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JUN 08 2004

FILE: SRC 02 276 52122 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



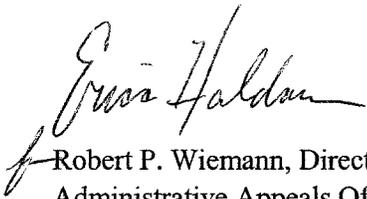
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Alcazar Business Association, Inc. 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 to be an affiliate of [REDACTED] LTDA., located in Colombia. The petitioner is engaged in the commercialization and manufacturing of footwear. The initial petition was approved to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's president and general manager. The petitioner was incorporated in the State of Florida on April 9, 2001 and claims to have one employee.

On October 25, 2002, the director denied the petition and determined that the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity.

On appeal, the petitioner claims that the beneficiary has been "engaged in managerial and executive duties" and provides an additional job description for the beneficiary's position.

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 (1)(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 employed 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 September 25, 2002 the petitioner filed Form I-129. In an attachment to Form I-129, the petitioner described the beneficiary's U.S. duties:

He is in charge of all matters of the American company such as purchase and sale of merchandize [sic] and equipment, import-export and trade of the same, learn methods and procedures for new equipment and/or technology of the equipment acquired. He will do all transactions in regards to signing agreement like lease, hiring-discharging-interviewing personnel, bank transactions, accounting and legal services and everything necessary to keep the increase of business[.]

In addition, in a July 10, 2002 letter, the general manager of the foreign entity submitted a list of the beneficiary's duties:

- 1) Planning and handling of the productive scheme of the company.
- 2) "Development of the product:" Election of models and styles that conform the different collections of male line shoe for local market in the State of Florida.
- 3) Personal contact p [sic] with the different ferias and exhibition fairs that have taken place in the City of Miami.
- 4) Has total power to perform all the operations, contracts and to assume commitments, related to the development and expansion of the social object of our company and with the performing all the formal duties that establish the laws in the United [S]tates of America.

The petitioner also stated in an August 29, 2002 letter that the beneficiary's knowledge and vast experience as an executive has made him qualified to represent "Colombian business internationally, and therefore he is the liaison between North America market and Colombian Company." The petitioner indicated on Form I-129 that it had one employee at the time of filing.

On October 25, 2002, the director denied the petition and determined that the petitioner had failed to establish that the beneficiary has been and will be employed in a primarily managerial or executive capacity. The director found that the majority of the beneficiary's work time would be spent on the non-managerial, day-to-day operations of the business.

On appeal, the petitioner claims that the beneficiary has been “engaged in managerial and executive duties.” In addition, the petitioner states:

As [m]anager and [p]resident, [the beneficiary] has been in charge of the general administration and the management of the business and the establishments of administrative methods and procedures and marketing. Nevertheless, since the Company is just beginning, [the beneficiary] is in charge of the department of Sales for the product. The beneficiary is in charge of the design and control of the procedures for the future employees. He has been negotiating with financial institutions in order to obtain the best credit. Also, he has the absolute [sic] authority to hire and discharge personnel; the administration and supervision of the financial statements; the formulation and administration of the policies of the company and the development of the long-term goals; the objectives according to the directives of the Company and the regulations of the Corporation. Also, the revision of the analysis of activities, costs, operations and projection of data to determine the progress of the goals. Planifies [sic] the objectives of the Company and develops the organizational policies to coordinate functions and operations between the divisions and departments, as well as to establish responsibilities and procedures to retain objectives. [The beneficiary], as President of the Company, will evaluate the objectives and purpose of the policies. The beneficiary works 100% of his time, dedicated to the executive activities of the Company[.]

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). In the present matter, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has provided a nonspecific description of the beneficiary’s duties that fails to establish what the beneficiary does on a day-to-day basis. For example, the petitioner stated that the beneficiary’s duties include “the formulation and administration of the policies of the company and the development of the long-term goals” and “evaluat[ing] the objectives and purpose of the policies.” However, these duties are generalities that fail to enumerate any concrete policies that the beneficiary will formulate and establish. 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 that the beneficiary is “in charge of the department of [s]ales for the product” and “has been negotiating with financial institutions in order to obtain the best credit.” However, it is unclear who will actually develop the sales that the beneficiary will oversee. Therefore, although the beneficiary claims to be in charge of the sales department, it is evident from the record that the beneficiary, as the petitioner’s only employee, must directly perform the tasks that he has been assigned to oversee. 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 AAO notes that the petitioner claimed, “the beneficiary is in charge of the design and control of the procedures for the future employees.” However, 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).

Finally, the description of the beneficiary’s duties indicates that the beneficiary operates the business by primarily performing the non-managerial and non-executive tasks of the business as the beneficiary develops the product, negotiates, and has total power to perform all the operations of the business. However, 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. 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 matter, the petitioner has 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 must conclude that the beneficiary has not been and will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the findings in the previous decision, 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(l)(1)(ii)(G). On Form I-129, the petitioner indicated that the petitioner is an affiliate of the foreign entity. In an attachment to Form I-129, the petitioner claimed that the beneficiary owns 100 percent of the U.S. entity’s capital stock and that the following three individuals own 33.33 percent of the foreign stock: the beneficiary, [REDACTED], [REDACTED], and [REDACTED] thus directly contradicting the claim that it is an affiliate of the foreign entity. The foreign company’s constitution confirms that it is owned in equal shares by the above-named individuals, and the petitioner’s articles of incorporation indicate that the beneficiary is its sole stockholder. Thus, the petitioner’s evidence establishes that the two companies do not share common ownership and control and do not qualify as affiliates for immigration purposes. See 8 C.F.R. § 214.2(l)(1)(ii)(L). For this additional reason, the petition will not be approved.

Although not addressed by the director, a remaining issue to be examined is whether the petitioner has established that the beneficiary’s services are for a temporary period. The

regulation at 8 C.F.R. § 214.2(I)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this matter, the record shows that the beneficiary is the sole shareholder of the petitioning entity and a stockholder of the parent organization. In an attachment submitted with the petition, the petitioner stated that beneficiary owns 100 percent of the capital stock of the U.S. entity. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of the position in the United States. Therefore, the petition may not be approved on this basis as well.

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).

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 appeal will be dismissed.

**ORDER:** The appeal is dismissed.