



U.S. Citizenship
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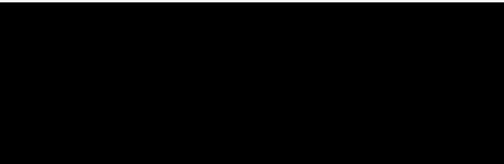


FILE: SRC 03 011 52674 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

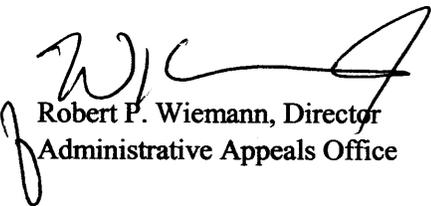
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 is an employment agency seeking 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 will be employed in a primarily managerial or executive capacity or that the petitioner has been doing business.

On appeal, counsel disputes the director's findings and submits a letter, dated December 9, 2002, describing the various documents he claims to submit with the letter. Counsel also submits another letter, dated December 17, 2002, in which he admits that an error was made on his part in failing to submit the \$110 fee required to process the appeal. Counsel acknowledges the possibility that the appeal and the submissions purportedly attached to the appeal may be returned to the petitioner due to the failure to pay the required fee. Counsel indicates in the Form I-290 that in the event the appeal and/or submissions accompanying the appeal are returned, he plans to resubmit any of the missing documents within 30 days. A thorough review of the entire record of proceedings indicates that supporting documentation (Tabs 1 through 8) have not been submitted at this time. Therefore, the record is considered complete as presently constituted.

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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) a visa petition under section 101(a)(15)(L) 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 (l)(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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The U.S. petitioner was incorporated in the State of Florida in 1998 and states that it is a subsidiary of Studio Selectivo Rosario S.A., located in Argentina. The initial petition was approved and was valid from October 11, 2001 to October 11, 2002, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for two years at an annual salary of \$35,000.

The first 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 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 the following description of the beneficiary's job duties:

[The beneficiary] will continue to direct the management of the organization, plot strategies for the continued expansion of the new business in Miami, develop business objectives and time tables within which to be completed [sic] and improve communications between the U.S. and the foreign company.

As president, [the beneficiary] will be acting as a senior level executive. She will have the power to hire and fire personnel and will oversee the entire function and other key decisions that will be necessary for the successful functioning of the U.S. subsidiary. Additionally, [the beneficiary] will be in charge of the various personnel training programs and will make the day[-]to[-]day operational decisions on behalf of the U.S. corporation. The Company [sic] currently has two employees. Both employees report directly to [the beneficiary].

On October 25, 2002, CIS issued a request for additional evidence. The petitioner was asked to explain how, with only two employees, the beneficiary would be able to devote primarily all of her time to managerial or executive duties. The petitioner was also asked to submit its federal tax returns for the years 2000 and 2001.

In response, counsel submitted a letter explaining that the petitioner has hired two individuals with marketing experience to assist the beneficiary. Counsel stated that one individual would handle the "client servicing function," while the other would be "in charge of coordinating and performing administrative functions." Counsel further stated that the beneficiary "primarily directs the management and establishes the goals, direction and policies of the organization [,] exercising wide latitude [sic]." No further descriptions were provided for the job duties of the beneficiary or her subordinates.

The director denied the petition noting that the petitioning entity has been in operation for longer than one year and can no longer be considered a new office.¹ The director concluded that the record does not contain sufficient evidence to determine that the beneficiary will primarily be performing duties of a managerial or executive capacity.

On appeal, counsel states the services of the petitioning entity will be performed by third-party independent contractors and provides the following description of the beneficiary's responsibilities:

The Beneficiary is responsible for procuring the initial contract, negotiating the terms of service, managing the client relationship and overseeing the performance of the actual services by the independent contractors. The Beneficiary does not actually perform the services rendered by the Petitioner.

[P]roposals for work are developed by the Beneficiary as part of her overall business strategy of the Petitioner. The services to be performed pursuant to these contracts in the event they are finalized shall be rendered by third-party independent contractors or future employees of the Petitioner and not by the Beneficiary.

¹ The regulation at 8 C.F.R. § 214.2(l)(ii)(F) states that a *new office* is an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

. . . . Contractors for these services were successfully negotiated and executed by under the direction of the Beneficiary

Counsel added further that the beneficiary “was responsible for managing the search for the personnel and handling the relationship with the Petitioner’s customers who initiated the personnel search request.” These statements regarding the beneficiary’s duties suggest that her main tasks revolve primarily around providing customer service to the petitioner’s client companies and supervising the “third-party independent contractors” hired to work for these companies. While the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation 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. Thus, the regulations do take into account a new business’s need to have a manager or executive who performs a variety of tasks, many of which cannot be deemed managerial or executive. However, if the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the stage of development that it can employ the beneficiary in a predominantly managerial or executive position. The record currently indicates that the petitioner does not employ a large enough support staff, whether directly or on a contractual basis, to relieve the beneficiary from having to perform non-qualifying duties. While counsel vehemently asserts that the “third-party independent contractors” perform the essential tasks of the petitioning organization, this assertion is incorrect. The “third-party” individuals to whom counsel repeatedly refers perform the work of other companies, not the work of the petitioner. The essential task within the petitioning organization is actually soliciting companies to pay an employment agency, like the petitioner, to provide them with employees to fill certain jobs. The petitioner then enters into contractual agreements with its clients regarding this provision of services. In the instant case, the beneficiary is directly involved in carrying out both of these essential tasks. Precedent case law has established that 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). As such, the beneficiary cannot be deemed a manager or executive. For this reason the petition cannot be approved.

The other issue in this proceeding is whether the petitioner has established that it has been doing business for the previous year as mandated by the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B).

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In support of the petition, the petitioner submitted a number of documents, including bank statements, a business license, commercial references and a copy of a page from a public phone book listing the petitioner’s name and phone number. Although these documents are not proper indicators of whether or not a company is doing business, the invoices the petitioner submitted adequately indicate that the company has engaged in the regular, systematic, and continuous provision of services. However, in order to demonstrate that the petitioner has been doing business for one year prior to filing the petition to extend the beneficiary’s stay, the petitioner would have to provide invoices dating back to October of 2001 when the beneficiary first entered the United States to open the new office. In the instant case, the earliest invoice provided by the petitioner is

dated February of 2002. While the beneficiary may have been performing tasks necessary to enable the petitioner to start doing business, there is no evidence to indicate that the petitioner actually started providing its services until February of 2002. 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).

While CIS attempted to clarify this issue by instructing the petitioner to submit certain tax information in the request for additional evidence, a request for the petitioner's tax return for the year 2000 was inappropriate as a means for determining whether the petitioner was doing business. The beneficiary did not receive her L-1A visa to enter the United States until October of 2001, and the petition to extend her status was not filed until one year later. A tax return from the year 2000, prior to the filing of either petition, is irrelevant in this case. The director was, however, correct in pointing out that the petitioner had no gross sales listed in its 2001 tax return. In light of the beneficiary's arrival date in October 2001, if the petitioner had commenced doing business at that time, its tax return would have indicated that business activity, even if the petitioner's earnings were set off by the initial losses incurred during the primary phase of setting up a business. The 2001 tax return did not, however, indicate that any business was conducted during that year. Therefore, the record lacks sufficient evidence to establish that the petitioner had been doing business for the required period of time. For this additional reason the petition cannot 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.