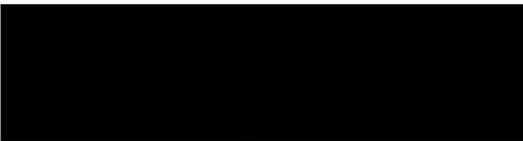




U.S. Citizenship
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Services

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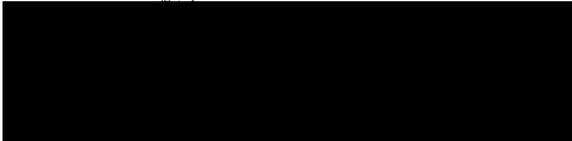


FILE: SRC 02 267 50018 Office: TEXAS SERVICE CENTER Date: AUG 9 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

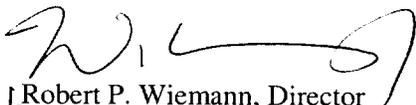
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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 filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida that offers investment and import and export services. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Quito, Ecuador. The petitioner now seeks to employ the beneficiary as its sales manager for three years.

The director denied the petition concluding that the beneficiary would be employed by the U.S. entity as a first-line supervisor rather than a manager or executive.

On appeal, counsel contends that the beneficiary's resume and the organizational hierarchy of the U.S. company demonstrate that the beneficiary qualifies for L-1A classification. Counsel claims that the beneficiary would be employed as the "primary manager" for all functions of the U.S. corporation.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. In addition, 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.

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 (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.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within 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.

Moreover, pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

- (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
- (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
- (3) The organizational structure of the foreign entity.

The issue in the present proceeding is whether the beneficiary would be employed by the U.S. entity 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 petitioner indicated on the nonimmigrant petition, filed September 10, 2002, that the beneficiary would be employed in the United States as a sales manager, and would be responsible for managing and generating the petitioner's assets, hiring and firing personnel, and training new employees. In an attached letter, dated August 30, 2002, the president of the foreign company stated that the beneficiary would be functioning in a managerial capacity in the U.S. entity. The president also stated that the beneficiary's job duties would include: (1) outlining the petitioner's business procedures; (2) supervising business goals; (3) supervising the staff and selecting personnel; (4) setting work standards and guidelines; and (5) coordinating work teams to ensure that each account is serviced adequately. The petitioner submitted the beneficiary's resume as evidence of her qualifications as a manager.

In an October 24, 2002 request for evidence, the director asked that the petitioner submit an organizational chart for both the U.S. and foreign entities identifying the beneficiary's position in relation to other employees, all job titles, and the names of those holding each position.

The petitioner responded in a letter dated December 4, 2002, and included an organizational chart for each company. The U.S. organizational chart identified the beneficiary as both the president and the general manager for the petitioning organization, and listed nine additional positions subordinate to the beneficiary. The positions identified as reporting directly to the beneficiary are the assistant manager, sales manager, and accountant. The petitioner noted in its letter that it intends to hire additional employees upon the beneficiary's L-1A approval.

In a decision dated January 7, 2003, the director outlined the regulatory requirements for establishing employment in a primarily managerial or executive capacity. The director stated that at the time of filing the petition, it appeared that the beneficiary held one of the lowest positions in the organization, as the petitioner did not yet employ any subordinate employees. The director concluded that the beneficiary would be employed as a first-line supervisor rather than in a primarily managerial capacity. The director therefore denied the petition.

In an appeal filed February 3, 2003, counsel states that the beneficiary "was, and at all times material herein, employed as an executive and current sales manager." Counsel contends that the petitioner's organizational hierarchy confirms the beneficiary's position as a manager, as it identifies three different levels of employment, rather than a single level management position as determined by the director. Counsel further claims that the beneficiary "would be the primary manager for the functions of the U.S. company, establishing the goals and policies of the said U.S. company, along with the decision making authority vested in her for the U.S. [c]ompany." Counsel refers to the beneficiary's resume, the petitioner's August 2002 letter submitted with the petition, and the petitioner's organizational hierarchy as evidence of the beneficiary's employment in a primarily managerial capacity.

On review, the record does not support counsel's claim that the beneficiary would be employed by the U.S. entity in a primarily managerial capacity.

Although the petitioner notes otherwise on the nonimmigrant petition, it appears from the record that the beneficiary is coming to the United States to open or be employed in a new U.S. office.¹ As a result, the AAO will consider the regulation at 8 C.F.R. § 214.2(l)(3)(v).

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans, organizational structure, and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. See 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

In the present matter, the petitioner has not disclosed its business plans, financial goals, or size of the U.S. investment. As noted above, this information is relevant in determining whether the petitioning organization would be able to support the beneficiary in a primarily managerial capacity as claimed by the petitioner and counsel. 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).

Additionally, the limited organizational chart submitted by the petitioner fails to provide a clear description of the petitioner's staffing levels within one year of approval of the petition. Although counsel noted in its December 2002 letter that the employee list submitted in response to the director's request for evidence included "brief job descriptions" for each employee, counsel neglected to provide job descriptions for the nine positions listed on the organizational chart. Moreover, as the record is devoid of any employee records, it is unclear whether these positions are currently occupied, or merely anticipated by the petitioner. If these positions are not presently filled, the petitioner has offered no indication as to whether within one year of approval of the petition the beneficiary would be supported by a subordinate supervisory, professional, or managerial staff sufficient to relieve the beneficiary from performing the non-qualifying operations of the business. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

When examining the executive or managerial capacity of the beneficiary, the AAO will also look to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the

¹ The evidence supporting the conclusion that the beneficiary is coming to the United States to open or be employed in a new office includes: the articles of incorporation, which indicate that the corporation was established less than one year prior to the filing of the petition; the lack of documentation, such as corporate tax returns, indicating that the petitioner has already been doing business in the United States; and the petitioner's reference to the U.S. company as a "new Florida corporation."

beneficiary. *Id.* The petitioner has not clearly defined the beneficiary's role in the U.S. organization or the job duties the beneficiary will perform when she is employed as a manager by the U.S. entity. On the nonimmigrant petition and in counsel's appeal, both the petitioner and counsel identified the beneficiary as the petitioner's sales manager. However, on the organizational chart, the petitioner refers to the beneficiary as the general manager. The petitioner has not explained the discrepancy in the proposed positions. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, the petitioner provides broad job descriptions for the beneficiary, including "outlin[ing] procedures to be followed," "supervis[ing] business goals," "set[ting] standards for the work and general guidelines for each assignment," and coordinating teams for adequate account service. 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. *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).

Based on the foregoing discussion, it cannot be determined that the beneficiary would be employed by the U.S. entity in a qualifying capacity.

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary has been employed abroad in a qualifying capacity. The petitioner stated on the nonimmigrant petition that the beneficiary was employed as a sales manager in the foreign company. Although the petitioner submitted an organizational chart for the foreign company, it neglected to translate the name of each position or explain the job responsibilities, as requested by the director. Absent additional documentation explaining the beneficiary's day-to-day job duties in the foreign company, the AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial title. Again, 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).

Additionally, although the petitioner provided translations for two documents relating to the foreign corporation, the majority of the documentation has not been translated. The regulations require that any document submitted to Citizenship and Immigration Services be accompanied by a full English translation that has been certified by the translator as complete and accurate. 8 C.F.R. § 103.2(b)(3). Accordingly, the untranslated evidence is not probative and will not be accorded any weight in this proceeding.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.