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JAN 27 2004

FILE: SRC 02 119 51064 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

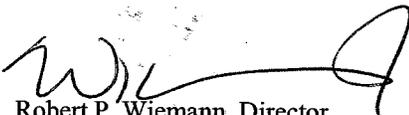
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

The petitioner is described a cleaning and maintenance solutions business. It seeks to continue the employment of the beneficiary temporarily in the United States as its finance manager. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary would be employed primarily in a managerial or executive capacity with the U.S. entity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will continue to be managerial or 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 serves 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)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

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);
- 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 incorporated in 2000 as a cleaning and maintenance solutions business. The petitioner claims that the U.S. entity is an affiliate of Joyeria Betty, C.A., located in Venezuela. The petitioner declares four employees with a gross annual income of \$21,118.04. The petitioner seeks to extend the beneficiary's services as finance manager for a period of two years, at a yearly salary of \$32,000.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity will be primarily managerial or executive in nature.

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 the petition, the petitioner stated that the beneficiary's duties for the past three years are a "continuation of previously approved employment without change."

In a letter of support, the petitioner described the beneficiary's proposed duties as:

Mrs. [REDACTED] will continue filling the position of finance manager for the corporation. She will be responsible for: 1. manage the short and long term financial plan[n]ing of the business; 2. establish general guidelines which must be followed and execute by employees; 3. review financial transactions and monitor budget to ensure efficient operations; 4. ensure expenditures stay within budget limitations, and in general "run the business finances" for the corporation. She is qualified to fill the position on the basis of her past experience with the foreign corporation and her current experience in the United States.

Mrs. [REDACTED] salary will be based upon performance of the company. Based upon an estimated forecast, she will be paid an annual salary \$32,000.00.

The director determined that the petitioner had not submitted sufficient evidence to decide the beneficiary's eligibility, and thereafter requested that the petitioner submit additional evidence. Specifically, the director requested that the petitioner submit a list and job titles of all U.S. employees along with a percentage of time the beneficiary would spend in each specific job duty.

In response to the director's request for additional evidence, the petitioner listed current employees to include a president and general manager, finance manager, and an administrative assistant. The petitioner also listed a sales

representative position as being available. The petitioner listed the beneficiary's job duties along with percentages of time she would spend in each job duty as:

Manage the short and long term financial planning of the business (20%)

Establish general guidelines which must be followed and execute by employees (30%)

Review financial transactions and monitor budget to ensure efficient operations (10%)

Ensures expenditures stay within budget limitations (5%)

Evaluates data pertaining to costs to plan budget (5%)

Establish credit limitation on consumer's accounts (5%)

Monitors order flow and transactions (5%)

Evaluates effectiveness of current collection policies and procedures (5%)

Analyzes and classifies risk as to frequency and financial impact of risk on company (5%)

The petitioner stated that it currently employs four individuals, and that the number of employees varies according to the season. The petitioner also provided a description of job duties for all employees of the U.S. entity as follows:

President and General Manager:

Primarily, he will have general and active discretionary decision making of the business and affairs of the corporation; Presides of [sic] all the meetings of the shareholders and at all the meetings of the Board of Directors; Shall execute bonds, mortgages and other instruments requiring seal; Shall sign certificates of stocks; Represent all the business and interest of Logomats and Supplies, Inc., Hiring and firing employees, etc.

Finance Manager:

Manage the short and long term financial planning of the business; establish general guidelines which must be followed and execute by employees; review financial transactions and monitor budget to ensure efficient operations; ensure expenditures stay within budget limitations, and in general "run the business finances" for the corporation.

Education: Work experience plus bachelor's degree.

Administrative Assistant

Plan, direct and coordinate supportive services of an organization, such as record keeping, mail distribution, invoicing and collection, file keeping, oversee facilities planning and maintenance and custodial operations, coordinates activities of clerical and administrative personnel, analyzes and organizes office operations, etc.

Education: work experience, plus degree

Sales Representatives. (self-explanatory)

The director determined that the record contained insufficient evidence to demonstrate that the beneficiary would be employed primarily in a managerial or executive capacity. The director stated that the evidence failed to show that the beneficiary managed a subordinate staff of professional, managerial, or supervisory personnel who would relieve her from performing the non-qualifying duties. The director further maintained that the record indicated that a preponderance of the beneficiary's duties would be directly providing the services of the business. The director stated that the beneficiary could not be said to be engaged in primarily managerial duties a preponderance of the time as the business had not expanded to the point where the services of a full-time, bona fide finance manager would be required. The director further stated that the evidence showed that the beneficiary was not the only employee with a managerial and or executive title.

On appeal, the petitioner considers the director's decision to be completely inappropriate. In its appeal, the petitioner states that the U.S. entity has been in full operation during the past year, that they have secured premises to house the new office, that they have hired employees, and that they have provided services and goods. The petitioner also states that the U.S. entity is a new enterprise, and as such, has to go through a period of preparedness and studies, in order to start up operations. The petitioner also submits evidence on appeal to demonstrate that it has been doing business.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive position. The record reveals that the petitioner is filing for a new office extension and therefore has been doing business for one year prior to the filing of the petition. Therefore, it is not to be considered a new office pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(F) for purposes of evaluating the beneficiary's proposed position. The petitioner stated on appeal that the U.S. entity "is a new enterprise and like any other new enterprise, it has to go through a period of preparedness and studies, in order, to start-up operation" However, 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended 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 case, the petitioner has failed to present sufficient evidence to establish that it has reached the point where it can employ the beneficiary in a predominantly managerial or executive position.

The petitioner has not provided a comprehensive description of the beneficiary's purported job duties. The beneficiary's position description is too general and broad to establish that the preponderance of her duties will be managerial or executive in nature. The following duties are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive: manage short-term and long-term financial planning of the business; establish general guidelines which must be followed and executed by employees; and review of financial transactions and monitor budget to assure efficient operations. Further, there is insufficient detail regarding the actual duties of the assignment to overcome the

objectives of the director. 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. *Id. at 1108*. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervising personnel who can relieve her from performing non-qualifying duties. The petitioner claims that there is an administrative assistant and a sales representative who are employed by the U.S. entity. However, the record does not reflect that either employee works full-time or that they take direction from the beneficiary in performing their duties. In addition, the petitioner admits that "the number of employees vary according to the season," and also indicates that the sales representative position is "Available."

Furthermore, there has been no evidence submitted to demonstrate that the U.S. entity will be in a position to remunerate the beneficiary for her services pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(E). Tax records submitted by the petitioner reflect that in 2001 the U.S. entity realized gross receipts and sales in the amount of \$7,547.00 and paid out \$17,116 in salaries and wages. Evidence in the record demonstrates that the beneficiary's salary is to be \$32,000 per year. Based upon the evidence submitted it does not appear that the reasonable needs of the petitioning company would plausibly be met by the services of the beneficiary as manager or executive or that the entity is in a position to remunerate the beneficiary for her services.

The record does not establish that a majority of the beneficiary's duties will be primarily directing the management of the organization. The record indicates that primarily the beneficiary's duties have and will consist of maintaining the business operations rather than managing the same. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring and firing of personnel, discretionary decision making, and setting company goals and policies constitute significant components of the duties performed by the beneficiary on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Although the petitioner stated that the beneficiary will be primarily responsible for managing the short-term and long-term financial planning of the business and will also establish general guidelines, the record reflects that the president and general manager primarily carryout those responsibilities. Evidence submitted by the petitioner demonstrates that the president and general manager's signature appears on the majority of the U.S. entities financial and business records. The petitioner has failed to provide sufficient documentary evidence to show how the beneficiary manages the finances of the business or whom she manages or supervises.

Based upon evidence submitted on the record, it appears that the beneficiary will be performing the functions of the U.S. entity rather than managing a function of the organization. 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 record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the organization. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Accordingly, the petitioner has failed to demonstrate that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8

C.F.R. § 214.2(1)(1)(ii)(G). The petitioner has not demonstrated that a qualifying relationship still exists with a foreign entity and has not persuasively demonstrated that that the foreign entity is and will continue doing business during the alien's stay in the United States pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(H). As the appeal will be dismissed on other grounds, however, these issues need not be examined further.

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.