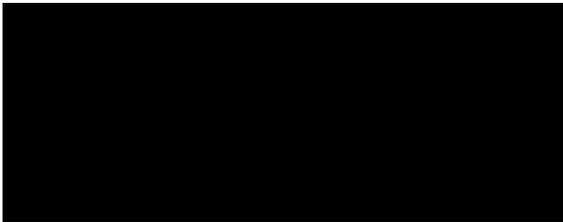




U.S. Department of Homeland Security
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Washington, DC 20536

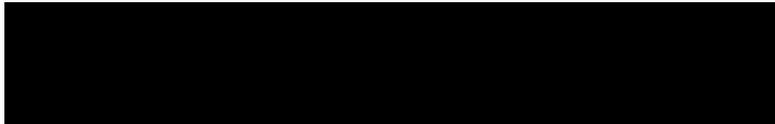


U.S. Citizenship
and Immigration
Services



FILE: SRC 02 270 52217 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. Based upon review of the evidence, the appeal will be dismissed.

The petitioner claims to be in the business of distributing fruit snacks. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its Chief Executive Officer. The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary will be employed by the U.S. entity primarily in a qualifying executive capacity.

On appeal, counsel disagrees with the director's decision, and asserts that the beneficiary's job duties will continue to be primarily, executive in nature.

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 services 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 distributing fruit snacks. The petitioner claims that it is an affiliate of Oficina Alvesilva S.R.L., located in Venezuela. The petitioner seeks to continue the employment of the beneficiary in an executive capacity for two years, at a yearly salary of \$68,000.00. The petitioner declares three to four employees and \$110,000 in gross annual income.

The issue in this proceeding is whether there is sufficient evidence to establish that the beneficiary will be employed by the U.S. entity primarily in an executive capacity.

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, the petitioner stated that the beneficiary’s proposed duties were simply a continuation of his past services as Chief Executive Officer. The petitioner described the beneficiary’s current duties as:

The position of Chief Executive Officer (CEO) at [the U.S. entity] involves all the functions that one could typically associate with the position of the highest-ranking corporate officer in any business corporation, including specifically the following functions:

Developing and establishing all corporate policies and objectives; planning business objectives; developing all the corporate policies, functions and operations; and establishing responsibilities and procedures among workers in order to attain the highest profitability and efficiency, and also to attain corporate revenue goals, which goals are established by [the

beneficiary] as CEO. Furthermore, the duties [of] CEO include the direction of the financial programs of the company, not only to insure that there are sufficient funds on hand at all times to attain desired revenue objectives, but to assure that revenue planning is ongoing in terms of meeting the needs of the corporation's expansion program, which program is aggressively in place as of the moment of preparing this petition.

The petitioner also stated that the beneficiary's "proposed duties can be summarized simply as a continuation of his services as our Chief Executive Officer." The petitioner further stated that the beneficiary is employed by the U.S. entity in an executive capacity in that he directs the entire organization, establishes the organization's goals and policies, exercises 100 percent latitude in discretionary decision-making, and receives no supervision from higher-level persons in the United States.

The petitioner stated in a letter dated, September 16, 2002, that the beneficiary worked 40 hours per week. The petitioner continued with a description of the beneficiary's daily activities by stating:

Virtually all of [the beneficiary's] time now is involved in discussions with the two preeminent chains of pharmacies namely, Walgreen's . . . and Eckerd's." [The beneficiary] is constantly on the phone with decision making personnel at Walgreen's Eckerd's, or with the owner/operator of an independent gas retailer He is also in charge of hiring and training of our product distribution personnel, and the creation and assignment of distribution routes

The director determined that the evidence submitted by the petitioner was insufficient to show that the beneficiary's proposed duties would be primarily managerial or executive in nature. The director stated that the petitioner had not established that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional or managerial employees who will relieve him from performing the services of the business. The director further stated that review of the evidence showed that the business had not expanded to the point where the services of a full-time CEO would be required, and that the majority of the beneficiary's time would be spent in non-executive, day-to-day operations of the business.

On appeal, counsel disagrees with the director's decision. Counsel asserts that the director's decision is wrongly based upon regulatory provisions relating to the definition of managerial capacity, rather than executive capacity. Counsel also contends that the director should have afforded the petitioner an opportunity to respond to a notice requesting additional evidence prior to denying the petition. Counsel further asserts that the beneficiary qualifies within the executive capacity category, in that the petitioner has three to four additional employees who, in supplying the company's goods, relieve the beneficiary from performing the day-to-day functions and non-qualifying duties of the organization.

Counsel's arguments are not persuasive. The evidence does not establish that the beneficiary will be employed by the U.S. entity primarily in an executive capacity. Although counsel argues that the petitioner was entitled to an opportunity to respond to a notice requesting 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 additional independent evidence on appeal to substantiate its disagreement with the director's decision.

The evidence of record demonstrates that the petitioner established a fruit snacks business in the United States in 2000. The evidence further shows that the petitioner is petitioning for an extension of stay for the beneficiary as its chief executive officer. Counsel infers that the petitioner is in the process of developing and expanding its fruit snacks business, which in turn will result in the creation of a greater demand for its fruit product and increased recruitment for new employees. Counsel also states that the beneficiary will be in charge of this development process. However, the petitioner was previously granted one year as a “new office” in order to establish the enterprise and commence doing business. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States 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 matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The petitioner claims that it employs a chief executive officer and three to four additional employees whose job it is to distribute and keep stocked the company’s fruit product throughout South Florida. Counsel claims that the petitioner has hired three to four employees who provide the company’s goods to customers, such that the beneficiary is relieved of performing day-to-day functions and non-qualifying duties. Counsel also states on appeal that the three to four employees duties consist of driving to their designated locations “every couple of days or so” to “update stock” or “replace stock.” However, there has been no independent documentary evidence produced to substantiate the existence of additional employees. 8 C.F.R. § 214.2(l)(14)(ii)(D) requires the petitioner to submit “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” In addition, there has been no evidence submitted to show who, other than the beneficiary, performs the non-qualifying functions of the organization. It appears from the record that the beneficiary, as chief executive officer, will be performing the day-to-day non-executive services of the organization rather than primarily performing as its chief executive officer. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service 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 evidence fails to demonstrate that the petitioner has reached the point that it can employ the beneficiary in a predominantly executive position.

The petitioner has provided no comprehensive description of the beneficiary’s duties that would demonstrate that he will 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. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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); *Avyr Associates, Inc. v. Meissner*, 1977 WL 188942 at *5 (S.D.N.Y.). There has been no evidence presented to demonstrate what goals and policies have been and will be established by the beneficiary in his capacity.

Furthermore, the record does not demonstrate that the U.S. entity contains the organizational complexity to support the proposed executive staff position. While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other pertinent factors such as the nature of the petitioner’s business. Together, these facts can be used as indicators to help determine whether

a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant matter, the latter more accurately describes the beneficiary's role.

The record demonstrates that the beneficiary works in the office the majority of each day. The petitioner stated that the three to four other employees are assigned specific routes (18 locations each) in which to replenish the stock of fruit; and that they drive to each designated location about every other day to replenish the stock at the fruit stands. There has been no independent documentary evidence submitted to establish that there are any individuals currently available to perform the functions of the organization or to relieve the beneficiary from performing non-executive duties such as delivering the petitioner's product to vendors.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed by the U.S. entity in an executive capacity. Moreover, the petitioner has not shown that the beneficiary will function at a senior level within an organizational hierarchy other than in position title. While it is apparent that the beneficiary is attempting to further the petitioner's business objectives, it does not appear at this time that the petitioner is prepared to sustain the beneficiary in a strictly executive capacity. When examining the capabilities of an established organization, future projections are not sufficient to establish that the petitioner is developed to the point where it can support an employee primarily in an executive position. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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).

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.