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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 Eye Street N.W.
Washington, D.C. 20536

File: EAC 02 153 52650

Office: VERMONT SERVICE CENTER Date:

OCT 8 - 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:

PUBLIC COPY

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 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 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.

The petitioner is described as an import and export company that first purchases U.S. equipment, spare parts, engineering services and "agro products," and then exports these products and services to Venezuela. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its Vice President. The director determined that the petitioner had not established that the beneficiary would be employed in an executive capacity.

On appeal, counsel asserts that all of the beneficiary's duties are executive and managerial in nature. Counsel states that the director's decision was based on an incorrect application of law and policy and further claims that the decision was incorrect based on the evidence of record at the time of the decision.

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)(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.

Furthermore, 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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 United States petitioner was incorporated in 2000 and states that it is a wholly-owned subsidiary of Mini Bruno Sucesores, C.A., a Venezuelan corporation. The petitioner indicated two employees on the Form I-129 and listed approximately \$1 million in gross revenues. The initial petition was approved and was valid from January 30, 2001 to January 30, 2003, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$96,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily 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.

The director issued a request for additional evidence to demonstrate that the beneficiary will be engaged in primarily managerial or executive job duties. The director requested, in part, "[a] breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis."

In the request for evidence, the director stated that the duties of the proffered job do not appear to be primarily managerial or executive in nature. The director stated that the petitioner's statements concerning the proposed duties identify general managerial functions and resemble restated portions of CIS regulations. The director determined the duties outlined are vague and do not specify exactly what duties the beneficiary will perform. The director inquired as to what the beneficiary does that qualifies him as a manager or an executive, other than in title.

The director also requested the following:

Submit additional evidence showing the management structure and personnel structure of your United States entity, to assist us in determining whether the beneficiary will be employed in a qualifying or managerial or executive capacity.

1. How many subordinate supervisors are or will be under the beneficiary's management?
2. What are the job titles and job duties of those employees?
3. What executive/managerial and technical skills are required to perform the duties in the U.S?
4. How much of the time spent by the beneficiary is or will be allotted to executive/managerial duties and how much to other non-executive functions?
5. What degree of discretionary authority in day-to-day operations does or will the beneficiary have in the United States position?

On or about June 25, 2002, the petitioner responded to the request for evidence with the following information concerning "the hourly breakdown of the management duties and responsibilities." The petitioner stated that the beneficiary performs the following duties weekly:

- Establish business and financial goals of the company. (2 hours)
- Define policies and procedures for US office business and administrative activities. (5 hours)
- Negotiate and approve purchasing and service contracts from US and international vendors, such as industrial equipment manufacturers and animal feed commodity suppliers. (10 hours)
- Identify and negotiate new business partnerships and joint ventures in the rendering business, industrial equipment trading and animal feed commodities trading business on behalf of South American parent company. (10 hours)
- Review and approve profit and loss statements and discuss the same with accountant. (2 hours)
- Review and approve all legal contracts, documentation and leases and discuss the same with corporate attorney.

(2 hours)

- Authorize purchase orders, contracts and commercial invoices. (2 hours)
- Manage established vendor relationships and investigate new vendors and discuss mechanical and chemical specification of product purchased. (2 hours)
- Direct and follow up with Venezuelan government officials for issuance of trade permits and licenses within the Agricultural and Commerce Ministries for the approval of the same for import of products from the U.S. (5 hours)
- Approve all billing and payment for company expenditures. (2 hours)
- Select, hire, train, and coordinate U.S. office personnel. (2 hours)
- Contact and follow up with clients in South America. (2 hours)
- Research new rendering techniques. (2 hours)
- Represent US and Parent company at trade shows. (4 days 5 times per year)

In his decision, the director stated the beneficiary's duties as outlined in the original submission are vague and do not specify exactly what duties the beneficiary will perform on a day-to-day basis. The director found it was not clear whom the beneficiary will direct since a statement from the petitioner shows that there are only two employees, including the beneficiary. The director determined the record does not currently show that the beneficiary will be managing a subordinate staff of qualifying personnel who will relieve him of performing nonqualifying duties. In conclusion the director stated the record does not establish that the beneficiary will be employed in an executive capacity.

On appeal, counsel states that the director's decision was based on an incorrect application of law and CIS policy and also claims that the decision was incorrect based on the evidence of record at the time of the decision. Additionally, counsel cites CIS non-precedent decisions.

Counsel also resubmits the list of weekly duties previously provided by the petitioner with additional statements of the beneficiary's job duties. Counsel for the petitioner claims that the beneficiary is engaged in managerial duties under section 101(a)(44)(A) of the Act, and executive duties under section

101(a)(44)(B) of the Act. Therefore, the petitioner must establish that the beneficiary is acting primarily in an executive capacity and in a managerial capacity by providing evidence that the beneficiary's duties satisfy each of the four elements of the two distinct statutory definitions.

Counsel asserts that all of the beneficiary's duties are both managerial and executive in nature. In reviewing whether the beneficiary is acting in a primarily managerial capacity, the AAO will review the provided job description, duties, and responsibilities. 8 C.F.R. § 214.2(1)(3)(ii). As indicated above, counsel resubmitted the weekly duties previously provided by petitioner.

In reviewing the job duties provided in the record, the AAO finds the beneficiary's duties are vaguely described. The beneficiary's duties are described as establishing business and financial goals. The petitioner does not describe or provide evidence of the business and financial goals the beneficiary has established. The petitioner does not describe what "policies and procedures" have been defined for the U.S. office "business and administrative activities." Additionally, the petitioner claims that the beneficiary performs for two hours the weekly duty described as "select, hire, train and coordinate U.S. office personnel." It is not clear what personnel the petitioner is referring to; the petitioner seems to be simply restating the regulations. The AAO notes that there are only two employees, including the beneficiary, in the U.S. office.

The petitioner's vague descriptions provide insufficient detail to allow CIS to determine many of the beneficiary's weekly responsibilities. 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).

Additionally, a large portion of the beneficiary's weekly duties are described as:

- Negotiate and approve purchasing and service contracts from US and international vendors, such as industrial equipment manufacturers and animal feed commodity suppliers. (10 hours)
- Identify and negotiate new business partnerships and joint ventures in the rendering business, industrial equipment trading and animal feed commodities trading business on behalf of South American parent company. (10

hours)

In addition, counsel declares on appeal that the beneficiary "oversees the planning and development of industrial, labor and public relations policies designed to improve the company's image and relations with customers and the public." These duties primarily appear to consist of marketing tasks. Marketing duties, by definition, qualify as performing a task necessary to provide a service or product. 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).

Counsel asserts that the beneficiary is a function manager and not a staff manager. The only staff that the beneficiary manages is an administrative assistant who is not a supervisory, professional, or managerial employee. Counsel states that the beneficiary "supervises an essential function of the organization, that is, its operation. The beneficiary has sole responsibility for setting financial and business goals and policies of the U.S. company and negotiating contracts (with substantial monetary value.)" However, supervising the operation of a company is not the same as "manag[ing] an essential function within the organization" as required in section 101(a) (44) (A) (ii) of the Act.

Counsel refers to CIS Operation Instructions section 214.2(1)(5)(I)(A)(2) which states, in part:

Eligibility requires that the duties of a position be primarily of an executive or managerial nature . The test is basic to ensure that a person not only has requisite authority, but that a majority of his or her duties relate to operational or policy management, not to supervision of lower level employees, performance of duties of another type of position, or other involvement in the operational activities of the company, such as doing sales work or operating machines or supervising those that do.

However, it must also be noted that CIS Operation Instructions in section 214.2 (1)(5)(i)(A)(3) states, in part:

An executive may manage a function within an organization. It must be clearly demonstrated, however, that the function is not directly performed by the executive. If the function itself is performed by the intended executive, the position should be viewed as a staff officer or specialist, not as an executive.

Additionally, CIS Operation Instructions in section

214.2(1)(5)(i)(A)(1) states, in relevant part:

An executive or managerial capacity requires a certain level of authority and an appropriate mix of job duties. Managers and executives plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals In addition, individuals who primarily perform the tasks necessary to produce the product(s) or provide the service(s) of an organization are not employed in an executive or managerial capacity.

In support of the petitioner's position that the beneficiary is a function manager, counsel refers to two unpublished decisions involving petitioners with one employee. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the unpublished decisions. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel's assertions are not persuasive that the beneficiary is a function manager and meets all the criteria of a manager as required by Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). Counsel's claim that the beneficiary is "managing the operations of the U.S. company" does not satisfy the requirement of managing an essential function within the organization. Based on the information provided by the petitioner, the beneficiary is performing the services of the U.S. company and therefore is not a manager as defined by the regulations. In analyzing what could be considered "managing the operations of the U.S. company" the AAO looks to the description of the U.S. company in relation to the beneficiary's job duties. The petitioner states in the response to the request for evidence that:

Presently, the U.S. subsidiary is managing the import and export operations of our parent company with respect to increasing purchases and is actively seeking new areas of business to expand U.S. business. In this regard, the company has been purchasing U.S. equipment, spare parts and engineering services, in addition to agro products.

The petitioner states that the beneficiary negotiates and approves purchasing and service contracts. He also identifies and negotiates new business partnerships and joint ventures in the rendering business, industrial equipment trading, and animal feed commodities business. Additionally, he establishes vendor relationships and

investigates new vendors. He authorizes purchase orders, contracts, and commercial invoices. Upon review of the record, the beneficiary is providing the services of the U.S. company. He is performing all of the services that the U.S. company provides, that is, purchasing and exporting equipment, spare parts, and engineering services.

Simply stating that the beneficiary "manages the operations of the U.S. company" does not establish that the beneficiary manages an essential function. The petitioner must state with specificity the "function" that the beneficiary claims to manage and explain how it is essential. The claim that the beneficiary "manages the operations of the U.S. company" is vague and, as previously discussed, does not reflect the actual day-to-day activities of the beneficiary. Such an argument could be made by anyone who operates an enterprise. For example, anyone who operates a newsstand could plausibly assert that they "manage the operations" of the newsstand, when that person's day-to-day duties primarily involve the selling of newspapers, speaking to customers, operating a cash register, receiving inventory, paying bills, and other duties. While this individual might be "managing the operations" of the newsstand, an examination of the person's actual duties reveal that she is primarily providing the services necessary for the operation of the newsstand. The statutory definition of manager specifically requires that the beneficiary "manage[] an essential function within the organization." Section 101(a)(44)(A)(ii) of the Act (emphasis added). In accordance with the plain language of the statute, if an individual is primarily performing the non-managerial services necessary to the function, that person will not be considered to be managing that function.

On appeal, counsel also asserts that the beneficiary qualifies as an executive employee based on the following:

- (i) He directs the management of the organization with complete autonomy and decision-making authority.
- (ii) He establishes the goals and policies of the company with very little direction from the parent company.
- (iii) He exercises wide latitude in decision making. Specifically negotiating contracts - some worth upwards of \$250,000 - the beneficiary has total and complete discretionary decision-making authority.
- (iv) He receives only general supervision or direction from higher level executives and board of directors of the parent company.

On appeal, counsel states, in part, that the beneficiary "exercises wide latitude in discretionary decision making, establishes goals and policies, and directs the management of the organization." Counsel did not enumerate any goals or policies and is again restating the language describing duties of an

executive under section 101(a)(44)(B) of the Act. Additionally, as discussed above, the beneficiary is the one directly performing and providing the services of the business. Counsel's assertions are not persuasive. The description of the beneficiary's weekly duties and responsibilities indicates that the beneficiary is providing the necessary services to the petitioner to allow its continued operation. 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, supra* at 604.

Counsel claims that CIS' "decision clearly shows that the denial of the L-1A petition was based on staffing levels alone and no other reason." However, as noted by counsel and by CIS in the director's decision, CIS is prohibited by statute from focusing solely on the number of employees. Section 101(a)(44)(C) of the Act. 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. *Systronics Corp. v. I.N.S.*, 153 F. Supp.2d 7, 14 (D.D.C. 2001).

Upon review, the director focused on more than the number of employees and reviewed the petitioner's description of job duties that were provided in the initial petition and the response to the request for evidence. As noted by counsel, the director stated that "[t]he beneficiary's duties are vague and do not specify exactly what duties the beneficiary will perform on a day-to-day basis." In conclusion, the director determined "[t]he record does not establish that the beneficiary will be employed in an executive capacity."

The AAO notes that the petitioner claimed in the initial petition and in the response to the request for evidence that the beneficiary would be acting in an "executive capacity." Accordingly, the director reviewed the proffered job description and duties under the appropriate CIS regulations. However, on appeal, counsel now claims that the beneficiary is primarily acting in both an executive and managerial capacity. Additionally, counsel now claims that the beneficiary is not a staff manager but a function manager and adds additional duties and responsibilities to the job description.

On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition

conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner is an import and export company that purchases equipment, spare parts, and engineering services, in addition to "agro products", and exports these products and services to Venezuela. The fact that an individual operates the business does not necessarily establish eligibility for classification in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties will be directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties will be directly performing the operations of the organization, that is, the negotiation and approval of contracts as well as identification and negotiation of new business partnerships. The only other employee organizes the logistics of exports, performs market research, and manages accounts payable and receivables.

Although counsel for the petitioner asserts that the beneficiary manages an essential function, counsel describes the essential function as the "operation of the company." The record indicates that a preponderance of the beneficiary's duties have been and will be directly performing the operations of the organization. Even though counsel asserts that the beneficiary is not producing a product, based on the evidence provided, the beneficiary is the one performing and providing the services of the U.S. company. The provided descriptions of the beneficiary's primary duties indicate that the beneficiary is not primarily acting in a qualifying managerial or executive capacity. For this 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.