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U.S. Citizenship
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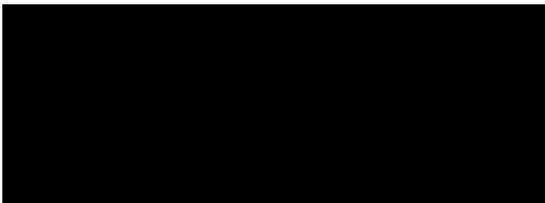
FILE: WAC 01 162 55045 Office: CALIFORNIA SERVICE CENTER Date: APR 26 2004

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:

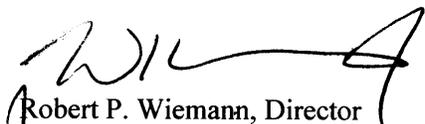


INSTRUCTIONS:

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.

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Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner, American Classics Enterprises, Inc., 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 is a subsidiary of Automobile Fuchs-Rosner located in Germany and is engaged in the business of trading and real estate investments and developments. It seeks to extend the petition's validity and the beneficiary's stay for two years as the U.S. entity's president at an annual salary of \$36,000. The petitioner was incorporated in State of California on October 15, 1999.

On October 24, 2001, the director denied the petition because the beneficiary will not be employed in a primarily executive or managerial capacity.

On appeal, counsel, on behalf of the petitioner, states that the beneficiary will continue to work in "both an executive and managerial capacity for the petitioner in the United States."

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.

The issue in this proceeding is whether the beneficiary will be employed in a primarily 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.

On April 3, 2001, the petitioner submitted a letter in support of the Form I-129. The April 3rd letter described the beneficiary's U.S. duties:

The president . . . managing the U.S. entity . . . will continue to supervise and control the operations of the entire company, including hiring and firing of personnel, directing business strategies and formulating financial plans for all business operations. [The beneficiary] establishes policy and overall operational guidelines and exercises wide latitude in personnel management. All financial reports and budget plans are subject to the [beneficiary's] review, and he will negotiate contracts with potential suppliers and customers.

On May 24, 2001, the director requested additional evidence concerning the beneficiary's U.S. duties.

In response, the petitioner submitted the following description of the beneficiary's U.S. duties:

- Supervises and control the operation of the entire company, including directing business strategies and formulating financial plans for all business operations.
- Personally negotiates contracts for purchase and sale of real estate, and has been actively involved in ongoing negotiation with foreign buyers of automobiles, collectibles and other items.
- Continues to market the company's German purchase and sales connections to buyers and sellers in the U.S. on a daily basis. [sic]

On October 24, 2001, the director denied the petition because the beneficiary will not be employed in a primarily managerial or executive capacity.

On appeal, counsel states that the beneficiary will continue to work in "both an executive and managerial capacity for the petitioner in the United States." Therefore, the 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. *See* sections 101(a)(44)(A) and (B) of the Act.

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. The beneficiary's duties are described as "establishes policy," "exercises wide latitude," "directing business strategies," and "formulating financial plans." However, these duties are generalities that fail to enumerate any concrete policies, strategies, or plans that the beneficiary will establish, direct, or formulate. 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).

Further, the petitioner generally paraphrased the statutory definition of executive and managerial capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as establishing policies and exercising wide latitude. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner describes the beneficiary's U.S. duties as personally negotiating contracts and continuing to market the company's German purchase and sales connections. The petitioner's description of the beneficiary's duties suggest that he performs duties that largely

comprise marketing tasks. Marketing duties, by definition, qualify as performing a task necessary to provide a service or produce a 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).

The description of the beneficiary's duties does not persuasively demonstrate that the beneficiary has managerial control and authority over a function, department, subdivision, or component of the company. The petitioner has not clearly demonstrated what function the beneficiary actually performs. For example, the beneficiary's duties include having to "supervise and control the operations of the entire company." However, 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. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Counsel also claims Exhibit I establishes that the petitioner hired an additional employee in the fourth quarter of 2001, after filing the petition. As a result, counsel claims that the director incorrectly determined that the beneficiary was the sole employee. However, on Form I-129, the petitioner indicated that it has one employee, namely, the beneficiary. The director properly considered the petitioner's organizational structure as it existed at the time of filing. 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).

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

Beyond the decision of the director, the AAO observes that it is questionable whether the foreign entity continues to do business; therefore, a qualifying relationship may no longer exist between the petitioner and foreign entity. See 8 C.F.R. §§ 214.2(l)(1)(ii)(G)(2), (H). Specifically, the petitioner failed to provide information concerning the foreign entity's address on Form I-129, Section I. The petitioner submitted a letter signed by the beneficiary, dated April 3, 2001, stating that the parent company was established in 1985 and is an importer and distributor of classic American cars and a dealer of collectible items with a 7000 foot showroom located in downtown Wiesbaden, Germany. In addition, the petitioner submitted a copy of a translated business registry, a brochure, flyers, and photos. However, the record contains no documentary evidence

such as lease agreements, current invoices, corporate tax returns, custom forms, or similar records to demonstrate that the foreign corporation continues to do business. Going on record without supporting documentation is insufficient to meet the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*. For this additional reason, the appeal will be dismissed.

Another issue in this proceeding, also not raised by the director, is whether the employment offered to the beneficiary is temporary. Generally, the petitioner for an L-1 nonimmigrant classification need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovich*, 18 I&N Dec. 361 (Comm. 1982); *see also* 8 C.F.R. § 214.2(1)(3)(vii). The record indicates that the beneficiary is the owner of the petitioning organization, and that it appears that there is no existing foreign entity abroad to employ the beneficiary. Therefore, the beneficiary's stay in the U.S. does not appear to be temporary.

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.