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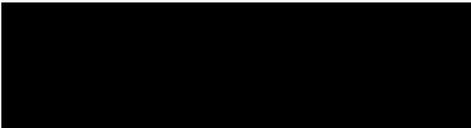
NOV 23 2004

FILE: EAC 02 288 52084 Office: VERMONT SERVICE CENTER Date:

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

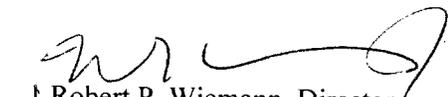
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Vermont 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 provides conference planning and event organization services. It seeks authorization to extend the employment of the beneficiary temporarily in the United States as its president at an annual salary of \$100,000. The director determined that the petitioner did not submit evidence that the beneficiary has been and would be working in a managerial or executive capacity as required by the regulations.

On appeal, counsel submits a brief and additional evidence. Counsel asserts that the beneficiary is performing in a managerial capacity.

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.

The regulation at 8 C.F.R. § 214.2(l)(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 (l)(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.

Furthermore, 8 C.F.R. § 214.2(l)(14)(ii) states that 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 United States petitioner was incorporated in 2001. The petitioner stated it is an affiliate of Konzeption & Protokoll, located in Germany. The petitioner stated the beneficiary wholly owns both the U.S. and foreign company. The petitioner indicated one employee on the Form I-129 and a gross annual income of \$905,000, as of June 2002. Counsel for the petitioner stated the initial L visa was approved in November 2001 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 \$100,000.

The only issue in this proceeding is whether the beneficiary has been or will be employed in a managerial 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.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner states that the beneficiary is the president of the company. In the instant petition, the petitioner stated that the beneficiary is a functional manager and she is responsible for existing and new business development and enhancing customer relations. The petitioner stated the beneficiary will continue to:

- Manage and oversee transportation logistics, flight and train arrangements and pre and post convention tours.
- Plan and oversee events comprising of welcome receptions, gala dinners, entertainment and show events.
- Provide on-site management including pre-check of rooming lists, meeting rooms and registration of participants.
- Manage and oversee contract negotiation, venue selection, catering and technical coordination.

- Manage and oversee the design and production of exhibition booths.
- Oversee the production of invitation letters to participants and the registration of individual participants and groups.
- Manage and oversee Citywide Conventions comprising of hotel selection, concentrating and securing rooms and handling and updating rooming lists.

The petitioner stated "the position of [p]resident is a function management position which requires management of essential functions within the company." Additionally, the petitioner stated "[p]roper execution of the managerial duties of the [p]resident are essential functions that are critical to the company's development internationally."

On September 26, 2002, the director issued a notice requesting additional evidence. Specific to the issue in the instant proceeding, the director requested:

- Evidence that establishes the duties performed by the beneficiary in the past year and the duties he/she will perform if the petition is extended.
- Evidence of the staffing of the United States organization. Indicate the number of employees, the duties performed by each employee or each section, as well as management and personnel structures of the United States firm.
- If the company has used contractors rather than employees to perform any functions, submit evidence documenting the number of contractors utilized and the duties performed.

In response to the request for evidence, counsel for the petitioner explained that during the last year, the beneficiary has engaged in the following activities and duties on behalf of the petitioner: Set-up of business company - 40% of time; Business Start-up and Development, [REDACTED] - 40% of time; Accounting, Financial Matters, Administration - 20%. Counsel explains that the beneficiary's future duties will be: Business, Customer Relations - 30% of time; Business Development, Marketing, Market Expansion - 20% of time; Promote the U.S. as Conference Location for European Customers/Companies - 20% of time; Expand on-site client service capabilities for European companies visiting U.S. conferences - 10% of time; Accounting Financial Matters, Administration - 20% of time.

Counsel noted that the petitioner "has the intent to eventually hire its own staff." Additionally, the petitioner stated that it has used contractors where needed. The petitioner stated that these "independent contractors" consisted of using an off site meeting planner (one time) and limousine and coach services to transport clients.

In his decision, the director determined the evidence submitted in support of this petition did not clearly demonstrate that the beneficiary's proposed employment will involve executive or managerial authority over the United States operation. Based on the evidence provided, the director presumed that the beneficiary will be engaged primarily in the non-managerial, day-to-day operations involved in producing a product or providing a service. Furthermore, the director noted that the petitioner has not established that the beneficiary will be involved in the supervision and control of the work of other supervisory professional or managerial employees who will relieve her from performing the services of the organization. Therefore, the beneficiary does not qualify for the classification under section 101(a)(15)(L) of the Act.

On appeal, counsel for the petitioner states that director denied the petition on specific grounds under INA § 101(a)(44)(B). Counsel states that the petitioner never asserted that the beneficiary would be employed in the capacity as an executive but as a manager. Counsel asserts “many of the functions which [the beneficiary] would perform as [p]resident of the company would be managerial in character and thus within [sic] the definition of management of a function under § 101(a)(44)(A).”

Counsel asserts that the appeal should be reviewed with respect to CIS operating instructions and relevant AAO and federal court decisions. However, the AAO will first look to appropriate statutes and regulations in order to determine if the beneficiary has been and will be performing in a managerial capacity. Additionally, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In support of counsel’s assertions that the beneficiary is performing in a managerial capacity, he refers to the petitioner’s response to the request for evidence and states that during the previous year the beneficiary spent 80 percent of her time setting up the business entity and engaging in start-up development and marketing activities focused on customer relations and customer account development. Counsel adds that the beneficiary’s future duties show that customer relations, business development, marketing and promotion of the company will occupy 70 percent of her time.

Although the director focused on executive duties and not duties of a functional manager, a review of the record by the AAO finds that the petitioner has not established that the beneficiary will be employed in a managerial capacity as required by INA § 101(a)(44)(A).

Counsel relies on several unpublished AAO decisions to support the petitioner’s claim that the beneficiary is acting as a function manager. The term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but is instead primarily responsible for managing an “essential function” within the organization. As stated above, the petitioner claims that the beneficiary manages an “essential function” but the petitioner does not specifically define what essential function the beneficiary manages. The petitioner vaguely states “[p]roper execution of the managerial duties of the [p]resident are essential functions that are critical to the company’s development internationally.” On appeal, counsel adds “the [b]eneficiary has managerial control and authority over the major function of [the petitioner] to produce major programs, events, seminars, shows and presentations for international companies.” However, this description does not demonstrate that the beneficiary manages the function rather than perform the duties of the function. 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). Additionally, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

A critical analysis of the nature of the petitioner's business undermines counsel's assertion that independent contractors relieve the beneficiary from performing non-qualifying duties. The majority of the contractors have only been described as providing transportation services. Though counsel states that the petitioner used an off-site meeting planner, it was only for one event. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. There is no documentary evidence in the record of proceeding corroborating the retention and compensation of independent contractors. Again, without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

It appears from the record that the only individual performing any marketing-related functions is the beneficiary. As described by the petitioner, the beneficiary performs all marketing tasks including devising marketing plans, contacting advertisers, and performing any public relations tasks. The beneficiary performs all administrative and bookkeeping tasks. The beneficiary even performs the final pre-check of rooming lists. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude her from functioning in a primarily managerial or executive role. 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. at 593.

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 record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization. The petitioner has not demonstrated that the contractors relieve the beneficiary from performing non-qualifying duties. The beneficiary is the one providing the petitioner's services. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial capacity. For this reason, the petition may not be approved.

In addition, the petitioner indicates that the beneficiary is the sole owner of both companies. However, the U.S. Partnership tax returns indicate that the foreign company owns 99 percent of the U.S. company and the remaining 1 percent is owned by the beneficiary. The foreign company states that it is wholly owned by the beneficiary. 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). Additionally, the regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that she will be transferred to an assignment abroad upon completion of her services in the United States.

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.