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U.S. Citizenship
and Immigration
Services

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MAY 19 2004

FILE: SRC 02 223 52229 Office: TEXAS SERVICE CENTER Date:

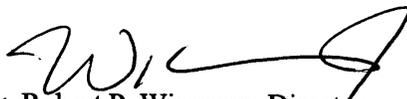
IN RE: Petitioner:
Beneficiary:

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 AAO will dismiss the appeal.

The petitioner claims to be engaged in the purchase and sale of chemical additives for the plastics industry. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and director. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. On appeal, counsel disputes the director's findings and submits an appellate brief to support 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.

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 states that it was incorporated in October of 2000 and claims to be the wholly owned subsidiary of Danamart Chemicals Mexico. The initial petition was approved and was valid from July 2001 to July 2002 in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$40,000.

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 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 in the executive capacity of President and Director. [He] is responsible for managing, overseeing and supervising business development of the US company. This includes duties such as surveying and evaluating various prospective business opportunities; negotiating contracts; managing and overseeing the proper operation of the company; marketing and promotion of the business and chemical products; product pricing; and personnel decisions including hiring and dismissal. [The beneficiary] has established goals and policies for our Houston subsidiary, and exercises discretionary decision making authority. He oversees all aspects of the company on an executive level and will direct

management as other employees are hired. As a result of [the beneficiary's] services, our U.S. company has already shown increased profitability

On September 27, 2002, CIS issued a request for additional evidence instructing the petitioner to explain how the beneficiary can spend a majority of his time performing qualifying duties when he is the petitioner's only employee.

In response, the petitioner provided a list of decisions the beneficiary made in his executive capacity. The petitioner also submitted a statement from counsel claiming that the regulations do not require that a majority of the beneficiary's time be spent performing executive duties. Counsel also provided the following additional description of the beneficiary's duties:

[The beneficiary] is responsible for managing, overseeing and supervising business development for the company. This includes negotiating contracts, managing the operation of the company, marketing and promotion of business and chemical products, producing pricing and personnel decisions. [The beneficiary] possesses primary and sole responsibility over these duties and oversees all aspects of the company on an executive level.

The director denied the petition, noting that the beneficiary could not have made personnel decisions, as claimed, as the beneficiary is the petitioner's only employee. The director concluded that the petitioner failed to establish that the beneficiary would primarily be performing managerial or executive duties.

On appeal, counsel states that the director failed to cite authority to support the determination that the beneficiary's duties must *primarily* be of a qualifying nature. Counsel is directed to the statutory definitions of managerial and executive capacity at 8 U.S.C. §§ 1101(a)(44)(A) and (B). Precedent case law has further specified 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). In the instant case, the petitioner has repeatedly stated that the beneficiary is called upon to perform all of the petitioner's operational tasks. This need is logical in light of the fact that the beneficiary is the petitioner's sole employee. However, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

It is understood that when a new business is established and commences operations, a designated manager or executive will be responsible for setting up operations and will be engaged in a variety of activities not normally performed by employees at the executive or managerial level. It is also understood that often the full range of managerial responsibility cannot be performed. CIS provides for this initial stage of development with a provision in the regulations that allows the petitioner to establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). There is no law or regulation that allows for an extension of this one-year period. In the instant case, while the petitioner has indicated that it plans to hire additional employees to assist the beneficiary, none had been hired by the time the petition was filed. Counsel disputes CIS's policy in reviewing only facts that existed at the time the petition was filed. Precedent case law prohibits CIS from

approving a visa petition based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Thus, contrary to counsel's understanding, CIS's request for additional evidence gives the petitioner an opportunity to provide evidence that was not originally submitted with the petition. CIS's assumption, generally, is that the requested evidence or information would clarify facts that existed at the time the petition was filed. Requesting additional evidence after the petition has been filed is not an invitation to the petitioner to submit evidence of new events that occurred up to the time of the petitioner's response to the request for evidence. If counsel needs CIS to consider such new facts, he should advise the petitioner to file a new petition.

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. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record indicates, and the petitioner confirms, that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel; nor does the petitioner have any staff to relieve him from performing non-qualifying duties. The petitioner has not demonstrated that it has reached a level 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. 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.

Beyond the decision of the director, the record does not contain sufficient evidence to establish that the petitioner has a qualifying relationship with a foreign entity. In the initial petition the petitioner indicated that it is wholly owned by a Mexican company. However, in Schedule E of the petitioner's 2001 tax return, the petitioner states that the beneficiary personally owns 100 percent of its stock; while Form 5472, which was attached to the same tax return, indicates that a foreign company owns at least 25 percent of the U.S. petitioner. 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). The petitioner in the instant case has submitted no evidence to resolve these considerable inconsistencies. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, for the additional reason discussed in this paragraph, this 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.