

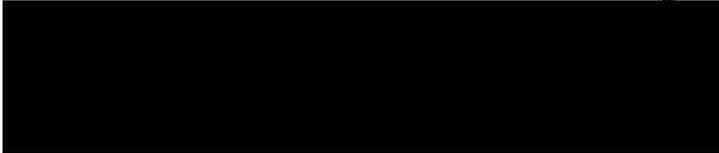
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U.S. Citizenship
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Services

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JUN 03 2004



FILE: EAC 0208051835 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



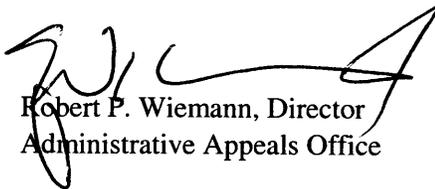
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 Director, Vermont 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 operating in the United States as an import-export, commercial investment, and trading company. It currently employs the beneficiary as its president/chief executive, and seeks to extend the employment of the beneficiary for an additional four years. The petitioner filed a petition to extend the classification of the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary has not and would not be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the submitted documentation was overlooked and misunderstood by Citizenship and Immigration Services (CIS). The petitioner claims that the Internal Revenue Service (IRS) corporate tax returns for the foreign and U.S. entities indicate that both companies have generated sales. The petitioner also claims that the beneficiary performs "executorial duties" in the United States.

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.

The issue is whether the beneficiary has been and would 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.

On the nonimmigrant petition, the petitioner explained the beneficiary, as president/chief executive, is responsible for the U.S. entity's "overall operations, personnel, administration [and] implementation of investments [and] business plan as documented." In the appended business plan, the petitioner noted the following:

[The beneficiary] will be in charge of all operations of this American branch subsidiary with full Discretionary [sic] powers as required to include that of all employment, expenditures, preparation and submittal to proper authorities in the United States and documents concerning taxes, licenses, etc. He will have supervisory powers over all employees. As to policy decisions, such as investments, expansions into other areas, this [sic] policy decisions will be subject to ratification of the Executive Board of the parent Company of which [the beneficiary] is also a member.

The petitioner also provided an organizational chart of the U.S. company, in which the beneficiary is identified as the "Head of U.S. operations/Marketing, Administration & overall In Charge of personnel." Subordinate to the beneficiary is a vice-president, a supervisor, and four sales people.

The director issued a request for evidence dated February 22, 2002, in which he stated that the beneficiary's duties in the United States "appear to relate to the day-to-day operation involved in producing a product or providing a service as well as the supervision of non-qualifying employees." The director requested that the petitioner submit: (1) a breakdown of the hours devoted to each of the beneficiary's job duties on a weekly basis; (2) an organizational chart for the U.S. company, including position descriptions for each employee; and, (3) additional evidence, such as subordinate supervisors and employee job titles and duties, that would establish the beneficiary's employment in a qualifying capacity.

In response, the petitioner stated that since December 1999, the beneficiary has been performing the following job duties in the U.S. entity:

[D]irecting and implementing trading activities and commercial investments He is the head of all employees and staff that this American corporation has employed and those projected to be employed in the future. [The beneficiary] does function as Chief Executive of the American Subsidiary with full powers in making policy decisions and directing entire operations of this corporation. Additionally since he is required to travel extensively between India [and] USA to coordinate trading strategies of the parent company and the American subsidiary, day-to-day operations involved in producing [a] product and services are being performed by subordinate supervisors under the directions of [the beneficiary].

In an accompanying letter, the petitioner stated:

[The beneficiary] is in charge of all operations of this corporation with full discretionary powers as required and including that of all employees, expenditures, preparation and submittal to proper authorities in the United States and documents concerning taxes, licenses etc. He has supervisory powers over all employees. He is fully empowered to make policy decisions, investments, expansions and directions on operating procedures of the American subsidiary and including that of the business facilities acquired by it.

The petitioner also provided an organizational chart similar to that previously submitted, and noted that the vice-president, who is directly subordinate to the beneficiary, is in charge of "operating the business facility," including the personnel, banking, and determining the facility's products and services.¹ The petitioner also notes that it anticipates the development of an import-export division, which will employ five individuals.

In his decision, the director stated that the record does not establish that the beneficiary has been or would be employed in the United States in a primarily managerial or executive position. The director noted that five of the seven individuals that the petitioner claims to employ are actually employees of the dry cleaning facility. Additionally, the director noted that the record does not sufficiently identify the goods and services provided by

¹ The "facility" referred to by the petitioner is a dry cleaning operation, "Professional Cleaners," which the petitioner claims to own and operate.

the petitioning organization. The director also noted that the corporate tax returns fail to indicate a dollar amount for cost of goods sold by the petitioner. Consequently, the director denied the petition.

On appeal, the petitioner asserts that the director misinterpreted and overlooked facts in the record. The petitioner explained that because the dry cleaners was not acquired until September 2001, income generated by this business would be included on the petitioner's 2002 corporate tax returns. The petitioner noted that investments made to acquire the dry cleaners are reflected in the petitioning organization's 2001 corporate tax return. The petitioner also stated that the beneficiary's "executorial duties" include analyzing the market for additional dry cleaning facilities and formulating and implementing administrative and operational policies.

On review, the record does not establish that the beneficiary has been employed or would be employed in the United States in a primarily managerial or executive capacity.

When 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). 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 matter, the petitioner has failed to provide a description of the job duties performed by the beneficiary in the U.S. entity sufficient to demonstrate employment in a qualifying capacity. Although the petitioner was offered two opportunities to submit a detailed description of the beneficiary's job responsibilities, the petitioner provided generalized statements, such as "[being] in charge of all operations," possessing full discretionary and supervisory powers, and "full powers in making policy decisions," which fail to specifically identify the true nature of the beneficiary's employment. *See 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) (the actual duties themselves reveal the true nature of the employment). 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. *Id.* Furthermore, the petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The AAO notes that a related issue exists which the director did not address. Based on the evidence provided, it is reasonable to conclude that the U.S. entity is not doing business in the United States, and therefore, that the beneficiary is not employed in a primarily managerial or executive capacity. The petitioner claimed that the beneficiary is in charge of "U.S. operations," which, according to the record, is a dry cleaning facility. While the petitioner submitted substantial documentation pertaining to the dry cleaning business, there is no evidence that the petitioning organization owns the dry cleaners. All documents relating to the dry cleaning business, including the purchase and sale agreement, loan agreement, and security agreement, identify a separate company, SNA Enterprises, Inc., as the buyer, borrower, and debtor, respectively. In fact, the year 2000 IRS Form 1120S, Schedule K-1, Shareholder's Share of Income, Credits, Deductions, etc., for SNA Enterprises, Inc., indicates that the corporation is owned entirely by one shareholder. The AAO recognizes that the individual identified on Schedule K-1 as the sole shareholder of SNA Enterprises, Inc. is the vice-president of the petitioning organization. The AAO further acknowledges that Statement 2 of the petitioning organization's 2000 IRS Form 1120, U.S. Corporation Income Tax Return indicates that the petitioner made an investment in the amount of \$253,426 in SNA Enterprises, Inc. These two facts, however, do not establish a relationship between the petitioner and SNA Enterprises, Inc., or between the petitioner and the dry cleaning facility. The AAO cannot conclude that the petitioner is doing business as a dry cleaning company.

Furthermore, because the record lacks evidence pertaining to the nature of the U.S. business, the beneficiary cannot be deemed to be functioning as a manager or executive in the U.S. entity. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Consequently, the AAO cannot conclude that the beneficiary has been or will be performing in a primarily managerial or executive capacity.

An additional issue not addressed by the director is whether a qualifying relationship exists between the foreign and U.S. entities. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Id.* In a letter submitted with the petition, the petitioner referred to an exhibit in the record pertaining to the stock purchase agreement between the foreign and U.S. entities. The record however does not contain this agreement. Nor does the record contain any documentation establishing the claimed parent-subsidiary relationship between the two entities. 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). Again, the appeal will be dismissed for this additional reason.

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.