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**U.S. Citizenship
and Immigration
Services**

D7

FILE: SRC 02 260 51138 Office: TEXAS SERVICE CENTER **MAY 17 2004**

IN RE: Petitioner:
Beneficiary:

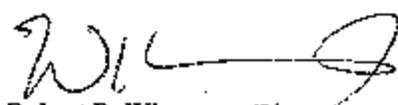
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

Self-Represented.

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 is a Venezuelan company seeking to employ the beneficiary as a general manager in its U.S. subsidiary. The U.S. company is engaged in interior design and decorating. The petitioner filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary would not be employed in a primarily managerial capacity.

On appeal, the petitioner claims that CIS' analysis was inconsistent with the information provided with the petition. The petitioner further asserts that the beneficiary's duties as a general manager "will be primarily those of the statutory definition of an executive capacity."

To establish I-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(i)(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 (I)(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 issue is whether the beneficiary will be employed in the United States 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 stated that the beneficiary's proposed job duties in the United States would include "organizing, directing and developing the company in the U.S. as well as overdoing [sic] U.S. operations and hiring/firing employees." In an attached letter, the petitioner also stated that as a general manager the beneficiary would be employed in an executive position. The petitioner submitted the U.S. company's organizational structure in which the beneficiary was identified as the general manager, subordinate to the president and vice-president.

In a request for evidence, the director asked that the petitioner provide a list of employees of the U.S. company, their job titles, and the corporation's 2001 corporate income tax return.

In response, the petitioner submitted a list of personnel, again naming the beneficiary as a general manager, and identified two salesmen, an administrative assistant, and an accountant who are subordinate to the beneficiary. The petitioner also provided the Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001.

In her decision, the director determined that the beneficiary would not be employed in a primarily managerial or executive capacity. The director noted that while the company indicated on the petition that it employs eight individuals, there is no evidence in the record, specifically on the income tax returns, reflecting the payment of salaries, wages, or compensation to officers. The director determined that the beneficiary would not be relieved from performing the services of the business, and therefore, would not be performing primarily managerial duties. The director subsequently denied the petition.

On appeal, the petitioner asserts that CIS's analysis was inconsistent with the evidence provided, as the beneficiary's job duties will be primarily those of an executive. The petitioner outlines the definition of managerial capacity pursuant to the regulation at 8 C.F.R. § 214.2 (I)(1)(ii)(B), and states that it previously provided the duties of the beneficiary which include organizing, directing, and developing the company, and "establish[ing] goals, policies and objectives of the organization in order for him to organize, direct and develop the company effectively." The petitioner further notes that the "beneficiary is going to be responsible for calling on individual and prospective clients, representing the company and negotiating with domestic and foreign customers," and that "[the beneficiary's] responsibility of setting goals and policies are subsumed in his capacity as [an] Executive who organized, directs and develops the company."

In regards to employees supervised by the beneficiary, the petitioner states that the beneficiary will supervise "other supervisory or professional employees who will relieve him from performing the services of the business." The petitioner submits an agreement between the U.S. company and an accountant, which the petitioner claims is an independent contractor who the beneficiary will supervise. The petitioner also claims that the foreign company "is planning to hire a Sales Manager in the near future" to be employed in the U.S. entity.

On review, the petitioner's assertions are not persuasive. 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(I)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the 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.* Therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of either capacity.

In the present matter, the petitioner uses the terms managerial capacity and executive capacity interchangeably, and fail to specifically describe in which capacity the beneficiary will be employed. Although the beneficiary's job title is that of a general manager, thereby implying employment in a managerial capacity, the petitioner stated in a letter submitted with the petition that the beneficiary would occupy an executive position in the U.S. entity. Additionally, although the petitioner outlines on appeal the definition of managerial capacity only, the petitioner claims to employ the beneficiary as an executive, and identifies job duties, such as directing the company and establishing goals and policies of the organization, typical of those performed by executives. See 8 C.F.R. § 214.2(I)(1)(ii)(C). Conversely, the petitioner also asserts that the beneficiary will supervise professional employees, which is identified in the regulations as a responsibility of a manager. The petitioner cannot rely on partial sections of the two statutory definitions, and essentially claim to employ the beneficiary as a hybrid "manager/executive."

In addition, the brief job description provided by the petitioner does not substantiate the petitioner's claim that the beneficiary would be relieved from performing the services of the U.S. business. The petitioner explains

on appeal that the beneficiary will "be responsible for calling on individual and prospective clients," and negotiating with customers. As the beneficiary would be communicating and interacting directly with the company's clients, the beneficiary is personally selling or performing the company's services rather than managing those that perform the services of the U.S. entity. Additionally, because the petitioner did not provide a description of the job duties to be performed by the salesman of the company, which are subordinate to the beneficiary, their role in the company is unclear. It cannot, therefore, be assumed that they will relieve the beneficiary from performing the above-mentioned non-managerial and non-executive functions. 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). Moreover, as noted by the director, the record does not contain conclusive evidence that subordinate individuals are even employed by the U.S. company, as the tax returns do not indicate any payment of salaries. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

For the foregoing reasons, the petitioner failed to specifically establish that the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity.

While not directly addressed by the director, the record is not persuasive in establishing that the foreign and U.S. entities are qualifying organizations under the regulation at 8 C.F.R. § 214.2(I)(1)(ii)(G). The petitioner stated on the petition that the U.S. company is a subsidiary of the foreign corporation, and submitted two stock certificates identifying the foreign company as an owner of 51% of the U.S. company. Ancillary evidence, however, including the U.S. Income Tax Return for an S Corporation (Form 1120S), and U.S. tax form Schedule K-1, do not support such a relationship. Specifically, Schedules K-1 for the years 1999, 2000, and 2001 identify an individual as owning 100% of the U.S. entity's stock. The record does not contain a Schedule K-1 for the foreign corporation establishing that it owns any share of the U.S. corporation. 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).

Moreover, to qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. See Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation owns it in any part. As addressed above, the petitioner asserted that the foreign company owns a majority interest of the U.S. company, which has claimed status as an S corporation. This conflicting information has not been resolved. For this additional reason, the petition will be denied.

An additional issue not addressed by the director is whether the beneficiary was employed abroad in a primarily managerial or executive capacity. The petitioner asserted that the beneficiary was employed as a marketing manager, and submitted an organizational chart identifying seven employees of the foreign corporation. The petitioner, however, did not submit any description of the beneficiary's job duties; nor did the petitioner identify any specific employees subordinate to the beneficiary. Additionally, as the petitioner failed to submit translated copies of the majority of the documents pertaining to the foreign company, the AAO cannot determine whether any individuals are actually employed by the foreign corporation. See 8

C.F.R. § 103.2(b)(3). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*. Again, as the appeal will already be dismissed, this issue need not be further discussed.

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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.