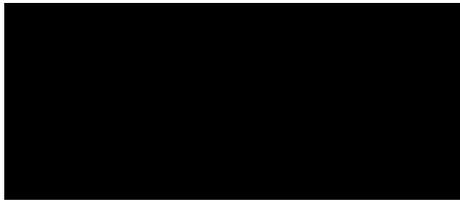




U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: SRC 02 258 52596 Office: TEXAS SERVICE CENTER Date:

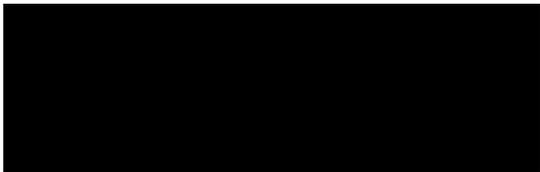
APR 26 2004

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:



PUBLIC COPY

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

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 of the Texas Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal.

The petitioner's business consists of the sales and distribution of dental products. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its sales manager. The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed by the U.S. entity primarily in a qualifying managerial or executive capacity.

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 (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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 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.

According to the documentary evidence contained in the record, the petitioner was established in 2000, and claims to be in the business of selling and distributing dental products. The petitioner claims that it is an affiliate of Oral Medica, located in Colombia. The petitioner seeks to continue the employment of the beneficiary in a managerial or executive capacity for two years, at a yearly salary of \$24,000.00. The petitioner declares four employees.

The issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity 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.

In a letter of support, dated August 28, 2002, the petitioner described the beneficiary's proposed duties as:

As the US company's sales manager, [the beneficiary] is responsible for managing the U.S. entity's sales department. He has the discretion over all sales decisions for the company. He manages the organization and/or essential function of the organization. He negotiates larger sales contracts on behalf of the corporation and deals with the U.S. supplier of goods. He also develops the pricing strategies for the company's products.

As its Sales Manager, [the beneficiary] is also directly responsible for the activities of the company's Sales Representative, and Administrator. He oversees their activities, and ensures that the company stays on track with the performance goals and objectives.

In addition to the above duties, [the beneficiary] also functions at a senior level within the organizational hierarchy and with respect to the function managed. [The beneficiary] reports on a regular basis to me (the company's General Manager), as well as the company's Board of Directors, and assists the company in establishing overall goals, objectives, and expansion plans.

The petitioner submitted a copy of the U.S. entity's organizational chart which shows that the company employs a general manager, sales manager, sales representative, and secretary.

In a letter, dated August 28, 2002, the beneficiary's proposed duties are described as being proportioned as follows:

(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 dental equipments [sic].

(15%) Evaluate and review the sales services ultimately provided by the company to ensure it meets proper specifications as per customer, and the products to ensure conformity with standards.

(20%) Identify new markets for penetration and develop marketing strategy accordingly.

(25%) Maintain regular communication with the General Manager and the Board of Directors, and with the foreign affiliate company; meetings (daily, weekly, monthly,

quarterly) and reports on sales, expansion, performance goals, marketing, advertising, [and] employment issues[.]

(20%) Monitor the activities of the Sales employees, including the Assistants; [and] develop training standards[.]

The petitioner submitted the following job descriptions:

PRESIDENT/GENERAL MANAGER:

- General administration
- Planning
- Budget
- Personnel (contracts, employees)
- Meetings (customers, Vendors, bank)
- Open accounts

SALES MANAGER:

- Make reports
- Make offers
- Customer's contracts (Exports and inside USA)
- Estimates
- Sales
- Promotions
- Sales administration
- Competitors

SALES ASSISTANT/PROMOTER:

- Deliveries
- Samples
- Promotions
- Period visit to customers
- Write orders

SECRETARY:

- Answer phone
- Invoices
- Files
- Open and close office
- Write letters, estimates, etc.
- File information for Accounting
- Make payments

The petitioner stated that it employs four employees. The petitioner submitted a copy of the U.S. entity's organizational chart, which demonstrated that a general manager, sales manager, sales representative, and secretary were all a part of the organizational structure. The petitioner submitted as evidence of employment,

the company payroll records, State Employer's Quarterly Tax Report and Federal Employer's Quarterly Tax Return for the period January 1, 2001 through June 30, 2002, and a business plan.

The director determined that the evidence was insufficient to show that the beneficiary's proposed duties would be primarily managerial or executive in nature. The director stated that many of the beneficiary's proposed job duties had not been established as intrinsically managerial. The director also stated that it was not realistic for a business to employ fifty percent of its' workers in a mostly managerial capacity.

Counsel disagrees with the director's decision, and submits a brief and evidence in support of the petition on appeal. Counsel asserts that the beneficiary will be directly supervising the sales representative and secretary/administrator. Counsel also contends that the beneficiary will be budgeting, networking with industry professionals, and establishing company goals. Counsel further contends that the beneficiary will have regular meetings with the general manager, and will report to the Board of Directors on activities involving the company. Counsel states that the beneficiary will have managerial control and authority over all functions and operations of the company's sales department, and will operate at a senior level within the organizational hierarchy. Counsel further asserts that beneficiary manages the sales function within the organization. The petitioner submitted copies of the U.S. entity's State Employer's Quarterly Tax Report and Federal Employer's Quarterly Tax Return for the period ending October 31, 2002, bank statements, and a general letter from the petitioner.

Counsel's arguments are not persuasive. The evidence does not establish that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity. Although counsel argues that the petitioner was entitled to an opportunity to respond to a Notice Request for Additional Evidence (RFE), Citizenship and Immigration Services (CIS) is not required to send an RFE unless the petitioner fails to submit initial evidence or in instances where the denial relies on adverse evidence that the petitioner is not aware of. *See* 8 C.F.R. § 103.2(b)(8) and 8 C.F.R. § 214.2(l)(8)(i). Furthermore, the petitioner has failed to submit independent documentary evidence on appeal to substantiate its claims.

On appeal, counsel states that since the petition was filed it has hired two new employees, and relies on evidence that was not in existence at the time the petition was filed to substantiate its claim. The petitioner submitted copies of the U.S. entity's State Employer's Quarterly Tax Report and Federal Employer's Quarterly Tax Return for the period ending October 31, 2002, bank statements, and a general letter from the petitioner. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). CIS cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (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 position. The record reveals that the petitioner is filing for a new office extension. Therefore, it is not to be considered a new office pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(F) for purposes of evaluating the beneficiary's proposed position. The petitioner infers that the U.S. entity is still in its developmental stages. However, 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the

business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant case, the petitioner has failed to present sufficient evidence to establish that it has reached the point where it can employ the beneficiary in a predominantly managerial or executive position.

In evaluating whether the beneficiary is a managerial or executive employee, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner has not provided a comprehensive description of the beneficiary's purported job duties. The beneficiary's position description is too general and broad to establish that the preponderance of his duties will be managerial or executive in nature. The petitioner submitted a letter of support dated August 28, 2002 in which it listed the beneficiary's proposed duties along with the percentage of time to be spent performing each task. The petitioner stated that the beneficiary's duties would consist of: 10 percent networking with business industries; 10 percent communicating with various suppliers and distributors; 15 percent evaluating and reviewing the sales services; and 20 percent identifying new markets for penetration. Based upon this evidence it appears that the beneficiary will be spending more than 50 percent of his time performing non-managerial duties. Further, there is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Specifics are clearly 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 actual duties themselves reveal the true nature of the employment. *Id. at 1108*. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervising personnel. The petitioner claims that the U.S. entity employs a sales representative and secretary. However, the record does not reflect that the employees are professional, maintain supervisory positions, work on a full-time basis, or that they take direction from the beneficiary in performing their duties. In addition, the duty descriptions given for the employees are vague and general and are insufficient to establish that the beneficiary is relieved to perform executive duties.

The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he would be establishing goals and policies, that he will be exercising a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Paraphrasing the regulations as a substitute for a day-to-day description of the beneficiary's job duties is insufficient to demonstrate the beneficiary is acting in an executive or managerial capacity. *Fedin Bros. Co., Ltd. V. Sava*, 724 F.Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1977 WL 188942 at *5 (S.D.N.Y.). There has been no independent documentary evidence presented to demonstrate what goals and policies have been and will be established by the beneficiary in his capacity.

The record does not demonstrate that the beneficiary primarily manages an essential function of the organization. The beneficiary's proposed job description depicts an individual who performs the day-to-day services of the organization, not that of a functional manager. Although the petitioner stated that the beneficiary would be primarily responsible for managing the sales department, the record reflects that the beneficiary continues to perform the duties necessary to establish the business namely: networking with business industries, communicating with various suppliers, evaluating and reviewing the sales services, and identifying new markets for penetration. When managing or directing a function, the petitioner is required to establish that the function is essential and that the manager is in a high-level position within the organizational hierarchy, or with respect to the function performed. The petitioner must also demonstrate that the executive or manager does not directly perform the function. Although counsel argues that the beneficiary

will be managing an essential function of the U.S. entity by directing all aspects of the sales division, the record does not demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. The petitioner has failed to provide a detailed position description specifying exactly what the management of the corporate functions associated with the sale of dental products will entail.

Based upon evidence submitted on the record, it appears that the beneficiary will be performing the services of the U.S. entity rather than serving as its sales manager. 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). The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the organization. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. The record does not demonstrate that the U.S. entity contains the organizational complexity to support the proposed managerial or executive staff position, nor is there sufficient evidence to show that multiple managers are necessary to sustain the U.S. entity. Accordingly, the petitioner has failed to demonstrate that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

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.