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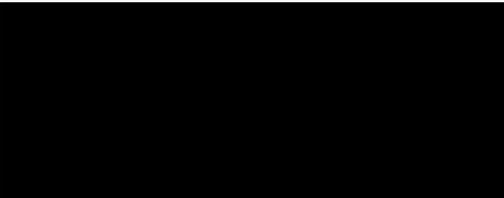
FILE: SRC 02 246 52654 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



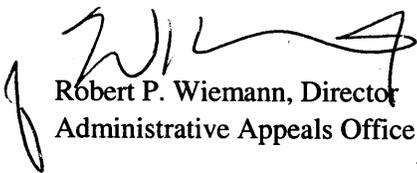
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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

The petitioner claims to be engaged in the business of parking lot administration and equipment. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and general manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. On appeal, counsel disputes the director's findings and submits a brief in support of his assertions.

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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) 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 (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 U.S. petitioner states that it was established in May 2000 and that it is an affiliate of Corporacion Park, C.A., located in Venezuela. The initial petition was approved and was valid from August 15, 2001 to August 15, 2002. The petitioner seeks to extend the petition's validity and the beneficiary's stay for two years at an annual salary of \$35,000.

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 Immigration and Nationality Act ("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 support of the petition, the petitioner provided the following description of the beneficiary's job duties:

As its General Manager, [the beneficiary] is responsible for all of the administrative decisions of the company, for all marketing activities of the U.S. entity, and for the overall performance of the company. He has the discretion over all full-time, longer-term personnel decisions for the company, and directly supervises their activities. (Emphasis in the original). His management of the full-time employees, as well as the accountant is an essential function of the Organization. He negotiates contracts on behalf of the corporation and oversees the day-to-day operations of the company.

The petitioner also provided the following breakdown of the beneficiary's duties:

- (10%) Networking with business industries in community to identify and cultivate new information sources.
- (10%) Communicate with various suppliers, distributors, clients, and potential clients, related to Parking Lot equipment and products.
- (10%) Preparation of budget for the US entity.
- (10%) Determination of needs of the US company.
- (15%) Evaluate and review the services ultimately provided by the company to ensure it meets proper specifications as per customer, and the products to ensure conformity with standards. [sic]
- (15%) Maintain regular communication with the foreign parent company.
- (30%) Monitor the activities of all employees.

On October 18, 2002, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary was transferred to the United States in order to "expand the Petitioner's start up operations and increase its employment." Counsel also asserts that the beneficiary will not answer phones, make coffee, or deal with the shipping and delivery of merchandise. While counsel is correct in acknowledging these listed duties as non-qualifying, this list is not exhaustive. The beneficiary cannot be deemed a bona fide manager or executive merely by claiming that he does not engage in office administration or shipping and delivery tasks. The evidence in the record must establish that the tasks performed by the beneficiary are primarily managerial or executive. See 8 C.F.R. § 214.2(1)(3)(ii). In the instant case, the percentage breakdown of the beneficiary's duties, provided with the petition, indicates that 30% of the beneficiary's time will be spent directly supervising the petitioner's employees. The organizational chart submitted at the time of the filing indicates that the petitioner's organizational structure was composed of an administrative worker, and two companies whom the petitioner contracted to handle its freight forwarding and accounting and bookkeeping needs. Since a large portion of the beneficiary's job consists of supervising the work of others, the petitioner must establish that such employees are supervisory, professional, or managerial. See 8 C.F.R. § 214.2(1)(1)(ii)(B)(2). The petitioner has not submitted any information about the services actually performed or the educational levels of any of the employees directly supervised by the beneficiary. Simply going on 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*, 14 I&N Dec. 190 (Reg. Comm. 1972). Although counsel claims that the petitioner hired additional employees after filing the petition, eligibility must be established at the time of filing. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248 (Reg. Comm. 1978). Therefore, any changes that occurred in the petitioner's organizational structure after filing the petition, no matter how relevant, cannot be considered in determining the petitioner's eligibility in regard to the instant petition.

Counsel also cites one of the AAO's unpublished decisions to support the assertion that the petitioner's size is irrelevant in the instant proceeding. However, 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, there is no similar provision regarding unpublished decisions. Thus, the AAO concludes that in the instant case the director's consideration of the size of the petitioning organization comports with current law. Although size cannot be the sole consideration in determining eligibility for managerial or executive status, the director can and should consider the size of the petitioner's personnel for the purpose of establishing whether the petitioner has a sufficient staff to relieve the beneficiary from performing non-qualifying duties.

In an effort to establish that the beneficiary will perform in a qualifying managerial capacity, counsel provides the following additional list of the beneficiary's proposed job duties:

- To leally [sic] represent the company; sing [sic] and subscribe contracts
- To calendar the dates in which the assemblies of shareholders will be held, organizing the agenda, directing, and being responsible for presenting the balances of each term, to inform the situation of the company. [sic]
- Execute, fulfill, and enforce all the agreements and decisions taken by the Board of shareholders.
- To open, close, and manage bank accounts; sing [sic] promissory notes, issue, accept endorse, and discount letters of exchange another [sic] commercial effects.
- To present the Board of shareholders the annual balance of the operations of the company. [sic]
- To receive and make payments in the name of the company, granting the corresponding receipts and invoices
- Give and receive money in loans or guaranty, and to grant the necessary guaranties to support the obligations acquired by the company or others.
- To name and revoke mercantile factors and grant powers to the members; to grant juridical, extra juridical, general or especial [sic] powers, assigning faculties that he/she estimate convenient in each case. [sic]
- To revoke powers granted
- To delegate in other persons his/her trust or in other members of the company
- To estimate and fixed [sic] the general and administration expenses.
- To name, remove of fix remuneration of the personnel hired in the company. [sic]

- To establish the internal norms that must be fulfilled to follow the directors of the company.
- To grant and subscribed [sic] all the documents that are necessary for the good functioning of the company and with the purpose of achieve [sic] its goals.
- To execute all the attributions that are necessary for the good development of the company

Although the above list of duties is lengthy, it consists almost entirely of descriptions that are too vague to convey a true understanding of what the beneficiary will actually be doing on a daily basis. While the petitioner also provided a percentage breakdown of the beneficiary's duties in support of the petition at the time of filing, that list of duties indicates that the beneficiary will be directly involved in soliciting business for the company, dealing with suppliers and distributors, and supervising a staff of contractors and an office administrator. Regardless of the petitioner's size, the AAO cannot conclude that the beneficiary will primarily fill the role of a manager or executive, as the record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization or managing the organization, or a department, subdivision, function, or component of the organization. Rather, the record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or that he will be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Finally, although CIS could have requested that the petitioner submit additional evidence regarding the beneficiary's duties, as counsel suggests, there is no regulation or legal precedent that mandates a request for additional evidence where the petitioner has submitted the required initial evidence, as is the case in the instant matter. *See* 8 C.F.R. § 103.2(a)(8). Furthermore, although implied by counsel, the director's adverse decision was not based on any evidence outside of the record. To the contrary, the adverse decision in the instant matter was based entirely on information submitted by the petitioner. Therefore, the director's decision to issue a denial without first issuing a notice of intent to deny the petition is not in conflict with the regulation at 8 C.F.R. § 214.2(l)(8).

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.