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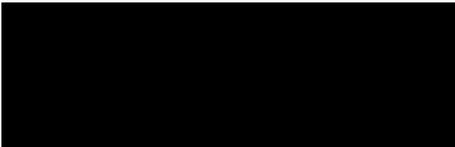


U.S. Citizenship
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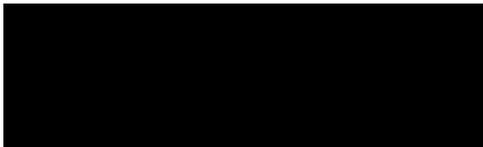


FILE: SRC 02 249 50001 Office: TEXAS SERVICE CENTER Date:

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 Director, Texas 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 claims to be engaged in the business of international gastronomy, importing and exporting of goods, and managing convenience stores and gas stations. It seeks authorization to employ the beneficiary temporarily in the United States as its president and general manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. On appeal, counsel disputes the director's findings and submits an appellate brief in support of his assertions.

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 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.
- (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.

The U.S. petitioner states that it was established in the year 2000 and claims to be a subsidiary of Marisqueria Los Roques, S.R.L., located in Venezuela. The record shows that CIS previously approved an L-1A petition. That petition was valid from June 1, 2001 to June 1, 2002. The petitioner stated that CIS denied a petition to extend the beneficiary's authorized stay. The petitioner then filed a new petition that is the subject of this proceeding. It is noted that the petitioner claims that the qualifying relationship between the foreign and U.S. entities stems from the beneficiary's ownership of a majority of the shares of both entities. As the petitioner does not claim that the foreign entity directly owns a majority of the petitioner's shares, it does not fit the definition of "subsidiary." See 8 C.F.R. § 214.2(l)(1)(ii)(K). Rather, the petitioner's claim suggests that the

foreign and U.S. entities share common ownership and control as affiliate organizations. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L). The petitioner now seeks to employ the beneficiary in the United States for a period of two years at an annual salary of \$48,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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 support of the petition, the petitioner provided a number of supporting documents and the following description of the beneficiary's job duties:

In his capacity as the company's President/General Manager, [the beneficiary] is responsible for managing the entire U.S. entity and has the discretion over all operations decisions for the company. He manages the organization and/or essential function of the organization. He manages the essential function within the organization of overseeing the organization and selling the products to be distributed in the U.S., Venezuela, and other regions in South America. [The beneficiary] directly supervises and has the authority to hire and fire or recommend those as well as other personnel actions Furthermore, he functions at a senior level within the organizational hierarchy or with respect to the function managed. [He] also exercises discretion over the day-to-day operations of the activity or function for which he has authority.

The petitioner also provided the following percentage breakdown of the beneficiary's duties:

- (5%) Networking with business industries in community to identify and cultivate new information sources, attend trade shows and conferences to keep abreast of the industry.
- (5%) Maintain regular communication with the foreign parent company.
- (30%) Evaluate and review the services ultimately provided by the company
- (15%) Oversee the administration and finances
- (15%) Evaluate and review the services ultimately provided by the company to ensure it meets proper specifications as per customer, which includes oversight of lower level management.
- (30%) Monitor the activities of the employees.

On May 28, 2002, the director issued a request for additional evidence. The petitioner was asked to provide a copy of its organizational chart showing the names and position titles of its employees. The petitioner was also instructed to provide brief job descriptions of the beneficiary's subordinate employees or, in the alternative, if no employees are supervised, to provide a description of the essential function the beneficiary manages.

In its response, the petitioner stated that its employees include the beneficiary as president, a full-time manager, one full-time customer service representative, and three part-time customer service representatives. A description of job duties that followed indicates that the beneficiary's immediate subordinate's duties mainly consist of contacting suppliers, preparing employee payroll, and supervising the employees. The job description for the customer service representatives suggests that they are cashiers. The organizational chart further illustrates the hierarchy described by the petitioner.

The petitioner also added that the beneficiary has administrative control over the company, which includes managing its bank accounts and its financial resources. As an example of the beneficiary's control over the petitioner's finances, the petitioner discussed its investment in two gas stations giving the petitioner 25% ownership interest in each gas station. The petitioner stated that hiring personnel and oversight of the manager of the company are part of the beneficiary's responsibilities. The petitioner also provided the following additional description of the beneficiary's job duties:

[T]he beneficiary represents and exercised [sic] the broadest power of administration and disposition, [sic] he manages the daily operations of the business; names; [sic] hires and fires personnel; signs contracts in the name of the company; manages the finances; prepares the budgets and sets the department policies and procedures. He oversees lower level management who in turn supervises first-line employees. Through the operating agreements, submitted with the original petition, he has full control of the operations of the companies.

[The beneficiary] is responsible for managing the entire U.S. entity and has the discretion over all operations decisions for the company. He manages the organization and/or essential function of the organization. He negotiates contracts on behalf of the corporation and deals with the U.S. suppliers of goods. He manages the essential function within the organization of overseeing the organization and selling the products to be distributed in the U.S., Venezuela, and other regions in South America. When other employees are to be hired by [the petitioner, the beneficiary] the beneficiary directly supervises and has the authority to hire and fire or recommend those as well as other personnel actions Furthermore, he functions at a senior level within the organizational hierarchy or with respect to the function managed. [The beneficiary] also exercises discretion over the day-to-day operations of the activity or function for which he has authority. . . .

On October 23, 2002, the director denied the petition. One of the findings the director used as a basis for this conclusion was that the petitioner failed to provide evidence that the petitioner has control over the two gas stations in which it has a 25% ownership interest. The director's finding, however, was inaccurate. The record contains two operating agreements, one between the petitioner and Hallandale Exxon 2001, LLC, and another between the petitioner and 103rd Exxon LLC. Both operating agreements name the petitioner as the independent contractor and operator of each business. Thus, regardless of the fact that the petitioner does not own a controlling number of shares in either business, it effectively obtained control of both entities by virtue of the operating agreements. The director's comment in regards to this issue, therefore, is hereby withdrawn.

The director also stated, "as there is no proof that there are any subordinate manager employees, it is concluded that the general manager will be carrying out the day-to-day operations of the U.S. entity and not supervising them." While a beneficiary claiming to be a personnel manager must establish that he/she manages and/or will manage a staff of managers, supervisors, and/or professional employees, a beneficiary claiming to be a function manager does not have the same burden. As pointed out in the director's decision, a function manager need not directly manage employees, so long as the petitioner can establish that the beneficiary manages or directs an essential function. Therefore, the director's finding that the beneficiary must be performing non-qualifying functions because he does not manage employees is erroneous and will also be withdrawn.

However, the director's overall conclusion, that the petitioner failed to demonstrate that the beneficiary's duties qualify him for classification as a manager or executive, is correct. On appeal, one of counsel's assertions is that the beneficiary supervises several lower level employees and that it is irrelevant, as a matter of law, whether or not they are managers of possess baccalaureate degrees. Although the beneficiary is not required to supervise personnel, if it is claimed that his 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.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate position(s) require(s) a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[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 the instant case, the breakdown of the beneficiary's duties indicates that 30% of his time is devoted to monitoring the work of other employees. It is noted that of the petitioner's entire staff, only one individual is claimed to be a managerial employee, while the others are staff employees whose main tasks include operating a cash register and collecting money for goods sold.

However, as the petitioner does not claim that personnel management is the beneficiary's essential role within the petitioning organization, the AAO will consider the beneficiary's qualification as a function manager. 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). If a 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. 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 petitioner in the instant case claims that the essential function managed by the beneficiary is "overseeing the organization and selling the products to be distributed in the U.S., Venezuela, and other regions in South America." In stating that the beneficiary oversees the organization, the petitioner failed to identify an essential function with specificity. The petitioner also apparently claims that the beneficiary manages the sales function. Although the petitioner has provided a number of descriptions of the beneficiary's duties, the descriptions mainly focus on the high degree of discretionary authority possessed by the beneficiary, not the actual tasks performed by the beneficiary on a daily basis. The percentage breakdown of the beneficiary's duties indicates that 15% of the beneficiary's time will be devoted to overseeing administration and finances. The petitioner has provided no specific duties that would clarify what the beneficiary actually does to oversee the administration and finances. The petitioner also indicated that another 15% will be devoted to evaluating and reviewing the services provided, and separately states that another 30% of the beneficiary's time will be devoted to the same duty. Therefore, the AAO can conclude that 45% of the beneficiary's time will involve evaluating and reviewing services provided by the company's

employees. However, the description of job duties provided for the beneficiary's subordinates suggests that there is one managerial employee and that the remaining employees work as cashiers who are primarily responsible for running the cash register. Therefore, it is entirely unclear to the AAO which "services" the beneficiary will be evaluating and reviewing. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. While several of the director's comments were inaccurate in regard to the particular facts of the instant case, the overall conclusion was on point. 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(l)(3)(ii). In this case, the petitioner provided a number of job descriptions for the beneficiary. While the job descriptions adequately indicated that the beneficiary is at the top of the organizational hierarchy and has discretionary power within the company, the petitioner failed to state with any clarity what the beneficiary actually does on a daily basis. The job descriptions that were provided were entirely too broad. Furthermore, the petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he will be relieved from performing non-qualifying duties. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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.

ORDER: The appeal is dismissed.