



U.S. Citizenship  
and Immigration  
Services

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[Redacted]

FILE: EAC 02 296 53510 Office: VERMONT SERVICE CENTER Date: **APR 26 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]

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**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.

*[Handwritten signature]*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Guilmor Corp., endeavors to classify the beneficiary as a manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims that it is a subsidiary of Corporacion 1811, C.A. located in Caracas, Venezuela and is engaged in the vinyl, aluminum, and wooden windows and doors business. It seeks to extend the petition's validity for a second time and the beneficiary's stay for four years as the U.S. general manager and sales representative. The petitioner was incorporated in Puerto Rico and claims to have one employee.

On March 13, 2003, the director determined that the beneficiary's duties were not primarily that of an executive or manager. The director also determined that that the petitioner failed to establish a qualifying relationship with the foreign entity.

On appeal, counsel states that the beneficiary is employed in an executive and managerial capacity and that the petitioner has been doing business since 2002.

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)(14)(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.

The first issue in this proceeding is whether a qualifying relationship exists between the petitioner and foreign entity. The regulation at 8 C.F.R. 214.2(l)(ii) provides:

- (G) Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

\* \* \*

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operation division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The regulation and case law confirm that ownership and control are factors that must be examined in determining whether a qualifying relationship exists between the petitioner and foreign organization. See *Matter of Church Scientology International*, 19 I &N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In the context of this visa proceeding, ownership refers to the direct or indirect legal right of possession of the assets of an organization with full power and authority to control. *Matter of Church Scientology*

*International* at 595. Control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an organization. *Id.*

The petitioner submitted very limited evidence with the Form I-129 to substantiate a qualifying relationship. Specifically, a September 18, 2002 letter asserts that the Venezuelan company owns 100 percent of the U.S. entity. Due to lack of evidence, the Director issued a November 25, 2002, request for evidence. Specifically, the director requested copies of stock certificates showing ownership of all issued and outstanding shares of stock for the petitioning entity.

In response to the request for evidence, the petitioner submitted stock certificate number one. The certificate stated that the foreign entity had purchased 10,000 shares of the petitioner's stock. The stock certificate is undated. The AAO notes that the handwriting on the certificate is very similar to the handwriting on the Form I-129. The AAO further observes that the record does not contain the petitioner's articles of incorporation or board of directors' meeting minutes.

On March 13, 2003, the director concluded that the undated stock certificate submitted to show the petitioner's ownership looked "questionable." Consequently, the director determined that a qualifying relationship did not exist between the U.S. and Venezuelan companies.

On appeal, the petitioner's assertions and newly submitted evidence suggest that counsel incorrectly interpreted the director's decision. In particular, counsel asserts that the petitioner is doing business and submitted documents to support that assertion. The documents included a completed 2002 Puerto Rican Corporation Income Tax Return in Spanish,<sup>1</sup> a blank Puerto Rican Corporation Income Tax Return in English, a copy of the petitioner's standard terms and conditions of sale, and photographs.<sup>2</sup> None of these items addresses the qualifying relationship question, however.

Therefore, the only evidence of record that addresses the qualifying relationship issue is the stock certificate. The lack of an issue date on the stock certificate casts doubt on the validity of the document. Also, the similarity between the handwriting on the stock certificate and the handwriting on the Form I-129 casts further doubt on the certificate's validity. The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA 1988).

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<sup>1</sup> The Puerto Rican income tax return is untranslated. Furthermore, it is not CIS's duty to compare the blank English language document with the completed Spanish language document. Instead, the petitioner must supply a valid translation from an appropriately certified person. See 8 C.F.R. § 103.2(b)(3). The tax returns, therefore, have no evidentiary value.

<sup>2</sup> The photos claim to show the U.S. entity's operation. The images, however, depict no address or signs on the buildings. The photos, instead, show generic illustrations of offices, possible employees, and a warehouse stocked with windows. Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Additionally, as observed above, the record lacks the petitioner's articles of incorporation or any minutes from board of directors' meetings. Consequently, it is unclear what proportion the 10,000 shares represents of all shares the petitioner may have issued. Without this proportion in the record, CIS cannot verify whether the petitioner is a subsidiary of the overseas entity. Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*. In sum, the petitioner has failed to establish a qualifying relationship between it and the Venezuelan company.

The second issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity for the petitioner. 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.

The AAO notes that the petitioner does not clarify whether the beneficiary is claiming to be engaged in primarily managerial duties or primarily executive duties. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

On September 28, 2002, the petitioner filed Form I-129. In a September 18, 2002 supporting letter, the petitioner described the beneficiary’s duties in Puerto Rico as:

- Setting all corporate policies as well as developing strategies for marketing and promoting the Milgard products in Puerto Rico.
- Implement[ing] the basis to ensure that [the petitioner] obtains a reasonable market share in the single and multiple family dwelling units in the market for vinyl, aluminum, and wooden windows and doors in Puerto Rico.
- [Closing] several contracts for purchase.
- [Continuing] to possess the primary responsibility of training and supervision of in house sales force and supervision and training of the foreman personal for the installation teams.

In addition, the September 18, 2002 letter states that the petitioner plans to establish a new operation assembly line in the San Juan area which will create another three positions. Separate lists of duties for the sales and marketing supervisor, installation supervisor, and the beneficiary accompanied the letter. The petitioner described the beneficiary’s duties as:

- Set and maintain all corporate policies as marketing strategies for local and intra-island markets.
- Establish operational procedures for marketing and installation of all products represented by [the petitioner].
- Maintain operations for the distribution of the represented products.
- Train and supervise all sales and installation personal.
- Establish distribution agreements with third parties in intra-island markets.
- Install and start operations of the future assembly plant in San Juan, P.R.
- Train and supervise personal for the assembly plant.

- Supervise warehousing facilities for [the petitioner] for finished products inventories and assembly components for the plant.
- Supervise Bonded warehousing for products to be installed at job sites all ready approved and sold.
- Established and coordinate all transportation for all imported products.
- Supervise and building and budgeting of represented manufacturers.

On November 25, 2002 the director requested the names and job titles of the petitioning entity's employees, and those employees whom the beneficiary supervises.

The petitioner responded to the director's request by submitting additional evidence including the job titles and names of the five employees whom the beneficiary supervises.

On March 13, 2003, the director determined that the record was insufficient to demonstrate that the beneficiary is employed in a primarily executive or managerial capacity. The director found that the beneficiary appears to be running a one-person sales office in Puerto Rico. The director also found several discrepancies in the record:

- The statement that the beneficiary supervises five employees conflicts with the one employee staff described in the petition.
- A statement that the beneficiary is doing business from his residence in Puerto Rico, but that a new production facility is being installed for opening in January 2003.
- A \$253,592 gross annual income appears to be insufficient to support a new production facility and 23 employees.
- A December 2002 letter from the foreign entity stating that the company has three employees at present, that the beneficiary was employed there from 1990 to 1999, that the beneficiary supervised five employees when he worked there, and that there were an additional 67 employees on the payroll when he worked there.

On appeal, counsel states that the beneficiary is employed in an executive and managerial capacity. Counsel states that the beneficiary "as general manager/sales representative is responsible for the day-to-day operation of the business and for establishing company policies and business directives. He has full discretion to bid for projects, to hire and fire, to operate for extended hours or to close down the operation. His corporate title is president." In addition, counsel claims the petitioner incorrectly indicated on Form I-129 that the company only has one employee.

The petitioner submits additional evidence on appeal including a detailed organizational chart, with positions that have been filled, and an invoice dated March 31, 2003.

Although the petitioner submitted additional evidence on appeal, the AAO will adjudicate this issue based on the evidence available to the director at the time of his review. It is an established rule that the AAO does not consider new evidence on appeal where the petitioner was put on notice of evidentiary requirements and given a reasonable opportunity to provide it for the record before the petition was adjudicated by CIS. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the present matter, the director, in his request for evidence, notified the petitioner that additional documentation was necessary to determine the beneficiary's employment. The petitioner failed to provide the more detailed evidence, which it subsequently submitted on appeal. As this evidence was previously available to the petitioner and directly requested by the director, it will not be considered on appeal. *Id.*

In addition, the AAO concurs with the director that there are numerous discrepancies in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho, supra.*

In examining the executive or managerial 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(l)(3)(ii). On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to establish what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include setting and maintaining all corporate policies and operations for the distribution of the represented products. The petitioner did not, however, define any concrete policies the beneficiary will set and maintain. 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, supra.*

In addition, the petitioner describes the beneficiary's duties as developing strategies for marketing and promoting the products and having the discretion to bid for projects and to operate for extended hours or to close down the operation. This indicates that the beneficiary is performing tasks necessary to provide a service or product. 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).

Moreover, the petitioner claims that the beneficiary directly supervises five employees. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* section 101(a)(44)(A)(ii) of the Act. According to the petitioner's description of the beneficiary's job duties, the beneficiary supervises subordinate employees. These employees include a sales supervisor, accountant, two sales representatives, and an installation supervisor. However, the beneficiary's subordinates are not managerial nor supervisory because the positions do not indicate managing or supervisory duties.

In addition, section 101(a)(32) of the Act states that the term “profession” includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teachers of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term “profession” includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. The petitioner has not established that the beneficiary’s subordinates are professional employees within the statutory and regulatory definitions. Therefore, the description of the beneficiary’s job duties and the job titles of his subordinates leads the AAO to conclude that the beneficiary is performing as a first-line supervisor of non-professional employees, rather than as a manager or executive. As stated in the Act, “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)(A)(iv) of the Act.

Moreover, the petitioner claimed in a letter filed with Form I-129 that it plans to establish a new operation assembly line in the San Juan area which will create another three positions. However, 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).

After careful consideration of the evidence, the AAO concludes that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.