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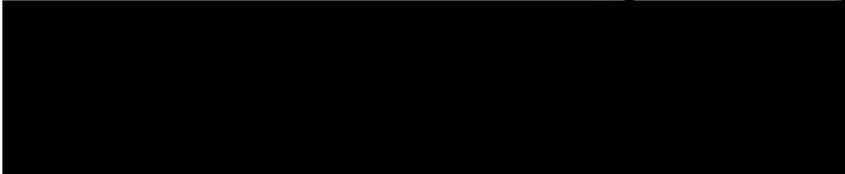


U.S. Citizenship
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Services

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FILE: LIN 02 220 56263 Office: NEBRASKA 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:
[Redacted]

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, Nebraska 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 engaged in the sale of machines for processing and packaging bakery products. The petitioner currently employs the beneficiary as president, and seeks to extend the beneficiary's temporary employment for two years. The petitioner filed a petition requesting the continuation of the beneficiary's classification as a nonimmigrant intracompany transferee. The director denied the petition concluding that the petitioner did not establish that the beneficiary has been employed in the United States in a primarily executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner submits "a further elaboration of [the beneficiary's] job duties," which the petitioner asserts establishes that the beneficiary is employed in the United States as an executive.

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) further 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The issue in the present matter is whether the beneficiary has been employed in the United States entity 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 a letter submitted with the petition the petitioner explained that as president of the U.S. entity, the beneficiary “is responsible for overseeing all company functions and directing them in order to build and maintain company revenue in a manner that complies with the guidelines and instructions of the Board of Directors.”

In a request for additional evidence, the director asked that the petitioner submit a detailed statement describing the executive or managerial duties performed by the beneficiary during the previous year, and those that the beneficiary will perform under the extended petition. The director noted that the statement should include specific evidence that the beneficiary’s position meets all four criteria of either a manager or executive, as defined in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(B) and (C), as well as information regarding the dates of the beneficiary’s employment, job titles, specific job duties, employees supervised, level of authority, and title of the beneficiary’s supervisor. The director also requested that the petitioner provide evidence regarding the staffing of the U.S. organization, including the positions held and the duties performed by each employee.

In response, the petitioner outlined the criteria for “executive capacity,” and asserted that the beneficiary qualified as an executive because: (1) the beneficiary is responsible for overseeing and directing all company functions in order to build and maintain company revenue; (2) the beneficiary is responsible for determining corporate goals in conjunction with the Board of Directors, ensuring that the goals are met, and creating and maintaining the corporate budget; (3) the beneficiary “has full responsibility for the day to day running” of the U.S. entity, including invoicing, bookkeeping, overseeing the Sales department, ensuring that all corporate functions are operating smoothly, and acts as a liaison between the U.S. organization and the parent company; and, (4) the beneficiary receives supervision from the board of directors only, which advises him on corporate legal contracts, and approves the corporate budget.

The petitioner further provided that the U.S. entity employed three individuals: the beneficiary, a director of sales, and a sales manager. The director of sales is responsible for the sale of one of the company’s brands of machinery, including establishing a customer database in the United States, overseeing sales costs, and creating and maintaining advertising and marketing budgets. The sales manager represents the company in the sale of its second line of machinery, conducts technical presentations and discussions with customers, and generates system proposals.

In her decision, the director concluded that the petitioner failed to establish that the beneficiary was employed in the U.S. entity in a primarily executive capacity. The director stated that the job description provided by the petitioner was too general, and paraphrased the regulations without explaining specific duties performed by the beneficiary. The director explained that the job description, such as “invoicing, bookkeeping, overseeing Sales, and ensuring that all corporate functions are operating smoothly” does not demonstrate the executive nature of the position. The director noted that it is also unclear who is performing the invoicing and bookkeeping duties, as the company’s remaining two employees are responsible for the company’s sales. The director consequently denied the petition.

On appeal, the petitioner asserts that the beneficiary qualifies as an executive of the U.S. organization. The petitioner states that the beneficiary's "general responsibilities" are to oversee and direct all company functions in order to build and maintain company revenue, and to create a company budget. The petitioner further provides that the beneficiary's "specific responsibilities" are:

- (1) Americanize the sales program of the European parent companies to suit the U.S. market for food processing and packaging machinery;
- (2) increase the sales of bakery equipment in the U.S.;
- (3) give U.S. customers better technical and service support by employing local, U.S.-based field engineers and eliminating the time difference between U.S. customers and European suppliers;
- (4) establish test facilities in the U.S. that will help [the U.S. entity] develop new food processing and packaging machinery specifically for the U.S. food industry;
- (5) oversee U.S. sales operations as conducted by a Sales department and, as needed, advise the Sales department on business and legal issues related to company projects;
- (6) approve order confirmation in connection with handing over projects from Sales to Project Management;
- (7) select U.S. companies as equipment sub-suppliers and negotiate contracts with those companies for the purchase of their equipment;
- (8) negotiate contract details with U.S. food companies that are customers of [the U.S. entity]; and
- (9) act as the primary liaison between [the U.S. entity] and its European parent companies.

The petitioner also provides excerpts from the beneficiary's work schedule, which included attending various meetings pertaining to contract negotiations and the company's banking and financial needs. In addition, the petitioner submits a letter from the corporate attorney, in which the attorney states:

As an executive officer, [the beneficiary] directs the Company's course of business, and directs the work of subordinate employees and consultants. In carrying out his executive duties, [the beneficiary] oversees the day-to-day operations of the Company, but does not personally carry out those operations. For example, on behalf of the Company, he outsources its payroll processing, bookkeeping, accounting and auditing functions.

The AAO will adjudicate this issue based on the evidence available to the director at the time of her review. It is an established rule that the AAO does not consider new evidence on appeal where the petitioner was put on notice of evidentiary requirements and given a reasonable opportunity to provide it for the record before the petition was adjudicated by the CIS. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In this matter, the director requested that the petitioner submit additional evidence, including specific job duties, of the beneficiary's employment as an executive. In response, the petitioner generally addressed the criteria of executive capacity, yet failed to identify the beneficiary's specific "executive" job responsibilities. As this evidence was available to the petitioner to submit for the record before the petition was adjudicated, it will not be considered on appeal. *Id.*

On review, the record does not establish that the beneficiary has been employed in the United States in a primarily 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(1)(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 failed to submit a detailed description of the beneficiary's job responsibilities that would substantiate the petitioner's claim that the beneficiary is employed in an executive capacity. In the petition, the petitioner stated only that the beneficiary's responsibility would be to oversee and direct all company functions in order to maintain company revenue. Subsequently, in response to the director's request for a more specific explanation of the beneficiary's job duties, the petitioner essentially paraphrased the regulation in which the term "executive capacity" is defined. See 8 C.F.R. § 214.2(l)(1)(ii)(C). The petitioner neglected to identify the specific job duties the beneficiary would perform in primarily directing the organization's management; nor did the petitioner address the job responsibilities related to establishing the organization's goals or policies, except to state that "the beneficiary is responsible for determining corporate goals," and ensuring that the goals are met. Additionally, the petitioner stated that the beneficiary "has full responsibility for the day to day running" of the organization's functions, such as invoicing and bookkeeping, yet failed to identify any employees performing such functions over which the beneficiary would exercise discretionary decision-making. 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.). 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*, *supra*.

In addition, the evidence submitted by the petitioner creates ambiguity as to the beneficiary's actual role in the petitioning organization. On the U.S. company's organizational chart, the beneficiary is identified as both the president and the secretary. The petitioner, however, failed to address the beneficiary's employment as secretary, or the job responsibilities related to this position. 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).

Furthermore, the petitioner did not comply with the regulation pertaining to the extension of a petition involving the opening of a new office. Specifically, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) requires that the petitioner submit with the petition a statement of the duties performed by the beneficiary for the previous year, and the job duties that the beneficiary will perform under the extended petition. Additionally, the petitioner is required to submit a statement describing the staffing of the organization, which would support the beneficiary's employment in a managerial or executive capacity. *Id.* The petitioner neglected to provide evidence of either criterion at the time of filing the petition. 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).

Moreover, as addressed above, although requested by the director, the petitioner failed to submit additional evidence identifying the specific job responsibilities of the beneficiary. While the requested evidence was available to the petitioner prior to the adjudication of the petition, the petitioner submitted only a brief description of the beneficiary's job duties, which the petitioner refers to on appeal as the beneficiary's "general responsibilities." The petitioner essentially recognizes that the evidence submitted prior to the appeal lacked the required specificity. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). The

purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

Consequently, the beneficiary cannot be considered to be employed in a primarily executive capacity in the United States.

Beyond the decision of the director, it does not appear that the beneficiary satisfied the criteria for employment in the foreign company. The regulation at 8 C.F.R. § 214.2(l)(3)(iii) requires that the beneficiary's prior year of employment abroad was in a managerial or executive capacity. In the present matter, the petitioner stated that the beneficiary "took a year long leave from the company" from September 1999 through June 2001. The record further indicates that the beneficiary received his L-1 visa on October 3, 2001, and was admitted into the United States on February 27, 2002. As the beneficiary was not even employed by the foreign company during the year prior to his transfer to the U.S. entity, it cannot be determined that the beneficiary possesses the requisite employment abroad in a managerial or executive capacity. For this additional reason, this petition may not be approved.

For the foregoing reasons, the petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests 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.