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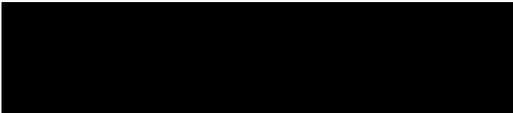


U.S. Citizenship
and Immigration
Services



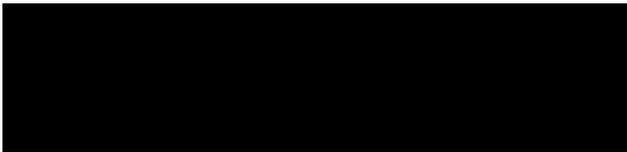
FILE: SRC 02 269 51281 Office: TEXAS SERVICE CENTER Date: **MAR 29 2004**

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

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prevent clearly unwarranted
invasion of personal privacy**

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 as an automobile distributorship. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and submits a brief in opposition thereto.

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)(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)(3) states, in part, 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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states 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 (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 2001 and claims to be an automobile distributorship. The petitioner claims that the U.S. entity is a subsidiary of Zulfiyar Motors, located in Jamaica, West Indies. The petitioner declares four employees. The petitioner seeks to extend the beneficiary's stay for two years at an annual salary of \$26,000.

The issue presented in this proceeding is whether the petitioner has established that the beneficiary 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.

In the petition, the petitioner described the beneficiary’s proposed job duties as: “[d]irect operations of U.S. subsidiary, including business development, formulation and implementation of company financial and marketing policies and growth strategy. Personnel development and executive decision and policy making at the highest level.”

The petitioner submitted an organizational chart of the U.S. entity, which listed the beneficiary’s duties as:

- Direct overall company operations
- Hire, train and evaluate personnel
- Perform due diligence re business development
- Formulate co. financial and marketing policies & growth strategy
- Engage in organizational exec. [d]ecision making at the highest level
- Manage Outsourced professional services.

The organizational chart depicted a part-time sales manager, financial manager, and sales consultant position. The chart also demonstrated an outsourced professional accounting service position coordinated by Mir legal information technology.

The petitioner submitted a copy of the U.S. entity Employer’s Quarterly Federal Tax Return (Form 941), dated July 31, 2002. The report indicated that as of July 31, 2002, the U.S. entity employed the beneficiary, a part-time sales manager, and a part-time sales consultant. Likewise, in a response letter, dated October 3, 2002, the petitioner stated that presently the U.S. entities management staff was employed on a part-time basis.

The director determined that the information provided by the petitioner was insufficient to show that the beneficiary would be performing in a primarily managerial or executive capacity. The director stated that the record did not convincingly demonstrate that the petitioner had any qualifying employees. The director also stated that although the beneficiary would serve the U.S. entity under the title of president, there was no evidence to show that there were any subordinate management employees, and that therefore the beneficiary would, more likely than not, be carrying out the day-to-day operations of the U.S. entity. The director further stated that the evidence in the record was not sufficient to demonstrate that the U.S. entity had grown to a point where it could

remunerate the beneficiary, or where the beneficiary would function at a senior level within the organizational hierarchy.

On appeal, counsel asserts that the petitioner has provided sufficient evidence to establish that the beneficiary will continue to be employed in the United States in a managerial or executive capacity. Counsel continues by stating that the U.S. entity has grown over the past year. Counsel also states that the beneficiary travels outside the United States on a weekly basis, and that the staff runs the office in his absence, without his day-to-day supervision. Counsel further states that the beneficiary divides his time between the U.S. and foreign entities. And, in so doing, he develops policies, participates in financial and marketing strategies, and provides general guidance and experienced leadership to the U.S. company. Counsel also states that the L-1 visa is available to comparatively small qualifying organizations, and that there is no disqualification in law or the regulations from being a qualifying employee because the employment is part-time.

On review of the record, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity. In evaluating the claimed managerial or executive duties of a beneficiary, Citizenship and Immigration Service (CIS) will look first to the petitioner's description of the beneficiary's job duties. 8 C.F.R. § 214.2(I)(3)(ii). The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. The following duties are without any context in which to reach a determination as to whether they are qualifying: responsible for directing company operations; hiring, training and evaluating personnel; formulating company financial and marketing policies; engaging in organizational executive decision making; and managing outsourced professional services. Furthermore, there is insufficient detail regarding the actual duties of the assignment to overcome the issues raised by the director. Without clarification or documentation to substantiate the petitioner's claims, the beneficiary's job duties listed cannot be construed as being managerial or executive in nature. 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).

There has been insufficient evidence submitted to show that the beneficiary is employed primarily in an executive capacity. Although the beneficiary's title is that of president, the petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he is primarily directing the management of the organization or a major component or function of the organization, that he is establishing goals and policies, that he is exercising a wide latitude in discretionary decision-making, or that he receives only general supervision or direction from higher level individuals. To the contrary, counsel states on appeal that the beneficiary travels outside the United States on a weekly basis, and that the subordinates are left to run the office. Counsel also states that the beneficiary performs duties for both the U.S. and foreign entities. There has been no independent evidence submitted to demonstrate how much of his time is spent providing services to the U.S. entity and how much time is spent providing services to the foreign entity. In the instant case, the petitioner is petitioning for the beneficiary to render professional services in the United States, not abroad. Furthermore, the record does not show what position the beneficiary will continue to hold at the foreign entity.

The record does not contain sufficient evidence to establish that there is a subordinate staff that relieves the beneficiary from performing the day-to-day non-executive duties of the business. Although the beneficiary is not required to supervise personnel, if it is claimed that her 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. While counsel claims that the U.S. entity is adequately staffed with other

employees who perform the everyday services of the business, the evidence shows that when the petition was filed, only two additional part-time employees were employed by the U.S. company. Although the subordinates titles are sales manager and sales consultant, there is no evidence in the record to show that the duties they perform are managerial, supervisory, or professional in nature. There has been no evidence submitted to show who, in fact, performs the day-to-day services of the organization in the absence of the beneficiary and the part-time workers. With the beneficiary's added responsibilities, and the subordinates being employed only on a part-time basis, coupled with the alleged growth of the business, it is unlikely that beneficiary will primarily perform executive duties on a day-to-day basis. While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other pertinent factors such as the nature of the petitioner's business. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp.2d 7, 15 (D.D.C. 2001). Together, these facts can be used as indicators which help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant matter, the latter more accurately describes the beneficiary's role.

Furthermore, the record does not demonstrate that the U.S. entity contains the organizational complexity to support the proposed executive staff position. The petitioner states on appeal that the U.S. entity employs four employees. However, the evidence shows that when the petition was filed, the U.S. entity employed only the beneficiary and two other part-time employees. The U.S. entity's 2001 Corporate Federal Income Tax Return (Form 1120) shows that \$27,760 was issued by the organization for salaries and wages. The petition reveals that the beneficiary's annual salary alone is \$26,000. The inconsistencies in the record raises questions as to whether the evidence accurately reflects the organizational structure of the enterprise. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, the petitioner has not shown that the beneficiary functions at a senior level within an organizational hierarchy other than in position title. There is no evidence to show that the U.S. entity has the organizational structure or the financial ability to remunerate the beneficiary for his services. It appears from the evidence that the beneficiary will continue to primarily perform the day-to-day duties of the organization, including supervising non-professional subordinate staff. Although the record demonstrates that the beneficiary is performing some executive functions; with the nature of the business, the number of employees, and the employees' part-time status, it appears necessary for the beneficiary to perform multiple non-executive duties in order to assure continued viability of the business. The AAO recognizes that the U.S. entity has added employees since the filing of this petition; however, such progress cannot be taken into consideration in determining this beneficiary's eligibility for an extension of status as the company's president. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts, *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The AAO cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981).

It is noted for the record that the petition for a new office extension in the instant case was filed on September 17, 2002. The regulation at 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended United States operation (new office) 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

beneficiary, at best, primarily supervises non-professional employees and provides the day-to-day services of the U.S. organization, and performs some executive duties. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service 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 evidence fails to demonstrate that the petitioner has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary is employed in an executive capacity.

Beyond the decision of the director, schedule K of the petitioner's 2002 IRS Form 1120 corporate tax returns reveal that no foreign entity owned at least 25% of the petitioning company, thereby contradicting the claim that it is a wholly-owned subsidiary of the claimed foreign parent company. Consequently, it cannot be concluded that the petitioner is a qualifying organization doing business in the United States and at least one foreign country, or that it has a qualifying relationship with a foreign entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). In addition, 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 petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. As the appeal will be dismissed, 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.