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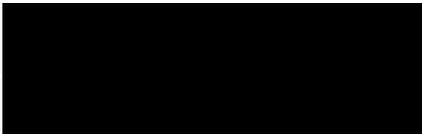


U.S. Citizenship  
and Immigration  
Services



FILE: SRC 02 240 52866 OFFICE: TEXAS SERVICE CENTER Date: **OCT 01 2004**

IN RE: Petitioner:  
Beneficiary

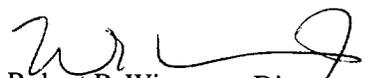


PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

**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

*[Handwritten mark]*

**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 sales 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 and claims to be engaged in the design, engineering, and construction of homes. The petitioner states that it is the subsidiary of P.V.M. Industria E Comercio de Confecoes, Ltda., located in Brazil. The beneficiary was initially granted a one-year period of stay to open a new office in the United States. The petitioner seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, the petitioner disputes the director's findings.

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 regulations at 8 C.F.R. § 214.2(l)(3) state 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.
- (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.

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 (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(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 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 stated that the beneficiary has been overseeing the implementation of the company's progress as a homebuilder and managing all sales and purchase activity, contract negotiation, advertising, and public relations. The petitioner also stated that the beneficiary is in charge of the hiring and training of sales and support staff.

On October 9, 2002, the director issued a request for additional evidence. The petitioner was asked to provide a copy of its organizational chart showing the beneficiary and those employees that are directly under the beneficiary's supervision. The petitioner was also instructed to provide a detailed description of the beneficiary's activities over the course of the petitioner's first year of operation. Finally, the petitioner was instructed to provide several of its quarterly wage reports and attachments as evidence of wages paid to the eight employees it claimed in the petition.

The petitioner's response included a copy of its organizational chart, which identified the two subordinates directly under the beneficiary's control as a sales supervisor controller [sic], who manages a sales person, and an assistant manager, who manages a business developer. The chart indicates that the position of import and export clerk is not filled. The petitioner also provided its Form 941 wage statements for the second, third, and fourth quarters of 2002. The wage reports suggest that the petitioner had two employees, including the beneficiary, through the third quarter and that an additional six employees were hired sometime during the fourth quarter of 2002, i.e. between the months of September and December. These individuals had not been hired by the time the petition was filed in August 2002. Although the petitioner complied with the director's request for a description of the beneficiary's duties over the course of the petitioner's first year of operation, the AAO notes that the petition was initially approved for a new office, which had been operating in the United States for less than one year. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. As such, the beneficiary's duties for the petitioner's first year of existence are irrelevant in the instant case, even if a significant portion of those duties were not of a qualifying nature.

On March 19, 2003, the director denied the petition noting that even though the organizational chart suggests that the beneficiary is relieved of having to perform non-qualifying duties, the evidence of record does not support the organizational chart. The director concluded that the petitioner failed to determine that the beneficiary would be employed in a managerial or executive capacity.

On appeal, the petitioner states that it submitted evidence to show that it employs seven, rather than two, individuals. While the AAO takes note of the additional employees hired by the petitioner between September and December of 2002, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). As the evidence suggests that the additional employees were not hired until after the petition was filed, the new hires are irrelevant in the instant proceeding and need not be considered in determining the petitioner's eligibility for the benefit sought. 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 regulatory provision 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 has not established that at the time it filed the petition it had reached the point that it could employ the beneficiary in a predominantly managerial or executive position.

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). In the instant case, the petitioner stated in its initial support letter that the beneficiary would implement company strategy and manage sales, purchasing, contract negotiations, advertising, and public relations. While this broad overview of the beneficiary's position suggests that the beneficiary would have a high degree of discretionary authority over the petitioner's daily operation and the overall business objectives, there is no indication as to the beneficiary's specific daily job duties. 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). The actual duties themselves reveal the true nature of the employment. *Id.* at 1108. The specifics of the beneficiary's day-to-day job duties are missing from the instant record. As such, there is no way of determining what the beneficiary would actually be doing on a daily basis under the extended petition. 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a managerial or executive capacity. The record does not establish that a majority of the beneficiary's duties would be primarily directing the management of the organization or supervising a subordinate staff of professional, managerial, or supervisory personnel. Nor does the record sufficiently establish that the beneficiary would be relieved from performing non-qualifying duties. 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 will 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.

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.