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U.S. Citizenship  
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Services



FILE: SRC 03 149 52564 Office: TEXAS SERVICE CENTER Date: **APR 01 2004**

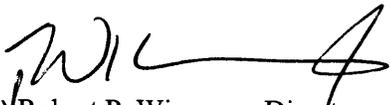
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:  
[Redacted]

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office 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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner, [REDACTED] states that it is the subsidiary of a [REDACTED] Productos [REDACTED]. The petitioner manufactures and distributes plastics. The U.S. entity was incorporated in the State of Florida on July 27, 1999. In May 2001, the U.S. entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A). CIS approved the petition as valid from May 5, 2001 through May 5, 2003. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for an unstated period of time. The petitioner seeks to employ the beneficiary's services as the U.S. entity's president at an annual salary of \$103,000 in 2003.

On September 23, 2003, the director determined that the beneficiary did not qualify as an executive; consequently, the director denied the petition.

On appeal, counsel asserts that the beneficiary's proposed duties are primarily executive.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(3) state 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.

In this matter, the petitioner asserts that the beneficiary will only perform executive duties. 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 capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). Initially, the Form I-129 described the beneficiary's proposed duties as: "Develop business for the [petitioner] in the southern part of the United States, develop[] an infrastructure to eliminate [the] expense of using middle men to transfer products and materials to Honduras [and] [e]xplore business development in other regions of the United States." A resume that accompanied the Form I-129 depicted the beneficiary's proposed functions as being "[r]esponsible for creating and developing [the petitioner] to open [the] plastics market in [the] Southern United States[,] . . . facilitat[ing] transactions on behalf of PROPLASA and for five affiliated companies/plants in Honduras[, and being] . . . in charge of purchasing raw materials and machinery."

The director determined that the above descriptions were inadequate to establish that the beneficiary would be performing primarily executive duties. As a result, on May 14, 2003, the director issued a request for evidence. Specifically, the director asked the petitioner to demonstrate that the beneficiary would "not perform the day to day functions of the company" or "engage in the day to day operation of the business." Also, the director requested copies of the petitioner's Internal Revenue Service (IRS) Form 940 EZ Employers Annual Federal Unemployment tax return as well as descriptions of the educational backgrounds and duties of any personnel the petitioner employs in addition to the beneficiary.

The petitioner submitted IRS Form 941 tax returns for the quarters ending March 31, 2002, September 31, 2002, December 31, 2002, and March 31, 2003. The tax returns reveal that the petitioner has only one employee, the beneficiary. Moreover, in response to the request for evidence, counsel admitted, "The petitioner does not have any other employees at this time. It uses the services of Mayfield Staffing."

In response to the request for evidence, counsel submitted a September 12, 2003 letter that stated: "[The] [o]perations in the United States do not require day to day involvement of something akin to a front line manager. [The beneficiary's] functions in the United States are those of an executive who [in year 2002] moved \$844,904.00 (U.S.) in plastics." Furthermore, counsel noted, "On a daily basis [the petitioner] coordinates the relationship between the U.S. operations and its clients/vendors. He is responsible for the movement of cargo in, from, and through the United States" and for the "elimination of middlemen." Counsel claimed that a "sample telephone bill show[ing] the [beneficiary's] international level of communications [demonstrates] that [the beneficiary] is not involved in daily chores."

On appeal, counsel asserts, "The [director] erred in deciding that the [petitioner] needs employees in order for the beneficiary to qualify as an executive. The category of executive requires that the beneficiary direct a function of the company. Trading with U.S. companies at the level of over \$800,000 is a major responsibility within [the petitioner]." The assertions of counsel do not, however, constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, counsel's assertions initially and on appeal that the beneficiary is an executive are insufficient to demonstrate that the beneficiary will, in fact, serve as an executive.

Furthermore, the duties listed above are too broad and nonspecific to convey an understanding of the beneficiary's daily activities. For example, the job descriptions depict the beneficiary as "develop[ing] business" and "infrastructure" in the United States, "facilitating transactions," and "coordinating the

relationship between the U.S. operations and its clients/vendors”; however, the petitioner did not explain what developing business and infrastructure, facilitating transactions, and coordinating relationships actually mean.

Going on record without supporting documentary evidence is insufficient for the purpose of meeting 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, specifics are an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature; otherwise, meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

The job duties discussed above indicate that the beneficiary will spend a substantial portion of his time marketing. Specifically, the beneficiary will be developing business and coordinating relationships. Marketing duties, by definition, qualify as performing tasks necessary to provide a service or produce a product. Additionally, the beneficiary will be performing other tasks necessary to provide a service or product. As an illustration, the beneficiary will be “in charge of purchasing raw materials and machinery” and “is responsible for the movement of cargo in, from, and through the United States.” 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). In sum, the beneficiary’s vaguely defined responsibilities and production-oriented activities preclude CIS from classifying the beneficiary as an executive.

On appeal, counsel asserts that the beneficiary will be an executive because he will “direct a function of the [petitioner].” The AAO notes, however, the petitioner has previously only claimed that the beneficiary will serve as an executive. A petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties the beneficiary will perform and indicate whether such duties are *either* in an executive *or* managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Moreover, the term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but, instead, is primarily responsible for managing an “essential function” within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary’s daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary’s daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Finally, the AAO recognizes that an entity’s size does not necessarily decide the question of managerial or executive capacity.

The petitioner not only insufficiently detailed the beneficiary’s proposed executive duties, but failed on appeal to identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary’s daily duties attributed to managing the essential function. Thus, the petitioner has failed to provide evidence that the beneficiary will manage an essential function.

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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.