

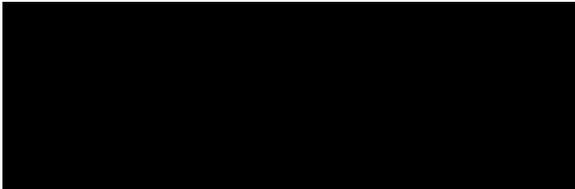
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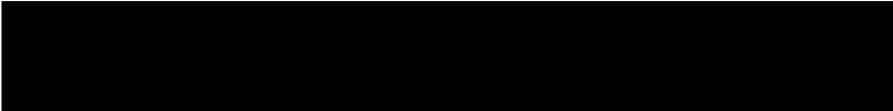


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Office: TEXAS SERVICE CENTER Date:

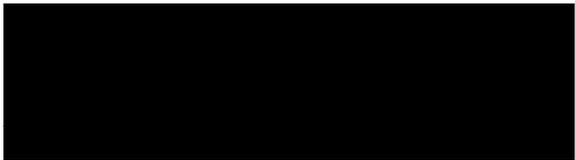
MAR 30 2004

IN RE: Petitioner:
Beneficiary:



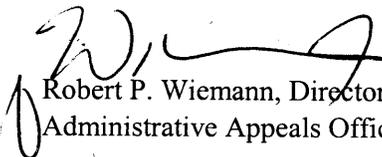
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, Artko Enterprises, LLC, states that it is an affiliate of a Colombian company, Complementos Industriales Complicol Ltda. The petitioner states that it is an import and export business that sells bronze sculpture and furniture. The U.S. entity was incorporated as a limited liability company in the State of Georgia on July 31, 2001. In August 31, 2001, the U.S. entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A). CIS approved the petition as valid from September 4, 2001 through September 4, 2002. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for three years.¹ The petitioner seeks to employ the beneficiary's services as the U.S. entity's president at an annual salary of \$37,000.

On August 22, 2002, the director determined that the beneficiary did not qualify as a manager or an executive. Consequently, the director denied the petition.

On appeal, counsel asserts that the beneficiary's proposed duties are primarily managerial and executive.

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 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.

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;

¹ The petitioner indicated on Form I-129 that the beneficiary planned to open a new office. On appeal, counsel states that the U.S. entity had already existed for one year at the time the petition for extension was filed. Thus, the petitioner must have erroneously checked the new office box on Form I-129.

- 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.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are *either* in an executive *or* managerial capacity. *Id.* Counsel's brief asserts that the beneficiary will be serving as a manager and an executive; therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of each capacity.

Initially, on Form I-129, the petitioner stated that the beneficiary would be "in charge of the development of . . . marketing strategy." A July 30, 2002 letter attached to Form I-129 depicted the beneficiary's "personal connections with wholesalers and retailers" as essential to the U.S. entity's business strategy.

After reviewing the Form I-129 and July 30, 2002 letter, the director asked the petitioner to provide additional evidence:

Submit a statement describing the staffing of the U.S. operation. This statement should clearly indicate the number of employees, the position and job duties of each employee, when the employee started with the US company, and should be accompanied by evidence of wages paid to the employee. Also, submit evidence of any contract employees. What are the hours of operation for this business? How many days of the week is this business open? Who performs the day-to-day duties, such as answering phones, mailing letters, finding buyers and sellers, tracking inventory and keeping financial records? Submit the work schedule for all employees.

(Emphasis in original.)

The U.S. entity responded on August 7, 2002. The response stated that the petitioner employs three persons and described their duties.

President. The petitioner described the beneficiary's duties during and after the U.S. entity's first year of operation. This petition is for an extension of a visa; therefore, the duties after the first year of operation are the relevant ones in this instance. The beneficiary's proposed duties will be "[f]ocused on the development of each of the products [sic] lines of the company, to assure the profitability of the general operation in the years to come."

President. The vice-president will "[c]oordinate, control and define all the operative and financial activities of the company which includes, [b]anking, [p]ayroll, suppliers['] payments and orders, import or export, and all the basic administrative duties necessar[y] to [achieve] ARTKO successes."

Sales. This employee's duties will be to "[c]reate a . . . [w]eb-[c]atalogue page to [sell] through the internet [the petitioner's] product, generate and follow-up [on] the mailing . . . lists, display and [sell] the product in the shows and antique fairs, find buyers, track[] inventory and consignments."

Additionally, the petitioner stated: "For our kind of business[,] we spend most of the time on the street, visiting and attending [to] our customers [at] their own place[s] of business. Also we participate [in] [a]ntiques and [d]ecorative [f]airs, auctions, and [in flea] markets . . ." The petitioner also supplied Internal Revenue Service (IRS) Form W-4 Employee's Year 2000 Withholding Allowance Certificates for the three employees described above.

On appeal, counsel further discussed the beneficiary's proposed duties:

[The beneficiary] regularly travels to the United States from Colombia to oversee the operations of the U.S. company. While the [b]eneficiary does confer with customers, it is for the broader, executive purpose of developing the overall business strategy of the company, and does not involve routine transactions. The [b]eneficiary has also been responsible for the development of new product markets in the United States. For example, the [b]eneficiary in his executive capacity, decided to expand the [p]etitioner into other lines of import products, including the business of importing leather hides and wood furniture in the United States

market. Moreover, the [b]eneficiary has overseen the implementation of the [p]etitioner's expansion into this business.

The evidence establishes that the majority of the beneficiary's proposed duties comprise marketing tasks. For example, the Form I-129 stated that the beneficiary would be "in charge of . . . marketing strategy." Similarly, the petitioner's response to the request for evidence depicted the beneficiary's proposed duties as being "focused" on developing the U.S. entity's product lines. Finally, on appeal, counsel admits that the beneficiary's proposed responsibilities are mainly marketing duties. Specifically, counsel described the beneficiary as being responsible for "overall business strategy" and the "development of new product markets in the United States."

Marketing duties, by definition, qualify as performing a task necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or 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).

Additionally, the duties listed above are too broad and nonspecific to convey an understanding of the beneficiary's daily activities. For example, the job descriptions present the proposed duties as including marketing and business strategy, developing product lines and new markets, and overseeing operations. The petitioner, however, did not define or quantify the tasks that underlie "marketing and business strategy," "developing product lines and new markets," and "overseeing operations."

Going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F. Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, specifics are 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).

The provision of tasks necessary to provide a product or provide services, and the vaguely and nonspecifically described job duties, preclude CIS from classifying the beneficiary as a manager or executive.

The petitioner has not demonstrated that the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing nonqualifying duties. See section 101(a)(44)(A)(ii) of the Act. In particular, section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[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).

In this matter, the petitioner apparently supervises two employees, a vice-president and a sales person. The relevant question is whether the supervised positions require advanced education. The response to the request

for evidence provides no information about the required education for the two subordinate positions. Therefore, it is unclear whether the vice-president and a sales person perform tasks that require at least a baccalaureate degree.

Further, the descriptions of the vice-president and sales person's duties are too general to convey an understanding of the two positions. When discussing the vice-president's duties, the petitioner does not define in terms of frequencies or examples what the terms "[c]oordinate, control and define," "banking," "payroll," "suppliers['] payments and orders," and "basic administrative duties" mean. Likewise, when describing the sales person's job, the petitioner does not define what "creating a web catalogue page," "following up on mailing lists," "displaying and selling product at shows," "finding buyers," and "tracking inventory" entail. As explained above, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*; *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*.

Therefore, given the undefined job descriptions and education requirements, it is unlikely that the vice-president or sales person would be able to relieve the beneficiary of his nonqualifying responsibilities.

On appeal, counsel asserts that CIS improperly denied the petition because the petitioner lacked legal representation at the time of filing. The AAO acknowledges that counsel did not represent the petitioner when the petition was initially filed. However, as required by 8 C.F.R. § 214(l)(3)(ii), the petitioner submitted Form I-129 with evidence that included a description of the beneficiary's proposed duties. The petitioner's choice to proceed without representation at the time of filing does not obviate the director's duty to consider evidence submitted in accordance with the regulations.

Moreover, on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Thus, the petitioner's decision to file a petition without obtaining legal representation is inapposite on appeal.

Beyond the decision of the director, the AAO notes that it is questionable whether the petitioner was doing business during the year prior to the filing of the petition for extension. Under the regulations, "[A] visa petition . . . which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by . . . evidence that the United States entity has been doing business . . . for the previous year." See 8 C.F.R. § 214.2(l)(14)(ii)(B); see also 8 C.F.R. § 214.2(l)(1)(ii)(H).

As discussed earlier, the petitioner filed a petition on August 31, 2001 for the beneficiary to open a new office. The petitioner filed a petition to extend the beneficiary's stay on August 1, 2002. The Year 2001, IRS Form 1065, U.S. Return of Partnership Income, for the period July 31, 2001 through December 31, 2001 reported gross receipts of \$8,342. The beneficiary's Year 2001, IRS Form 1040, Schedule C, Profit or Loss from Business, reported gross receipts of \$76,707. Based on the significantly larger Form 1040 gross receipt number, it appears that the petitioner may have been operating as a sole proprietorship rather than as a corporation during the year prior to the filing of the petitioner for extension.

A sole proprietorship does not qualify as a legal entity for the purpose of filing a nonimmigrant intracompany transferee petition for an owner. *See* 8 C.F.R. § 214.2(l)(1)(ii); *see also*, *Matter of Tessel*, 17 I&N Dec. 631 (Comm. 1981); *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). Furthermore, the petitioner must provide independent objective evidence to resolve any inconsistencies in the record, such as the significant discrepancy in size between the two gross receipt numbers. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA 1988). The record, therefore, precludes the AAO from conclusively determining whether the petitioner was doing business during the year prior to the filing of the petition for extension. However, as the appeal will be dismissed, the AAO will not examine this issue any 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.