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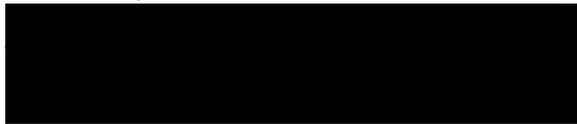


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FILE: SRC 02 165 50727 Office: TEXAS SERVICE CENTER

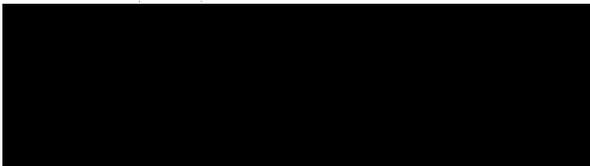
Date **JUL 12 2004**

IN RE: Petitioner:
Beneficiary:



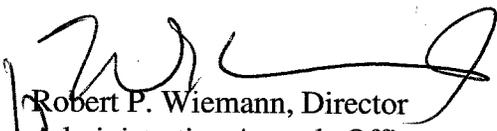
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the application to extend the beneficiary's stay and certified her decision for review by the Administrative Appeals Office (AAO). The director's decision will be affirmed.

The petitioner, El Camino Investments Corp., endeavors to classify the beneficiary as a nonimmigrant 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 it is a subsidiary of Textiles Llano LTDA., located in Colombia. The petitioner is engaged in real estate investment and imports goods. The initial petition was approved for one year to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for two years as the U.S. entity's president and general manager. The petitioner was incorporated in the State of Florida on May 10, 1999 and claims to have four employees.

On June 14, 2002, the director denied the petition and determined that the petitioner had not established that the beneficiary will be primarily performing duties in an executive or managerial capacity.

On July 16, 2002, the petitioner's counsel filed Form I-290B and submitted a motion to reconsider challenging the denial of the application. On the Form I-290B Notice of Appeal, counsel refers to the motion to reconsider stating that the petitioner has demonstrated that the beneficiary continues to be employed in a primarily managerial and executive capacity.

On August 3, 2002, the director denied the motion for reconsideration. The director subsequently certified her decision for review by the AAO.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, 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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act 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 (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (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.

The issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties for the United States entity.

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 May 3, 2002, the petitioner filed the Form I-129. The petitioner described the beneficiary's proposed duties in the U.S. as "[o]rganize, manage and direct the U.S. subsidiary. In charge of all aspects of company's operation, including financial management, personal selection and termination, product line development; production controls; purchasing; full discretion over company's management."

In support of the petition, the petitioner also submitted an April 12, 2002 letter further describing the beneficiary's and subordinate employees duties:

- [The beneficiary's] duties in the United States are to manage and direct the organization, establish and implement corporate policies and goals, establish long range objectives, review and approve the budget and marketing plans, contract personnel, determine salaries and all employees benefits, including vacation time, direct and coordinate marketing activities, in other words, the overall management of the company.

- **Property Manager:** He manages the apartment building, maintains the bookkeeping and correspondence, deals with suppliers, purchases materials, deals with the tenants of the building, issues checks, collects rent, make bank deposits and reports directly to [the beneficiary].
- **Administrative Assistant.** She assists [the property manager] and [the beneficiary], answers the telephones, writes letters, files, opens the mail, and obtains quotes for purchasing, deals with potential customers and reports to [the property manager] and [the beneficiary],
- **Handyman.** He takes care of all repairs in the building, purchases materials, fixes the air conditioning, plumbing, electrical, cut the grass, and performs all duties necessary in the apartment building.

On June 10, 2002, the director requested additional evidence that included a copy of the last four state quarterly reports for the U.S. entity and the U.S. entity's organizational chart listing the names, positions, starting dates, and whether the employees were full-time or part-time.

The petitioner responded to the request for additional evidence and submitted a copy of the U.S. entity's Federal and State Quarterly Tax and Wage Report for the first quarter in 2002 and the U.S. entity's organizational chart. The petitioner also states that it plans to hire additional employees for a new retail store that it plans to open.

On June 14, 2002, the director denied the petition. The director determined that the petitioner had not established that the beneficiary will be primarily performing duties in an executive or managerial capacity. The director found that the record demonstrated that the petitioner did not have any qualifying employees at the time the petition was filed.

As a result of the denial, on July 16, 2002, the petitioner's counsel filed Form I-290B and submitted a motion to reconsider challenging the denial of the application. On the Form I-290B Notice of Appeal, counsel refers to the motion to reconsider stating that the petitioner has demonstrated that the beneficiary continues to be employed in a primarily managerial and executive capacity.

On August 3, 2002, the director denied the motion for reconsideration. The director denied the petition because the petitioner did not demonstrate that the U.S. entity was in need of an executive or manager and that it had not demonstrated that the beneficiary will be employed in a primarily managerial or executive capacity. In addition, the director found that the evidence that was submitted did not establish that CIS based its decision on an incorrect application of the law. The director subsequently certified her decision for review by the AAO.

In examining the executive or managerial capacity of the beneficiary, the AAO will look to the description of the beneficiary's U.S. job duties to determine whether the beneficiary is primarily acting in a managerial or executive capacity. 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 fail to establish what the beneficiary does on a day-to-day basis. For example, the petitioner stated that the beneficiary's proposed U.S. duties included "establish[ing] and implement[ing] corporate policies and goals" and "establish[ing] long range objectives." However, these duties are generalities that fail to enumerate any concrete policies and goals or objectives that the beneficiary will establish or implement. 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).

Further, the petitioner claims the beneficiary's U.S. duties include tasks such as "review and approve the budget and marketing plans" and "direct and coordinate marketing activities." However, the record does not indicate who actually performs the marketing activities. Therefore, although the beneficiary claims to approve plans, it is evident from the record that the beneficiary actually performs the tasks that the beneficiary claims to review and approve. 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 record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel. In his motion for reconsideration, counsel claims that the beneficiary "is in fact supervising three other employees, one of whom is supervising the other two." Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. The petitioner submitted a U.S. organizational chart indicating that the beneficiary manages a property manager, administrative assistant, and a handyman. In the instant matter, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the secretarial and administrative work of the administrative assistant, who is among the beneficiary's subordinates.

The AAO also notes that the petitioner indicated that the property manager, administrative assistant, and the handyman were hired as of January 2002. The petitioner submitted a copy of its 2001 U.S. Corporation Income Tax Return for 2001 indicating that no salaries and wages were paid even though there was taxable income for 2001. In addition, the Employer's Quarterly Federal Tax Return for the quarter ending March 31, 2002 indicated that there was only one employee who was paid \$9,082 for the pay period that included March 12, 2002. However, the State Employer's Quarterly Report for the quarter ending March 31, 2002 indicated that four employees were paid \$9,082 for the pay period that included March 12, 2002. On Form I-129, the petitioner indicated that the beneficiary earns \$38,000 per year or an estimated \$3,100 per month. Therefore, the quarterly report appears to reflect only the beneficiary's \$9,082 wages for the quarter ending March 31, 2002 even though the petitioner indicated that four employees were paid gross wages of \$9,082. The inconsistencies between counsel's assertions and the submitted evidence raise serious doubts regarding the claim that the petitioner employed three subordinate employees since January 2002. 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).

Counsel also claims that, "[t]he number of employees supervised is clearly not determinative under the law." 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. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Counsel in his motion to reconsider further refers to an unpublished decision involving an employee of the Irish Dairy Board. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Finally, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. At the time of filing, the petitioner had not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. After careful consideration of the evidence, the AAO concurs with the director's decision 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 is not persuaded that the U.S. entity had been doing business for the previous year. At the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). The petitioner submitted a copy of its 2001 U.S. Corporation Income Tax Return for 2001 indicating that no salaries and wages were paid even though there was taxable income for 2001. In addition, the petitioner claims that three of the four employees were not hired until January 2002; however, the Employer's Quarterly Federal Tax Return indicated that there was only one employee for the quarter ending March 31, 2002. Therefore, since there was no evidence that the petitioner paid its employees during any of the other quarters during 2001, it does not appear that the company had anyone to perform activities necessary to operate a business during the period before the quarter ending March 31, 2002.

At the time the petitioner filed its petition on May 3, 2002, it had not established that it had been doing business for the previous year as required by the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B). 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 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). For this additional reason, the AAO concludes that 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 director's decision will be affirmed.

ORDER: The director's decision is affirmed.