the United States and to ascertain customs duties and taxes. The Customs Form 301, Customs Bond, serves to secure the payment of import duties and taxes upon entry of the goods into the United States. According to 19 C.F.R. § 144.12, the Customs Form 7501 shall show the value, classification, and rate of duty for the imported goods as approved by the port director at the time the entry summary is filed. The regulation at 19 C.F.R. § 144.13 states that Customs Form 301, Customs Bond, will be filed in the amount required by the port director to support the entry documentation.

Although customs brokers or agents are frequently utilized in the import process, the ultimate consignee should have access to these forms since they are liable for all import duties and taxes. Any company that is doing business through the regular, systematic, and continuous provision of goods through importation may reasonably be expected to submit copies of these forms to show that they are doing business as an import firm. As insufficient evidence was presented by the petitioning organization, the petitioner has failed to prove that it has been doing business as a bona fide import and export company. In addition, the petitioner's failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Consequently, the petitioner cannot be found to have been doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

The final issue in this proceeding is whether the beneficiary has been or will be employed in the United States in a 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.

On the I-129 petition, the petitioner identified the beneficiary as the marketing director of the U.S. organization. As a director, the beneficiary would perform the company's marketing and human resources functions, engage in executive decision-

making, and assist the president in the management of company activities and personnel. A letter from the petitioner submitted with the petition restated these same job duties.

The director requested additional evidence pertaining to the beneficiary's role as an executive or manager, including: (1) a detailed description of the beneficiary's daily activities and the percentage of time spent on each; and, (2) the current staffing in the U.S. organization, as well as position titles, responsibilities, and educational requirements of the other employees.

In response, the petitioner asserted that the beneficiary spends sixty percent of her time working as the director of marketing, and the remaining forty percent of time functioning as the director of human resources. As the director of marketing, the beneficiary performs the following:

[Establishes] marketing policy and strategy and [directs] marketing operations. She performs these duties by directing the import-export manager of the US business with the assistance of the administrative assistant. As vice president, she directs the marketing efforts of [the] parent [company] through the General Manager in Venezuela and supporting managerial and other staff, assisting and conferring with the President in the conduct of his duties, and coordinating with out-sourced professional services as required.

The petitioner also noted that the beneficiary trains, directs, and evaluates the staff of the U.S. business.

In an organizational chart submitted by the petitioner, the beneficiary is identified as the Marketing and Human Resources director, with the export-import manager and administrative assistant as her subordinates. Below these two individuals is a secretarial staff, yet it can only be assumed that these are proposed positions, as none of the documents in the record identify any individuals employed as secretaries. The duties of the import-export manager include managing vendor relations, import and export logistics, warehousing, and freight forwarding and customs. The administrative assistant is said to manage the office's day-to-day operations, as well as correspondence with the parent company. The petitioner did not provide any requested information pertaining to the educational requirements or levels of the subordinate employees.

The director determined that the petitioner had failed to provide sufficient evidence that the beneficiary has been performing or will continue to perform in a primarily managerial or executive capacity. The director noted that the petitioner submitted an "indefinite description of the [beneficiary's] job duties," and that the CIS is not obligated to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The director concluded that the record does not demonstrate that the beneficiary has sufficient support to relieve her from performing non-qualifying duties in the U.S organization.

In his letter on appeal, counsel asserted that the director failed to consider or understand the record when concluding that the beneficiary was not a manager or executive. In support of his assertion, counsel again provided the same job descriptions in support of the beneficiary's employment as a manager or executive.

On review, the record does not substantiate the claim that the beneficiary has been or will be employed in a primarily managerial or executive capacity. In examining the managerial or executive capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. 8 C.F.R. § 214.2(1)(3)(ii). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

In the present case, the petitioner asserted that, as director of marketing, the beneficiary establishes market policy and strategy and directs marketing operations through the import-export manager. The petitioner further states that the beneficiary directs marketing efforts of the parent company through the general manager and the supporting staff. Sixty percent of the beneficiary's time is spent acting as marketing director. The remaining forty percent is spent as the director of human resources for the U.S. company, in which she trains, directs, and evaluates the staff.

The job descriptions fail to identify the specific tasks to be performed by the beneficiary in her role as a manager or executive. Although the petitioner uses language found in the definitions of managerial or executive capacity, the descriptions are too vague to infer how the beneficiary's position amounts to that of a manager or executive. In addition, although the petitioner had an opportunity to submit

additional evidence in its response to the director's request, the petitioner simply restated the regulations as descriptions of the beneficiary's job duties. Simply 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). Further, the failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner has also failed to meet the requirements of managerial or executive capacity. One element of "managerial capacity" requires that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees. The petitioner asserted that the beneficiary manages the import-export manager and administrative assistant, thereby satisfying this requirement. However, the petitioner has failed to prove that the import-export manager is actually a manager, except in title alone. As there is no secretarial staff subordinate to the import-export manager, it can be assumed, and has not been proven otherwise, that this individual is not actually managing anyone. This in turn would support a finding that the beneficiary is not actually supervising or controlling the work of other supervisory, managerial, or professional employees.

In addition, pursuant to the regulations, the beneficiary must exercise discretion over the day-to-day operations of the activity or function for which the employee has authority. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(4). A first-line supervisor is not considered to be acting in a managerial capacity merely because of the supervisor's supervisory duties unless the employees supervised are professional. The term "profession" is defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101, and includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teachers of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

In the present case, although requested by the director, the beneficiary failed to submit any evidence, such as the subordinates' educational background, that might establish either is a professional under the definition. Therefore,

absent such evidence, the AAO must conclude that the beneficiary is not supervising professionals, and may instead be employed as a first-line supervisor. Also, as previously stated, failure to submit request evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

It also appears that rather than exercising discretion over the daily operations of organization's marketing department, the beneficiary is instead performing the marketing functions herself. None of the evidence submitted by the petitioner or counsel accounts for subordinate employees in the marketing department who would relieve the beneficiary from performing the non-qualifying activities. In fact, the organizational chart does not even identify the existence of a marketing department. Therefore, it can only be assumed that the beneficiary is performing all of the organization's marketing functions, including non-qualifying duties. An employee who primarily performs the tasks necessary to produce a product or to 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). For the above stated reasons, the AAO cannot conclude that the beneficiary has been or will be employed in the U.S. company in a primarily managerial or executive capacity.

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.