

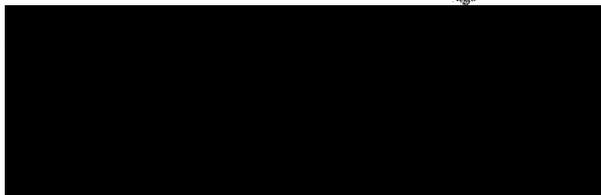
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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
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Washington, D.C. 20536



File: SRC 02 167 50083

Office: TEXAS SERVICE CENTER

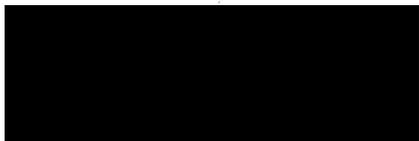
Date: **NOV 26 2003**

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)

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 which 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 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 petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a foreign company located in Venezuela. The U.S. company, [REDACTED] is described as a mortgage brokerage company incorporated in Florida. The petitioner seeks authorization to extend the employment of the beneficiary temporarily in the United States as president of the U.S. company. The petitioner states that the beneficiary has been in L-1A status since May 2000. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. Additionally, the director determined the petitioner had not established that a qualifying relationship exists between the U.S. company and the foreign company. The director also denied the petition stating the U.S. entity has failed to establish that it secured sufficient physical premises to house the U.S. entity.

On appeal, counsel states that the beneficiary is "clearly in an executive and/or managerial function." Counsel insists that the petitioner is the 100 percent owner of the U.S. entity and that the director did not review the evidence of ownership correctly.

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(1)(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.

The first issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties. 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.

When examining the executive or managerial capacity of the beneficiary, the Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). In the initial petition, the petitioner describes the U.S. position to be held by the beneficiary and states the beneficiary will continue to fill the position of President/Director. His duties are described as follows:

Will be supervising a team of approximately 10 sales associates and personal in our market expansion project. Continue to create contacts and business relationships with various construction providers in order to establish a niche. Responsible for day-to-day discretionary decisions involving sales contacts, marketing programs, advertising, personnel, payroll and other administrative duties.

On May 14, 2002, the director requested additional evidence in order to process the petition:

Submit an organizational chart for the U.S. entity. This must include the names, positions, whether they are full-time or part-time employees, and the date-started employment with the U.S. entity.

Submit evidence that all full-time employees are being paid.

How much per hour is each full-time employee being paid.

Submit a copy of the last four state quarterly reports (including wage report) for the U.S. entity. You must include the wage report.

Counsel provided the organizational chart for the U.S. company and monthly salaries for the three full-time employees. Though the director requested the state quarterly reports (including wage report) for the last four quarters for the U.S. entity, counsel only provided state quarterly reports for quarters ending March 31, 2002 and December 31, 2001. Counsel provided a payroll service's statement of deposits and filing for the second and third quarter of 2001. The U.S. company employs three full-time employees: the beneficiary [REDACTED] as president [REDACTED] as vice-president; and [REDACTED] as administrator.

The director determined that U.S. entity "does not have any qualifying employees." Based on the evidence provided, the director determined that "the president will be carrying out the day-to-day operations of the business and will not be supervising any employees." The director concluded that the petitioner has failed to demonstrate that the beneficiary will be working in a primarily managerial or executive capacity.

On appeal, counsel explains, "the U.S. organization employs three employees who do fulfill that day-to-day activities of the organization and whom are directly supervised by the beneficiary and this is evidenced by a statement from the organization and by the State Quarterly reports which show the number of employees." The assertions of counsel do not 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). It is noted that it appears that the beneficiary must be included in this group of three full-time employees. Upon review of the record, the AAO did not find any additional evidence that demonstrates how the day-to-day activities are fulfilled by the two full-time employees. 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).

On appeal, counsel asserts:

Clearly, an investment company deals with complex issues and many companies in the same line of business have Presidents who also serve as manager and/or executives. In addition, the support letter which is part of this record evidences the fact that the Beneficiary in this case is clearly in an executive and/or managerial function by describing his functions within the U.S. organization.

It is noted that neither counsel nor the petitioner clarifies whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. It appears that the beneficiary may be claiming to be employed as both a manager and an executive. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the beneficiary is representing he is both an executive and a manager. Based on the record, the petitioner has not established that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

On appeal, counsel states "[t]he Petitioner has demonstrated through its support letters that in fact the Beneficiary is supervising and is not involved in the day to day operations of the company." It is not clear who or what the beneficiary is supervising or how the "support letters" demonstrate this. The "support letters" submitted with the instant petition are addressed to various employees of the U.S. entity and are letters stating that the U.S. entity is approved to be a mortgage broker with various mortgage companies.

On appeal, counsel states, "it has been held that size of the organization is irrelevant and the number of employees supervised is not determinative". However, as required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the U.S. company was a three year-old mortgage brokerage firm that stated a gross annual income of \$54,014 for tax year 2001. The U.S. company employs the beneficiary as president, plus a vice president and an administrator in addition to two sales brokers who are paid by commission. It is noted that not all of the full-time employees possess managerial or executive titles. The petitioner did not submit evidence that it employed any subordinate staff members that would perform the actual day-to-day, non-managerial operations of the company. The petitioner states that the U.S. entity employs mortgage sales brokers but the petitioner has not described how the subordinate employees relieve the beneficiary of nonqualifying duties. Moreover, counsel for the petitioner states that the beneficiary is "[r]esponsible for day-to-day discretionary decisions involving sales contacts, marketing programs, advertising, personnel, payroll and other administrative duties."

The record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly performing the operations of the organization, as mentioned above.

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to section 101(a)(44)(A) and (B) of the Act. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from

performing nonqualifying duties. As discussed above, the petitioner has not established this essential element of eligibility. For this reason, the petition may not be approved

The second issue in this proceeding is whether a qualifying relationship exists between the petitioning company and the claimed parent company.

CIS regulations at 8 C.F.R. § 214.2(l)(ii)(G) define the term "qualifying organization" as follows:

*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.

8 C.F.R. § 214.2(l)(ii)(I) states:

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

8 C.F.R. § 214.2(l)(ii)(J) states:

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

8 C.F.R. § 214.2(l)(ii)(K) states:

*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.

8 C.F.R. §214.2(1)(ii)(L) states, in pertinent part:

*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.

On May 14, 2002, the director issued a request for evidence. The directed noted that the Form I-129 stated the U.S. entity is 100 percent owned by the foreign entity. It also states that the U.S. and foreign entity have the same relationship during the previous year. The petitioner also submitted a copy of the 2001 Federal Tax Return for the U.S. entity. Under Schedule E Compensation to Officers lists "Asuncion Prada" as the owner of 51 percent of the issued common stock. Also submitted were two stock certificates for the U.S. entity. Stock certificate "00" lists Monica Denyer-Pulignano as the owner of 49 shares. Stock certificate "01" listed the petitioner Refractarios Prammar, C.A. as the owner of 51 shares. The director asked the petitioner to explain these discrepancies and indicate the true owner of the U.S. entity. The director also asked if there was a qualifying relationship between the foreign entity and the U.S. entity and what is the relationship. The director requested a front and back copy of all stock certificates for the U.S. entity as well as a complete copy of the stock registry for the U.S. entity.

In response, counsel provided the front and back copies of the two previously submitted stock certificates as well as the stock certificate registry for the U.S. entity. It appears that the director did not notice the transfer of stock certificate "01" to the petitioner (the foreign entity) in the evidence that was submitted in the initial petition. However, counsel does not explain the discrepancies on the Form I-129 and the tax return. In the response to the request for evidence, counsel states "the qualifying relationship existed at first by the foreign entity owning 51 percent of the U.S. company and exists even stronger now own 100 percent of the U.S. company." The director noted that counsel did not explain why the petitioner had indicated on the I-129 petition that the foreign and U.S. entities had the same qualifying relationship as the previous year when stock certificate "01" was not transferred until April 16, 2002. The director determined that the petitioner failed to establish that the foreign entity is related to the U.S. entity in on of the following categories: parent, branch, affiliate or subsidiary as required by the regulations at 8 C.F.R. § 214.2 (1) (1) (ii) (G).

On appeal, counsel does not clarify the abovementioned discrepancies on the Form I-129 and tax return. Counsel explains

"therefore at the time of the initial L-1A petition which was approved for one year, the qualifying relationship did exist [sic] in that the foreign entity owned 51 percent of the U.S. company; and exists now and at the time of the L1A extension application as the foreign entity owns 100 percent of the U.S. company." Counsel still does not explain why the 2001 Federal Tax Return for the U.S. entity, under Schedule E Compensation to Officers lists "Asuncion Prada" common stock owned "51%". 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). Based on the record the petitioner provided insufficient evidence that would demonstrate that there is a qualifying relationship between the U.S. entity and the foreign entity as required by the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G). For this reason, the petition may not be approved

Although the director determined the U.S. entity has not secured sufficient physical premises to operate its business, this issue should have been adjudicated in the initial petition when the new office was opened. Therefore, the question of whether the petitioner has secured sufficient physical premises need not be examined further.

While not directly addressed by the director, the minimal documentation of the U.S. entity's business operations raises the issue of whether the entity is a qualifying organization doing business in the United States. Pursuant to 8 C.F.R. 214.2(l)(1)(ii)(G)(2) the qualifying organization must be engaged in the regular, systematic, and continuous provision of goods or services by a qualifying organization and not represent the mere presence of an agent or office in the United States. Again, as the appeal will be dismissed on other grounds, this issue need not be examined further.

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.