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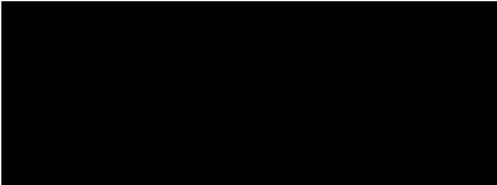
U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

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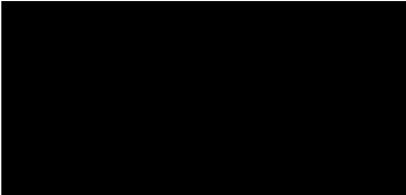


FILE: SRC 02 205 53687 Office: TEXAS SERVICE CENTER Date: FEB 5 2004

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

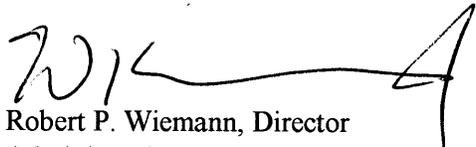
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 is an import and export company that supplies air conditioning and refrigeration equipment for sale in Venezuela by the foreign company. The petitioner seeks to temporarily employ the beneficiary in the United States as President to “oversee [the] corporate enterprise.” On June 21, 2002, the petitioner filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary would not be employed in the United States in a managerial or executive capacity.

Counsel for the petitioner subsequently filed a motion to reopen or reconsider. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel asserts that the petitioner had submitted “sufficient supporting documentation to indicate its qualifications as [a] U.S. company that can support an L-1A [intracompany] transferee.” Counsel further provides that the beneficiary’s services in the United States are essential to “move [the company] to the next level.” Counsel also submits a brief and additional evidence on appeal.

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) further 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.

The issue in the present matter is whether the beneficiary will be employed in the United States 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.

In a letter submitted with the petition, the petitioner explained that as president of the U.S. entity, the beneficiary would perform the following:

[D]irect the management of the organization, [and] establish goals and policies. He will maintain the highest discretion to make all final decisions. He will manage the function of establishing a presence in the United States while maintaining liaison with the organization in Venezuela. He will promote the company's import and export operations. He will also be in charge of business development, and spearhead efforts to select other business investments to diversify operations. He will make all final decisions on financial strategy. He will have authority to make decisions regarding hiring of staff and other personnel actions.

The petitioner further provided that the beneficiary is “well qualified” for the position as president as he has forty-five years of experience in the commercial sector in Venezuela, and “has founded numerous companies in Venezuela.”

In a request for additional evidence, the director asked that the petitioner submit evidence that the U.S. organization has been doing business, including customs forms, lease agreements, and photographs of the company’s office premises. In addition, with regard to the employment of the beneficiary in a managerial or executive position, the director requested that the petitioner provide the following: (1) an organizational chart of the U.S. entity, including the employees’ names, positions, the dates that employment commenced in the U.S. company, and whether they are employed in a full-time or part-time position; (2) a statement identifying the number of subordinate managers, supervisors or other employees who report directly to the beneficiary, and a brief description of their job titles and duties; (3) the last four state quarterly reports (including wage reports) for the U.S. entity; and, (4) a copy, including attachments, of the U.S. company’s year 2001 Federal Tax Return.

In response, the petitioner submitted an organizational chart, which reflected the beneficiary as president of the U.S. entity. His current subordinates included a bookkeeper and a manager of sales and marketing. The organizational chart also showed three additional positions, including a manager of product development, two sales representatives, and a support technician that the company anticipated filling in the future. The petitioner further explained that it “estimates that it will need at least two managers and four employees to sustain its plans for growth in the coming year.” The petitioner described the sales and marketing manager’s responsibilities as being in charge of international marketing and sales, obtaining new clients, and handling purchases from suppliers in the United States, Asia, and Europe. The petitioner explained that it was unable to submit any wage reports, as the two employees had not yet been paid, and therefore, a wage report had not yet been prepared.

The petitioner also submitted copies of customs forms, invoices, customer statements, and pictures of the office premises as evidence of doing business in the United States. Additionally, the petitioner provided a copy of the 2001 U.S. Corporation Income Tax return.

In a decision dated September 16, 2002, the director denied the petition determining that the petitioner had failed to prove that the beneficiary would be employed in a primarily managerial or executive position in the United States. The director concluded that the U.S. entity “had not grown to a point” where the beneficiary would function at a senior level within the organizational hierarchy, or with respect to a function of the organization. Additionally, the director concluded that the U.S. business could not support a manager or executive who would be engaged primarily in managerial or executive duties, rather than the day-to-day operations of the company. Moreover, referring to the 2001 corporate tax return, the director noted that the gross annual income was insufficient to remunerate the beneficiary his annual salary of \$40,000. Consequently, the director denied the petition.

On appeal, counsel for the petitioner asserts that the director failed to adequately consider the size of the U.S. company’s business operations. Additionally, counsel contends that the beneficiary’s “authority to hire and fire and plan the direction of [the petitioning organization] provides ample evidence that [the beneficiary] will serve as an executive.” Counsel further claims that the director “misinterpreted the test” for determining whether a beneficiary is a manager or executive by relying on the limited number of individuals employed by the petitioner. Counsel, citing the CIS Operation Instruction 214.2(l)(5)(i)(A)(2), contends that the correct

analysis is “whether the majority of the individual’s [duties] relate to operational or policy management, not merely to supervision of low-level employees, direction of performance or functions or other participation in the operations of the company.” Counsel asserts that “unless [CIS] has taken the position that [the beneficiary] is leaving his post as President of [the foreign company] . . . to pack shipping crates and clean the offices of [the petitioning organization]” CIS cannot conclude that the beneficiary will be primarily performing the non-managerial duties of the business.

Moreover, counsel contends that the beneficiary’s employment in the United States was necessary to perform the following:

1. Direct the management of the organization in its marketing efforts;
2. Establish the goals and policies of the organization in areas such as financing, marketing and product development ([i.e.] the air conditioners sold, level of maintenance.)
3. Exercise wide latitude in decision making such as hiring and training people to run this job creating business in a currently sluggish economy;
4. As the director of the enterprise, [the beneficiary] needs firsthand contact so that he can provide general supervision and direction to other executives and managers throughout the organization so that he can lead the organization through a period of rapid growth during such a perilous economic period both in the United States and his home country of Venezuela.

On review, the record is not sufficient to establish that the beneficiary will be employed in the United States in a primarily managerial or executive position.

When examining the managerial or executive 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* In the present case, counsel asserts in his brief on appeal that the beneficiary will be employed in an executive capacity. Therefore, the job description submitted by counsel and the petitioner must be sufficient to demonstrate that the beneficiary will perform in a primarily executive capacity, as that term is defined in the regulations.

The petitioner’s job descriptions do not establish that the beneficiary will be employed in a primarily executive position in the United States. In its letter submitted with the petition, the petitioner asserted that the beneficiary “will direct the management of the organization,” “will establish goals and policies,” “will maintain the highest discretion to make all final decisions,” “will manage the function of establishing a presence in the United States,” and will be in charge of business development. On appeal, counsel for the petitioner claims that the beneficiary will “hire people and negotiate contracts,” “direct the management of the organization in its marketing efforts,” “establish goals and policies of the organization,” and “exercise wide latitude in decision making.” The job descriptions provided by the petitioner and counsel fail to present a detailed explanation of how the beneficiary will perform in a primarily executive position. Rather, the descriptions are simply a restatement of the regulations in which the term “executive capacity” is defined. 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). A specific job description is clearly an important indicator 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, supra*. Therefore, the petitioner's conclusory assertions regarding the beneficiary's employment capacity are not sufficient.

Additionally, the petitioner's statement that the beneficiary will promote the petitioner's import and export operations clearly establishes that the beneficiary will be performing non-executive functions of the business. The organizational chart, which identifies the current employees as a bookkeeper and a sales and marketing manager, fails to account for an additional manager or any other subordinates who would either assist the beneficiary or be responsible for the import and export of the U.S. company's products. Likewise, neither the petitioner nor counsel has offered an explanation as to how the beneficiary would qualify as an executive while performing the import and export functions of the U.S. entity. While the AAO does not assume that the beneficiary will "pack shipping crates" while employed in the U.S., the petitioner's description of the beneficiary's job duties fails to establish what proportion of the beneficiary's duties is managerial or executive in nature, and what proportion are actually non-managerial and non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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, counsel, in his brief on appeal, seems to be under the incorrect assumption that the petitioner has an opportunity from the time the beneficiary is transferred to the United States to develop an executive position in which the beneficiary will be employed. Counsel asserts that the beneficiary "needs to be in the United States so that he can hire people to conduct the day-to-day operations of the enterprise and move the company forward." Additionally, in its response to the director's request for evidence, the petitioner noted that the petitioning organization will need at least two managers and four employees to sustain its plans for growth, including a secretary, sales personnel and an air conditioner support technician. The petitioner claimed that the beneficiary will hire "people to work full time in the U.S. as soon as the operations require it." No information was provided as to whether the beneficiary or other personnel will perform the business' non-managerial or non-executive functions prior to "the operations [requiring] it," and the beneficiary hiring subordinates. Unlike the exemption provided to a new office, which allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position, an organization which has already been doing business for more than one year must be able to support a managerial or executive position at the time of filing the petition. *See* 8 C.F.R. § 214.2(l)(3)(ii). 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). Consequently, the petitioner and counsel failed to demonstrate that at the time of filing the petition, the petitioner was able to employ the beneficiary as an executive.¹

Finally, counsel asserts on appeal that the director misinterpreted the test for determining a manager or executive based on the limited number of individuals employed by the petitioning organization. Citing the CIS Operation Instruction 214.2(l)(5)(i)(A)(2), counsel claims that the correct test was "whether the majority

¹ The record contains evidence, including a Year 2001 U.S. Corporation Tax Return, the company's Articles of Incorporation, filed on May 8, 1998, customer statements for the years 1999, 2000, and 2001, and an office lease executed on August 8, 2000, that supports a finding that the petitioner has been doing business in the United States for more than one year, and therefore, is not considered to be a new office.

of the individual's [duties] relate to operational or policy management, not merely to supervision of low-level employees, direction of performance or functions or other participation in the operations of the company."

Operation Instruction 214.2(l)(5)(i)(A)(2) states the following:

Eligibility requires that the duties of a position be primarily of an executive or managerial nature. The test is basic to ensure that a person not only has requisite authority, but that a majority of his or her duties relate to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company, such as doing sales work or operating machines or supervising those that do. This does not mean that the executive or manager cannot regularly apply his or her technical or professional expertise to a particular problem. The definitions are not intended to exclude from the duties of a manager or executive activities that are not strictly managerial, but are common to those positions, such as customer and public relations and lobbying and contracting.

Counsel's reliance on the above-quoted instruction is insufficient to establish that the director misinterpreted the test for determining managerial or executive capacity based on the limited number of employees. Contrary to counsel's assertion, the operating instruction does not address whether the size of a petitioning organization, or the number of individuals employed should be relevant in the director's analysis of managerial or executive capacity. Rather, the instructions only state that the majority of the beneficiary's duties should not be the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. At the time of filing, the petitioner was a four-year-old import and export company that claimed to have a gross annual income in the year 2001 of approximately \$300,000. The petitioning organization contended that it would employ the beneficiary as president, plus a sales and marketing manager and a bookkeeper. The petitioner also indicated it anticipated hiring an additional manager, two sales representatives, and a support technician. There is no other evidence as to who would perform the actual day-to-day, non-managerial and non-executive operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and one other managerial employee. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

For the foregoing reasons, the director correctly concluded that the petitioner had failed to sufficiently demonstrate that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

Beyond the decision of the director, it remains to be determined whether the foreign and U.S. organizations possess the requisite qualifying relationship. The petitioner asserted that the two companies are affiliates, as

both companies are owned by the same five individuals, and each individual holds the same amount of shares in each company. However, the record does not clearly identify the ownership of the foreign company. The petitioner submitted stock certificates issued by the U.S. corporation only. As the petition will be dismissed on other grounds, this issue need not be further addressed.

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.