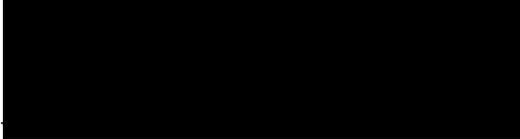


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U.S. Department of Homeland Security
Citizenship and Immigration Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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



FILE: SRC 01 236 50837 Office: TEXAS SERVICE CENTER

Date: OCT 28 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:



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 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

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DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeal Office (AAO). The AAO will dismiss the appeal.

The petitioner, [REDACTED] claims to be a wholly owned subsidiary of the Venezuelan company, [REDACTED] C.A., which operates as an importer and exporter of goods in the food industry. Although not specifically noted in the file, the petitioner was incorporated in or around April 2000, as the corporate tax return indicates a starting period of April 2000. The U.S. entity, petitioned to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A); the visa was approved and issued on September 15, 2000. The beneficiary was admitted into the United States on June 9, 2001 to open and be employed in the new U.S. office.

In an I-129 petition dated July 30, 2001, petitioner seeks to extend the validity of the petition and the beneficiary's stay in the United States for two years. The petitioner seeks to employ the beneficiary as the "Director of U.S. Operations" at an annual salary of \$30,000. In a decision dated May 20, 2002, the director denied the petition indicating that the petitioner failed to establish the following requirements: (1) that the beneficiary has been and will be performing primarily managerial or executive duties; and, (2) that the petitioner has been doing business for the year prior to this filing.

On appeal, counsel asserts that the beneficiary is performing in an executive and managerial capacity in the implementation of the U.S. entity's business plan, and that the petitioner is a bona fide import/export company that has been doing business for the prior year.

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.

The regulation at 8 C.F.R. § 214.2 (1) (3) further states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1) (1) (ii) (G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization 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 services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Further, pursuant to 8 C.F.R. § 214.2 (1)(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 (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 first issue the AAO will address is whether the beneficiary has been or will be employed in a primarily managerial or executive capacity.

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

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter submitted with the petition to extend the beneficiary's visa, the petitioner stated that the "beneficiary continues to be [employed in] an executive and managerial position. [The petitioner] currently has one employee and other personnel hired under contract." The petitioner further asserted that:

[The beneficiary] will continue to coordinate the relationship with our local, U.S. and other worldwide suppliers. [The beneficiary] will negotiate purchase/sales orders for the import/export of products; such orders will include terms of shipment and prices for said goods. Additionally, he will continue to handle all personnel matters for [the petitioner,] including the responsibility for retaining, dismissing and replacing the majority of [the petitioner's] employees within the United States. He is charged with a high level of functional management responsibilities for the direct operation and development of the US company, including marketing strategies and sales activity, with discretion over corporate and business decisions.

The director requested that the petitioner submit evidence indicating the staffing levels of the U.S. company, position titles, a description of the duties performed by each employee, and each employee's educational level. The director also asked that copies of Year 2000 W-2 forms be given for all employees. In regards to the foreign parent company, the director requested that the petitioner submit a definitive statement explaining the beneficiary's employment abroad including, his position title, duties, level of authority and position within the organizational hierarchy. The petitioner was also asked to submit the number of employees subordinate to the beneficiary, a description of their job titles and duties, and the qualifications required for each position.

In response to the director's request, counsel submitted a letter indicating that evidence of the staffing level in the U.S. company was displayed in an attached exhibit. The exhibit cited by counsel includes: (1) a Tax Liability Report for the

U.S. Company for the period of January 1, 2001 to March 31, 2001, that lists the beneficiary as the only employee; and, (2) a year 2000 U.S. Individual Income Tax Return for the beneficiary. No further evidence was submitted by counsel to establish the petitioner had any additional employees.

Counsel also submitted a brief description of the beneficiary's duties abroad. The petitioner asserted that as sales manager for the company, the beneficiary spent most of his time "implementing sales policies, negotiating with suppliers, distributors, clients and other business partners." He also "supervised and controlled a sales force and other employees in his Sales Department." Counsel made reference to exhibits "J" and "K", titled Certification by the General Manager of the Corporation and Corporate Chart, respectively, however, these exhibits were part of the original petition and were not resubmitted for the director's review. Therefore, no further information was provided to identify the organizational hierarchy of the foreign company or the beneficiary's position within the company.

In a decision dated May 20, 2002, the director denied the petition for an extension of the beneficiary's L-1A visa, indicating that "[t]he petitioner has failed to show that there are other employees at the US company who will relieve the beneficiary from performing non-qualifying duties." The director based her finding on the fact that the petitioner employed only one employee, the beneficiary, and that the petitioner failed to provide additional evidence of other employees. The director further indicated that the record lacked sufficient evidence to conclude that the beneficiary had been employed in a primarily managerial or executive capacity. As the petitioner had failed to respond to the director's request for information pertaining to the foreign company's organizational hierarchy and its employees, the director did not have sufficient evidence to conclude the beneficiary's duties were managerial or executive in nature. As stated by the director in her decision, "[e]ach petition must be adjudicated on its own merits." Therefore, although the petitioner may have submitted pertinent information with the original petition, this information was not available for the director to review in making her determination.

On appeal, counsel submitted a brief stating again that "the beneficiary is performing in an executive and managerial capacity in the implementation of the petitioner's business plan." The beneficiary will negotiate purchase and sales orders for the import and export of goods and handle all personnel matters for the petitioner. Counsel also provided an Employer's

Quarterly Report, which indicates the U.S. company employed two individuals for the quarter ending June 30, 2002, and further asserted the following:

By December 19, 2001, the time of our response to your request for additional Evidence dated September 21, 2001, the petitioner was still in the organizational stage and had not [sic] additional employees, other than [sic] the beneficiary. We would like to take this opportunity to state that as of today, petitioner is employing the beneficiary as Director of the US operations and Mrs. Reina Bovio Rojas, in the position of Marketing Manager and is in the process of interviewing an administrative assistant.

Counsel's brief was submitted on or around June 19, 2002.

In regards to the documentation of the beneficiary's duties abroad, counsel acknowledged the petitioner's failure to include the necessary exhibits. Counsel provided a small organizational chart of the foreign company, however the position titles are written in Spanish. The only English translation provided is of the beneficiary's title as sales manager, which is typed above his name. In addition, the beneficiary's duties were described as: elaboration of sales program; keeping clients informed of new products and prices; invoice control for product's exit inventory and customer's credit capacity; verify the condition and quality of products available for sale; determine the rotation of inventory; and, update customer lists.

On review, the record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. Pursuant to 8 C.F.R. § 214.2 (1)(3)(v)(C), within one year of the approval of a petition for an individual employed in a new office, the U.S. operation must be able to support an executive or managerial position. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

The petitioner is an import/export company that, at the time of filing the petition for an extension, employed the beneficiary only. Although the number of employees supervised or the size of an organization alone is not determinative of whether an individual is functioning in a managerial or executive capacity, either factor may be considered when other irregularities exist. See *Systronics Corp. v. I.N.S.*, 153 F.Supp. 2d 7, (D.D.C. 2001). The size of the personnel staff is especially important when determining whether the petitioner has sufficient staff to relieve the beneficiary from performing non-qualifying duties.

Id. Although petitioner asserts on appeal that as of June 19, 2002 it employed the beneficiary and a marketing manager, and anticipated hiring an administrative assistant, the applicable time period is when the petition was filed. As the petition for an extension was filed on July 30, 2001, it is on this date that the evidence must be reviewed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In the present case, the information provided by counsel as to the individuals currently employed by the U.S. company is irrelevant. On July 30, 2001, the petitioner employed the beneficiary only. Therefore, there were no other employees during that time who could relieve the beneficiary from performing non-managerial or non-executive duties. Further, on September 15, 2001, one year following the approval of the original petition, the beneficiary was still the only employee of the petitioner. As there was no one else to perform the organization's non-qualifying duties, such as the sales or shipping duties, the AAO cannot find that the petitioner is able to support a managerial or executive position as required by statute.

The petitioner asserted on appeal that "the beneficiary is performing in an executive and managerial capacity" in the U.S. entity. A petitioner cannot claim that some of the duties of a beneficiary's position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. See 8 C.F.R. § 214.2 (1)(3)(ii). As the petitioner asserted both capacities, it must establish that it can employ the beneficiary in both a managerial and an executive position.

The petitioner has failed to provide sufficient information to prove that the beneficiary will work in either capacity. The petitioner asserts that the beneficiary will "continue to coordinate the relationship with our local, U.S. and other worldwide suppliers," will negotiate sales and will handle all personnel matters. These statements are broad and vague, and do not provide a comprehensive description of the specific scope and nature of the beneficiary's routine duties. As specified in 8 C.F.R. § 214.2 (1)(3)(ii), a detailed description, sufficient to determine that the duties to be performed are primarily managerial or executive in nature, must be submitted with a petition. Simply going on record without supporting documentary

evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The record does not support a finding that the beneficiary manages the organization, or a department of the organization, supervises other professional employees, or manages an essential function of the organization, and exercises discretion over the day-to-day operations of a function. Although the petitioner claims that the beneficiary will handle all personnel matters, this is not enough to establish a primarily managerial role. In fact, the beneficiary, as the only employee of the petitioning company, is performing all the tasks necessary to provide a service of the company. 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). There is also insufficient evidence to conclude that the beneficiary directs the management or a major component of the organization, establishes the goals or policies of the organization, exercises wide latitude in discretionary decision-making, and receives direction from higher level executives only. As such, the petitioner has failed to prove that it is capable of employing the beneficiary in a predominately managerial and executive position. Likewise, the AAO cannot find that the beneficiary will be employed in a primarily managerial or executive capacity.

In regards to the beneficiary's employment abroad, the record does not support a finding by the AAO that the beneficiary was 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. See 8 C.F.R. § 214.2 (1) (3) (ii). The petitioner's description includes broad language such as, "implementing sales policies, negotiating with suppliers, distributors, clients and other business partners," "negotiat[ing] on behalf of the company," "represent[ing] the company at commercial association [sic]," "preparing press releases," and "evaluating expansion procedures." It should be noted that this exact language appeared in both the response to the director's request for evidence and counsel's brief on appeal. On appeal, counsel did not provide any further description that the beneficiary's position abroad involved managerial or executive duties. These broad statements given by the petitioner do not sufficiently provide a complete description of the beneficiary's duties and functions. Again, simply going on the record without supporting documentary evidence is not sufficient for the purpose of meeting the burden

of proof in these proceedings. *Matter of Treasure Craft of California*, supra.

In the present case, the record supports a finding that, while working abroad, the beneficiary performed the functions necessary for the import and export of goods, including the inspection of the condition and quality of the company's product, dealing directly with customers and outside parties, and negotiating on behalf of the company. Although there was one individual subordinate to the beneficiary, it appears from the evidence submitted that the beneficiary was not relieved from performing these non-qualifying duties. This is further substantiated by the organizational chart, which fails to clearly identify in English the title or position description of the beneficiary's one subordinate. As already stated above, precedent case law has established that an employee who primarily performs the tasks necessary to produce a product or provide a service is not considered to be employed in a primarily managerial or executive role. *Matter of Church of Scientology International*, supra at 604. In addition, the AAO is not compelled to deem the beneficiary to be a manager or an executive simply because he possesses a managerial or executive title. The petitioner has not established that the beneficiary was primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. Therefore, the AAO concludes that the beneficiary was not performing abroad as a manager or executive.

The second issue in the present case is whether the petitioner has been doing business for the previous year as required under 8 C.F.R. § 214.2 (1)(14)(ii)(B).

The regulation at 8 C.F.R. § 214.2 (1)(1)(ii)(H) defines doing business as:

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

In a letter submitted with the petition to extend the beneficiary's visa, the petitioner provided a copy of a newspaper advertisement of the company's services, a bank letter stating that the petitioner maintains a commercial account at that particular financial institution, and the year 2000 corporate income tax return, which reflects gross receipts or

sales of \$11,420.00 during the period of April 22, 2000 through December 31, 2000.

The director requested that the petitioner submit the following information to show that the petitioner is operating as an import/export company: Customs Form 7501 (Entry Summary); Form 7525-V (Shipper's Export Declaration); Customs Form 301 (Customs Bond); Form 7513 (Shipper's Export Declaration for In-Transit Goods); documentation of an importer number assigned to the petitioner by U.S. Customs; copies of invoices and contracts; and a new lease agreement, as the agreement submitted had expired.

In response to the request for evidence the petitioner submitted copies of invoices dated September 2000 through December 2000 and February 2001 through March 2001. The petitioner did not provide any customs forms as requested by the director; nor did the petitioner address the issue of the expired lease.

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 to the director, she found that the petitioner had failed to prove that it had been doing business as a bona fide import and export company.

On appeal, the petitioner submitted monthly invoices for the year 2001 and January 2002 and distributor invoices for March 2001 and January 2002. The petitioner also supplied a copy of the new lease agreement providing for an extension on the lease until August 31, 2002, pictures of the office space and the company truck, a rent statement dated June 2, 2002, a May 2002 phone bill, petitioner's occupational license, a 2001 combined tax notice, and a certificate of occupancy.

The petitioner has provided a large amount of evidence on appeal to support its assertion that it has been doing business this past year as a bona fide import/export company. However, the petitioner was required to submit this evidence in response to the director's request, rather than on appeal. 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). Further, the information provided by the petitioner is not applicable to the time period in question, that is, the year prior to filing for the extension. As indicated above, the regulation at 8 C.F.R. § 214.2 (1)(14)(ii)(B) requires that a request for a visa extension in the case of a new office must be accompanied by evidence that the U.S. company has been doing business during the entire year prior to the filing. As the petition in the present case was filed in July 2001, the evidence submitted should pertain to any business activity from July 2000 through July 2001. Therefore, it must be concluded that the petitioner was not doing business during the necessary time frame.

Beyond the decision of the director, the record is not persuasive in concluding that a qualifying relationship exists between the foreign company and U.S. company. Pursuant to 8 C.F.R. § 214.2 (1)(14)(ii)(A), when filing for a petition extension, the petitioner must provide evidence that the United States and foreign entities are still qualifying organizations as defined in 8 C.F.R. § 214.2 (1)(1)(ii)(G). As the appeal will be dismissed on the grounds discussed, this issue need not be addressed 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.