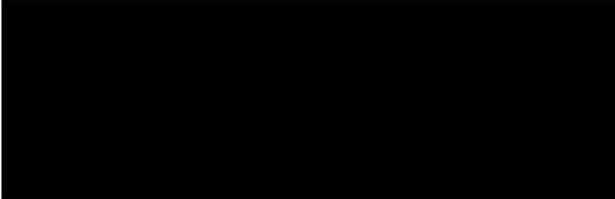


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U.S. Citizenship
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File: SRC 00 212 51737 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



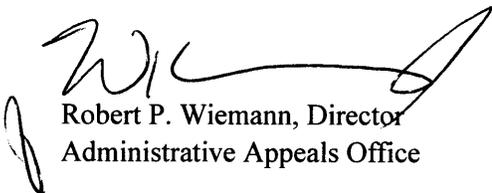
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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 filed this nonimmigrant petition seeking to extend the employment of its general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida that claims to be engaged in the import and export business. The petitioner claims that it is a wholly-owned subsidiary of Kiosco Sur 2, located in Caracas, Venezuela. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary's actual duties qualify him to be classified as a manager or executive.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary is the "top employee" of the petitioner, and that the beneficiary acts "*prima facie* in a managerial capacity as defined by Title 8 of the Code of Federal Regulations." In support of this assertion, counsel for the petitioner submits a brief.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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) 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the beneficiary will be employed by the U.S. entity in a primarily managerial or executive function.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 initial petition, the petitioner asserted that the beneficiary would be acting as the general manager of the U.S. entity, and stated that the beneficiary would "[c]oordinate the activities of the company to obtain optimum efficiency and economy of operations and to maximize profits" and "direct and coordinate new markets and obtain competitive positions in the industry." After reviewing the vague job description, the director issued a request for additional evidence on August 3, 2000. Included in this request was a specific requirement that the petitioner submit a description of the beneficiary's duties for the previous year, including the percentage of time the beneficiary spent performing each duty.

In response to the director's request, counsel for the petitioner submitted multiple documents pertaining to the U.S. entity's corporate status and asset acquisitions. Although specifically requested by the director, the petitioner failed to submit documentation establishing the beneficiary's managerial capacity. In lieu of submitting a detailed description of the beneficiary's duties, counsel for the petitioner, in the cover letter accompanying the response, merely stated that "[t]he beneficiary is the General Manager of the business and will have full responsibility for all employees. This includes six to eight employees divided into three shifts, seven days a week." This statement was not accompanied by supporting documentation, such as an organizational chart of the U.S. entity or quarterly tax returns evidencing the employment of additional personnel, as requested by the director.

On January 16, 2001, the director denied the petition, stating that "[t]he petitioner has failed to demonstrate that the petitioner is in need of an executive or manager, and has failed to demonstrate that the beneficiary's actual duties qualify him to be classified as a manager or executive."

On appeal, counsel alleges that the beneficiary "is the top employee of the United States business/subsidiary," and that "[a]s general manager, he reports directly to the foreign parent." Counsel further provides that the beneficiary is the general manager of the United States business/subsidiary, and that as the general manager,

he has “full responsibility for the employees (three shifts) as well as for the other major functions of the United States business/subsidiary;” “sole authority to make hire/fire/promotion and leave decisions of the employees of the United States business/subsidiary;” and “full authority and discretion over the day-to-day operations of the United States business/subsidiary.”

Upon review, counsel'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(l)(3)(ii). The petitioner's description of the job duties 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.* In a letter dated November 1, 2000, counsel states that the beneficiary is the U.S. entity's general manager and that he supervises six to eight employees. This statement is unacceptable as evidence of the beneficiary's managerial capacity for two reasons. First, 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). Second, the petitioner failed to provide any independent documentation to support this assertion. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Consequently, the AAO concurs with the director's finding that the record did not contain sufficient evidence to warrant a conclusion that the beneficiary was in fact acting in a managerial capacity for the U.S. entity.

Counsel's contentions on appeal are likewise deficient. In her brief, counsel merely restates the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(B), and concludes that the beneficiary has met each of the four elements required to establish managerial capacity. In this case, counsel has provided a vague and nonspecific description of the beneficiary's job duties that fails to demonstrate what the beneficiary does on a day-to-day basis. Specifically, the only information contained in the record other than the beneficiary's job title are statements by counsel that provide a general overview of the beneficiary's authority. There is no independent documentation contained in the record that corroborates the claim that the beneficiary has been and will be acting in a managerial capacity. As previously discussed, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft*, 14 I&N Dec. at 190. In addition, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Rather than providing a specific description of the beneficiary's duties, counsel merely restates the definition of managerial capacity on appeal, and paraphrases the definition in the general description it provides. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.* at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. A visa petition may not be approved at a future date after the petitioner or

beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, 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 the 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 petitioner had not reached the point where it could have employed the beneficiary in a predominantly managerial or executive position by the end of the one-year period.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the record does not contain sufficient evidence that establishes the petitioner's qualifications for an extension of the new office visa petition under 8 C.F.R. § 214.2(l)(14)(ii). This regulation provides that a visa petition, 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 management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The initial petition did not contain any of the required evidence required under 8 C.F.R. § 214.2(l)(14)(ii). Consequently, the director requested this relevant documentation in his request for additional evidence issued on August 3, 2000. Despite the specificity of the request, the petitioner failed to provide evidence that established the qualifying relationship of the U.S. and foreign entities, and neglected to submit a detailed breakdown of the beneficiary's duties or an organizational chart evidencing the hierarchical composition of the U.S. entity. Moreover, the petitioner provided unacceptable documentation of the U.S. entity's financial status as well as improper evidence that the U.S. entity was doing business, as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H).

The regulation at 8 C.F.R. § 214.2(l)(3)(viii) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to

provide the evidence required under subsections (A), (C), and (D) of 8 C.F.R. § 214.2(l)(14)(ii). The petitioner's failure to submit these supporting documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

An additional issue pertaining to the visa extension is the credibility of the evidence submitted in support of the U.S. entity's current financial status and its engagement in business. In lieu of the specific evidence requested above in accordance with 8 C.F.R. §§ 214.2(l)(14)(ii)(B) and (E), the petitioner elected to submit evidence of its acquisition of a gas station, which was purchased on October 23, 2000 after filing the present petition. Specifically, the petitioner submitted copies of (1) the purchase contract; (2) the seller's closing statement; (3) the buyer's closing statement; (4) the bill of sale; and (5) the seller's general non-compete agreement. In addition to these documents, the petitioner also submitted the current financial information for the gas station in the form of a one-page chart, which also sets forth the projected income of this venture for 2001.

As previously discussed, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended U.S. operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) require the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "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." 8 C.F.R. § 214.2(l)(1)(ii). There is no provision in the 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 petitioner had not reached the point where it could employ the beneficiary in a predominantly managerial or executive position at the time the extension was sought.

In the request for evidence, the director specifically required the petitioner to submit evidence that the U.S. entity had been doing business for the past year pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(B). Since the U.S. entity is identified as an import/export business, the most plausible evidence in support of this premise would be copies of customs forms or similar documents that are required in the daily operation of an import/export firm. In response to the director's request, however, the petitioner submitted evidence of its acquisition of a gas station that was purchased by the U.S. entity on October 23, 2000. No other documentation supporting the U.S. entity's function as an import/export business was submitted.

The evidence provided by the petitioner does not establish that the U.S. entity was doing business in the previous year for two reasons. First, the record is devoid of any evidence that confirms the U.S. entity's operation as an import/export business. Other than a corporate tax return for the year 1999, no additional evidence exists to suggest that the U.S. entity was operational during the relevant period. Although the petitioner submits a Certificate of Good Standing from the State of Florida, this document is insufficient to establish that the U.S. entity regularly engaged in business in the previous year.

Second, the petitioner appears to rely on the U.S. entity's acquisition and subsequent operation of the gas station as a means of establishing that it has been doing business as required by the regulations. This argument is flawed. The initial petition in this case was valid from July 6, 1999 to July 6, 2000. The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to show that it was regularly, systematically, and continuously doing business during this one-year period. Since the gas station was not acquired until October 23, 2000, more than three months after filing the petition, the petitioner cannot claim that it was doing business as a gas station during the one-year period. In addition, since the petitioner submitted no additional evidence that it regularly, systematically, and continuously did business as an import/export company within the one-year period, it has failed to satisfy the regulatory requirements. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In accordance with this provision, the financial documentation submitted for the gas station is also unacceptable, as it demonstrates the financial status of a business acquired and operated after the expiration of the one-year period. The regulation at 8 C.F.R. §214.2(l)(14)(ii)(e) requires the petitioner to submit documentation of the U.S. entity's current financial status. Since the petitioner has failed to submit any documentation of the U.S. entity's financial status during the relevant period, it has failed to satisfy the regulatory requirement.

A final issue not addressed by the director pertains to the credibility of the petitioner's claimed relationship with the foreign entity. Although the petitioner failed to submit direct evidence establishing the continued qualifying relationship between the U.S. and foreign entities, the record contains documentation that challenges the credibility of the petitioner's claim that it is a wholly-owned subsidiary of the foreign entity. Specifically, the record contains a copy of the U.S. entity's IRS Form 1120, U.S. Corporation Federal Tax Return, for 1999. On Statement 2, attached to the return, the petitioner indicates that 100% of the outstanding voting stock is owned by [REDACTED] an individual, and not the claimed overseas parent company. The petitioner failed to submit tangible documentation to corroborate the ownership of this stock. Generally, stock certificates accompanied by the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must be examined to determine the exact number of shares issued, the exact number issued to the shareholder, and the subsequent percentage of ownership and its effect on corporate control. The petitioner provides no stock certificates, ledgers, or evidence of monies paid in consideration of the stock purchase. More importantly, there is no explanation in the record with regard to the relationship, if any, between the foreign entity, Kiosco Sur 2, and the alleged owner of the U.S. entity's stock. Since the record contains no evidence that supports the foreign entity's ownership and control of the U.S. entity, a qualifying relationship cannot be presumed.

Additionally, the AAO notes that on Schedule K of the tax return, the petitioner indicates, in response to question 4, that the U.S. corporation *is not* a subsidiary in an affiliated group or a parent-subsidary controlled group. This allegation directly contradicts the petitioner's claim that the U.S. entity is a wholly-owned subsidiary of the foreign entity. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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.