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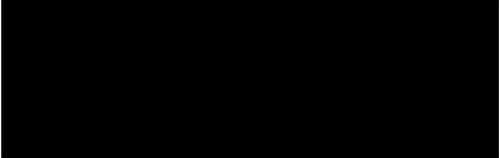
JUN 08 2004

FILE: SRC 03 022 52494 Office: TEXAS SERVICE CENTER Date:

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 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, [REDACTED] endeavors to classify the beneficiary as a 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 a subsidiary of Datacom Red Limited, located in England and is engaged in the design and installation of data and telecommunication systems. The initial petition was approved for one year to allow the petitioner to open a new office, and the petitioner now seeks to extend the petition's validity and the beneficiary's stay. The petitioner will employ the beneficiary as the U.S. entity's president. It was incorporated in the State of Florida on June 29, 2001 and claims to have two employees.

On January 17, 2003, the director denied the petition because 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's counsel submits a brief and claims that the beneficiary is "eligible and qualified for the benefits sought." Counsel submits additional evidence in support of the appeal.

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)(14)(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, pursuant to 8 C.F.R. § 214.2(l)(14)(ii), if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation requires:

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 (l)(1)(ii)(G) of this section;

- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(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 executive or managerial 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 October 29, 2002 the petitioner filed the Form I-129. The petitioner described the beneficiary's proposed U.S. duties as "[u]ltimately responsible for the daily growth of our US business, including [sic] recruitment, finances, sales generation" and "to increase and improve the stability of the US business." The petitioner indicated that it had two full-time employees, including the beneficiary.

On December 4, 2002, the director requested that the petitioner submit: a statement describing the staffing of the U.S. operation; a description of the employees' positions, duties, and educational levels; evidence of the wages paid to the employees; a copy of the Employer's Quarterly Federal Tax Report for the quarter ending September 2002; a work schedule for all employees; and, if the petitioner hired independent contractors, a description of how often the business uses their services and evidence, such as 1099 MISC and contracts, that these contractors were actually hired.

In response to the director's request for additional evidence, the petitioner submitted a letter explaining that the beneficiary was the only employee working for the U.S. company and that a previously employed worker was no longer with the company due to personal problems. This employee worked as a technical/sales manager from October 1 to October 4, 2002 and was subsequently terminated on November 21, 2002 after an extended and unexplained absence. The petitioner submitted a copy of the beneficiary's resume, a letter from the general manager of the foreign entity, and the Employer's Quarterly Federal Tax Report Form 941 dated November 27, 2002 that showed no salaries or wages were paid to the beneficiary. The letter from the general manager of the foreign entity stated that the foreign entity "has paid [the beneficiary] in full upfront a total of \$24,000 USD, which has sustained his existence in the USA until October 31st 2002, until which time he will be in a position to draw a monthly salary from our US business."

On January 17, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The director found that it was apparent that with no staff, "the beneficiary is called upon to perform many duties associated with running a business that are not managerial or executive."

On appeal, the petitioner's counsel submits a brief and claims that the beneficiary was "charged with managing and supervising the early progress of [the U.S. company] in an executive capacity."¹ Counsel claims that "the Beneficiary spent the first several months learning the

¹ The AAO notes that on page 7 of counsel's brief, counsel also asserts that the beneficiary will continue to represent the petitioner in a "[p]rimarily [m]anagerial [c]apacity." The petitioner does

business climate and only towards the end of the first year did he begin staffing [the U.S. company], enabling it to begin the process of selling its products and services. Likewise, the [petitioner] only began to generate significant income near the end of 2002.” Counsel also claims that the beneficiary is the “Sole Manager” of the U.S. entity. Counsel described the beneficiary’s duties as the following:

[M]anaged the successful compliance with federal and state business laws, hired necessary professional contractors such as accounting and legal support and, when the infrastructure permitted, hired full-time and contract staff . Finally, it is [the beneficiary] who has final say on suitability of proposed contracts and assignments, pricing of significant jobs, paying bills and, perhaps most importantly, growing the business in accordance with some guidance from the Parent, with whom he is in constant contact.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner’s description of job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). On review, the petitioner has not established that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The petitioner’s descriptions of the beneficiary’s proposed U.S. duties are nonspecific and vague. For example, the petitioner initially described the beneficiary’s duties as “increase and improve the stability of the US business” and “responsible for the daily growth of the business.” However, the petitioner fails to specify how the beneficiary handled these obligations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Reciting the beneficiary’s vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary’s daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *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).

In addition, the petitioner described the beneficiary as being involved in the “sales generation” of the company. Since the beneficiary is actually engaged in the sales efforts, it appears that he will be providing the services of the business. 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).

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 appeal, counsel provides a new description of the beneficiary's duties which generally paraphrases the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act. For instance, the beneficiary's position is depicted as exercising "wide latitude in discretionary decision-making," and counsel claims that "[h]is discretion serves as the discretion of the organization, guiding the employees he supervises towards completion of the goals set forward in the business plan." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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.). The job descriptions provided by the petitioner and the beneficiary do not allow the AAO to determine what duties the beneficiary actually performed at the time of filing, such that they could be classified as managerial or executive.

Moreover, the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). On appeal, counsel claims that the beneficiary manages an essential function within the organization. If the petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. As noted above, the petitioner has not provided a comprehensive and detailed description of the beneficiary's duties. Counsel stated that the beneficiary is in control of the "management of the operations, from securing office space to personnel decisions to ensuring statutory and regulatory compliance to arranging for the contracting of professional decisions" and "he is essential to providing the backdrop upon which [the U.S. company] can spring into a viable entity going forward." These tasks appear to be necessary to run the day-to-day operations of the business rather than managing an essential function of the operation. As previously stated 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. at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Counsel states on appeal that the petitioner hired necessary professional contractors such as accounting and legal support. Counsel claims, [REDACTED] was hired as a contract employee and charged with running the day to day operations of [the U.S. entity], handling such wide ranging duties as customer service, customer and technical support, and technical installation." Counsel also claims, "the Beneficiary hired [REDACTED] as a contract employee, charged with a variety of sales leads and, on occasion, price contracts." However, although counsel submits two letters from these claimed independent contractors, the petitioner has not presented evidence such as contracts or evidence of wages paid, to document the existence of these employees and vaguely identified the services these individuals provided. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Going on

record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, the Form I-129 indicated that two employees worked for the U.S. entity. However, on appeal, counsel claims that the beneficiary supervises two independent contractors, a full-time employee, and has extended contingent offer of employment to a second full-time employee. These discrepancies and the lack of documentary evidence establishing the actual employment of these claimed employees raise doubts as to the employees the beneficiary actually supervises. 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 explains on appeal that the petitioner did not have an “understanding” of “the request for additional information to include contract employees.” However, the request for evidence stated in plain language that the petitioner was to submit evidence of any contract employees, including Forms 1099 MISC and contracts, and a detailed statement describing how often the business uses their services. The petitioner submitted a timely response in December 2002 which conveyed an understanding of the information requested, and failed to mention any contract employees. On appeal, counsel claims that two contract employees had been hired by the petitioner by November 2002, and that one of them essentially performs duties as a “general manager.” The petitioner has not adequately explained why such key contract employees were not included in the petitioner’s response to the request for evidence, and, as noted above, has still not provided independent, objective evidence to establish that they worked for the petitioner at the time of filing. The AAO is not persuaded that the beneficiary had any subordinates at the time of filing other than [REDACTED] who was no longer providing services for the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Since the petitioner through counsel claimed that the beneficiary’s duties involved supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Although specifically requested by the director, the petitioner failed to provide a detailed description of the claimed subordinate employees’ duties. As noted above, the petitioner did not claim that it had hired independent contractors in its response to the director’s request for additional evidence. It submitted its September Form 941, 2002 Employer’s Quarterly Tax Return showing that no salaries and wages were paid to any employees. The petitioner stated that the beneficiary “is currently the only employee of [the U.S. entity]” and the technical/sales manager “had terminated his employment.” However, on appeal, counsel described several subordinate employees and vaguely described their duties. Without such specifics, it is difficult to determine whether these employees actually perform the nonmanagerial or nonexecutive tasks of the business. As discussed above, the petitioner also failed to provide documentary evidence to establish that these independent contract employees actually worked for the U.S. entity. In sum, the petitioner has failed to establish that the beneficiary supervises a staff of subordinate supervisory, professional, or managerial employees.

The AAO further notes that the director in her decision stated that the beneficiary was the “sole employee” who “was called upon to perform many duties with running a business that are not managerial or executive.” 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 Soffici*, 22 I&N Dec. at 165.

Finally, the petitioner indicated that “only towards the end of the first year did [the beneficiary] begin staffing [the U.S. company], enabling it to begin the process of selling its products and services.” 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 concludes that the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the evidence is not persuasive that a qualifying relationship exists between the petitioner and a foreign entity as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). Although the petitioner claimed that it is a subsidiary of the foreign entity, and that the foreign entity owns 50 percent of its stock, no documentation was submitted to substantiate this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Another issue in this proceeding, also not raised by the director, is whether the petitioner has been doing business. The record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary’s status. The petitioner submitted a number of invoices suggesting that it has been selling its services on a regular basis. However, the earliest invoice documenting the sale of the petitioner’s goods dates back to September 2, 2002. However, the petition was approved in November 2001. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant matter, there is no evidence that the petitioner was doing business from November 2001 through September 2002. In addition, the petitioner submitted no evidence of the financial status

of the U.S. company as required by 8 C.F.R. § 214.2(l)(14)(ii)(E). For these additional reasons, the petition may 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(l)(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 a major stockholder of the parent organization. No evidence of the claim was provided. 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 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.