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U.S. Citizenship  
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MAY 18 2004



FILE: SRC 02 274 53102 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



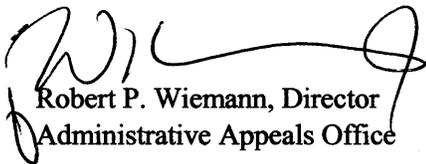
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is engaged in the business of structural engineering and consulting services. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its chief engineer, director. 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 asserts that the director failed to issue a notice requesting additional evidence and disputes the director's overall finding.

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.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed 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 the following description of the beneficiary's job duties:

[The beneficiary] oversees and manages structural engineering work as well as directing marketing and managing of [the petitioner], which has two employees, but will continue to grow. [The petitioner] ha[s] used several independent contractors during this initial stage of our development.

This position is a key managerial job. [The beneficiary] will perform complete management over the U.S. corporation, including overseeing the substantive work and managing employees and systems in our Altamonte Springs office. He will manage all independently employed personnel contracted by [the petitioner].

The director reviewed the submitted evidence and denied the petition concluding that the petitioner failed to submit sufficient evidence to establish that the beneficiary's duties will be primarily of a managerial or executive nature.

On appeal, counsel cites the regulation at 8 C.F.R. § 103.2(b)(8), which instructs CIS to issue a request for additional evidence in cases where the petitioner fails to submit initial evidence of ineligibility. See 8 C.F.R. § 214.2(l)(14)(ii) listing the initial evidence. Counsel asserts that the facts of the instant case warranted the issue of a request for additional evidence and that the director's failure to issue such a request was a violation of 8 C.F.R. § 103.2(b)(8). This assertion is incorrect. The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(C) requires that the petitioner submit a statement regarding the beneficiary's duties. The request for additional evidence is mandatory only in cases where the petitioner fails to submit initial evidence. In the instant case, the petitioner did, in fact, submit such a statement and that statement has been reiterated by the AAO above. The fact that the director found the submitted evidence to be insufficient does not mean she was obligated to issue a request for additional evidence. Counsel's assertion that the director must issue a request for additional evidence "[w]here doubt exists" is unsupported by any laws or regulations.

Counsel asserts further that denial of the petition should not have been based on the director's conclusion regarding the evidence submitted, but instead should have been based on "clear evidence that the beneficiary is ineligible." However, counsel has not cited any legal authority for his version of the standard of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Both counsel and the beneficiary discuss the beneficiary's high degree of discretionary authority in making important decisions on the petitioner's behalf. The beneficiary states in an affidavit that his job consists of negotiating salaries, leases, managing benefits, signing checks, reporting to the board of directors, and marketing the petitioner. Counsel indicates further that the beneficiary "spent his first few months doing nothing but marketing." Based on these statements it is apparent that the beneficiary's job, at least to some degree, involves marketing the petitioning company for the purpose of soliciting clients. While it is foreseeable that the beneficiary would be called upon to perform such non-qualifying tasks in the start-up phase of development, 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. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the beneficiary's own description of duties indicates that he continues to market the petitioner's services. However, the petitioner fails to document what proportion of the beneficiary's time would be consumed with this, and other, non-managerial functions. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Given the fact that the petitioner employed only two individuals at the time the petition was filed, coupled with counsel's indication that the beneficiary has performed engineering duties for the petitioner, the AAO is led to believe that a significant amount of the beneficiary's time is spent performing duties necessary to provide a service. 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). Although the beneficiary indicates that the petitioner has paid the foreign entity for engineering services on a contract basis, this claim is not supported by evidence in the record. 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). Furthermore, the petitioner submits a bid, dated October 23, 2002, breaking down the pricing structure for the services that would be provided for the interested party. The proposal names a structural designer of the foreign entity who will be assigned the task of frame analysis and indicates that “[a]ll tasks will be performed by senior structural designer [the beneficiary].” The proposed duties for this project indicate that the beneficiary continues to perform the tasks of a structural engineer. While the documents submitted on appeal suggest that the beneficiary has the authority to make proposals and provide the pricing structure for the petitioner’s services, the record lacks evidence to allow the AAO to conclude that the petitioner has progressed to a stage in its development where it requires the services of the beneficiary in a primarily managerial capacity. To the contrary, the record indicates that the beneficiary’s services are used to market the petitioner’s services and to actually provide many of those services in his capacity as a structural engineer. As previously stated, the performance of primarily non-managerial tasks indicates that the beneficiary will not be employed in a primarily managerial or executive capacity. *See Matter of Church Scientology International, supra.*

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. Although counsel claims that the beneficiary will be employed in a managerial capacity with a high degree of discretionary authority, the record does not contain sufficient evidence to establish that beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or that he will otherwise be relieved from performing non-qualifying duties. Furthermore, the few brief descriptions of the beneficiary’s duties are too vague to give the AAO an understanding of what the beneficiary actually does on a daily basis. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. 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.