



U.S. Citizenship
and Immigration
Services

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File: SRC 02 268 50507 Office: TEXAS SERVICE CENTER Date:

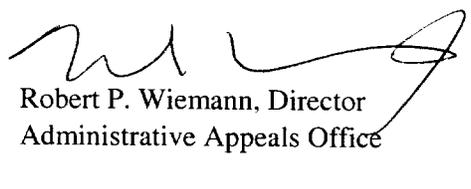
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

[Redacted]

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 president 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 is engaged in the catering and hospitality business. The petitioner claims that it is the affiliate of Puerto Chico, located in Buenos Aires, Argentina. 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 will be employed in the United States in a primarily managerial or executive capacity.

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 new evidence not available at the time of filing establishes the beneficiary's qualifications as a manager and/or an executive, and submits a Form I-290B accompanied by supporting documentation.

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(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.
- (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 United States entity in a primarily managerial or executive capacity.

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, counsel for the petitioner stated that the beneficiary would be employed in a primarily executive capacity. Specifically, counsel alleged that the beneficiary would serve as the president of the U.S. entity, and that his actual title would be "hospitality entrepreneur." The petition further asserted that the U.S. entity employed a total of two employees, including the beneficiary, and that the entity operated a catering business in addition to being a food distributor. Counsel described the beneficiary's job duties as follows:

[The beneficiary] will be the senior level person in the U.S. organization responsible for coordinating, expanding, directing, and developing the business. It is essential that a person who has held an executive position with the foreign company be employed in the U.S. operations. The parent company believes that [the beneficiary] is uniquely qualified for this temporary assignment based upon his executive experience with the foreign company's operation. [The beneficiary], as Chief Executive for the foreign company, will be responsible for establishing the overall goals and policies for the U.S. company. He will be responsible for supervising and determining all business activities, including marketing and distribution. [The beneficiary] will be in charge of various personnel and administrative decisions for the Petitioner, while overseeing the day-to-day operations. His responsibilities will be restricted to purely executive duties. In reality, though, due to the factors of a newly formed business, he will spend minimal amount of the personal time [sic] in the actual performance of duties directly related to the services of the Petitioner.

On October 22, 2002, the director issued a request for additional evidence. Specifically, the director requested evidence to establish that the petitioner was doing business as defined by the regulations both in the United States and abroad, and required the petitioner to submit W-2 forms for all of its employees. Additionally, the director required the petitioner to provide an organizational chart which reflected the beneficiary's positions both in the United States and abroad in relation to the other employees of both companies. Finally, the director requested an explanation regarding the ability of the beneficiary to act in a capacity that was solely managerial and/or executive when in reality the U.S. entity only employed two persons.

The petitioner submitted a three-page response addressing the director's concerns, which was accompanied by an organizational chart for both the U.S. and foreign entities, statements prepared by the petitioner's

accountant, and a copy of an employee list for the foreign entity. The organizational chart provided for the U.S. entity showed that the beneficiary supervised one additional employee, namely, a general manager. In the cover letter accompanying the petition, counsel alleged that the beneficiary's duties were both executive *and* managerial in nature, and paraphrased the regulatory definitions in order to describe the beneficiary's duties. Specifically, counsel stated:

. . . [T]he definition of Executive or Manager applies to [the beneficiary] due to his duties being both executive and managerial in nature. The beneficiary directs the business operations and exercises complete and unregulated discretionary authority in the direction of the petitioning company. The beneficiary also has authority to hire and train personnel. He also supervises the work of additional professional level employees to be transferred from the affiliate company in Argentina.

The director subsequently denied the petition, finding that the beneficiary was merely a first line supervisor and not a manager or executive as contemplated by the regulations. Counsel for the petitioner appealed the director's decision.

On appeal, counsel provides evidence of a joint venture agreement entered into by the petitioner on March 6, 2003, and alleges that as a result of this agreement, the U.S. entity will be required to "hire additional staffing to support the project." Counsel's primary assertion on appeal is that this newly-negotiated joint venture necessitates the need for additional staff, and thus necessitates the need for a manager or executive. Concluding that the beneficiary is the ideal candidate for the position, counsel urges the AAO to find this evidence sufficient to satisfy the regulatory requirements that the beneficiary be employed in a capacity that is primarily managerial or executive.

Upon review of all evidence in the record of proceeding, the AAO concurs with the director's denial of the petition. Specifically, counsel's assertions are flawed for several reasons, which the AAO will address individually below.

First, counsel alleges in the initial petition that the beneficiary's duties will be *solely executive* in nature. However, in response to the director's request for evidence and again on appeal, counsel asserts that the beneficiary's duties are both managerial *and* executive. 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. In this case, the petitioner failed to clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity, which has not been done in this case.

In addition, the beneficiary's duties are discussed in a non-specific manner, and counsel for the petitioner appears to summarize the regulatory definitions in lieu of providing an objective description of the beneficiary's day-to-day activities. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Moreover, the petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. Specifically, the petitioner submitted no information to establish the percentage of time the beneficiary actually performs or will perform the claimed managerial or executive duties. It has been noted in the record that there are only two employees working for the catering business, and that the beneficiary maintains a full-time position. There is no mention in the record of any cook, food preparer, sales person, or other comparable employee working for the petitioning enterprise. Instead, the petitioner claims that it employs only a president and a general manager, and that the general manager "is a helper in the preparation of catering." Since he is the only other employee in the company, it stands to reason that the general manager must be assisting the beneficiary in the preparation of catering. Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

On appeal, counsel's primary assertion is that as a result of the joint venture agreement executed on March 6, 2003, the U.S. entity will be hiring additional employees, and thus will affirmatively support a managerial or executive position for the beneficiary. The petitioner indicates that it plans to hire additional managers and employees in the future. However, 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). In this case, the petition was filed on September 16, 2002. The joint venture agreement was executed on March 6, 2003. The petitioner cannot rely on this subsequent agreement that was executed after the filing of the petition to establish the beneficiary's eligibility under the regulations. Furthermore, the regulation at 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 of Citizenship and Immigration Services (CIS) 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 reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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 AAO notes several issues that warrant review which were not addressed by the director in her decision. First, the petitioner has not provided evidence that a qualifying relationship still exists between the U.S. entity and the foreign entity, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. Evidence that would establish a qualifying relationship is generally in the form of stock certificates accompanied by documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest. As the record of proceeding contains no evidence of this nature, the petitioner has failed to satisfy this regulatory requirement. Consequently, for this additional reason the petition will be denied.

Secondly, the petitioner has failed to provide evidence that the U.S. entity has been doing business for the year prior to the filing of the petition. The regulation at 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires 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). In this case, the only evidence that the petitioner was systematically doing business for the previous year is a handful of invoices for nominal purchases or sales allegedly conducted by the petitioner, some of which do not contain any identifying information with regard to the vendor or the purchaser. This sparse amount of evidence is insufficient for purposes of this petition to warrant a conclusion that the U.S. entity has systematically been doing business as required by the regulations. As previously stated, 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. For this additional reason, the petition will be denied.

In addition, the evidence in the record contains several inconsistencies. First, the lease for the petitioner's alleged business address is that of a commercial property in North Miami Beach, Florida. However, all relevant documentation pertaining to the business, including but not limited to bank statements, phone bills, and invoices, indicates a different address located in Miami, Florida. The only documentation contained in the file that uses the alleged business address is the visa petition itself and the accompanying G-28 forms. Second, several of the U.S. entity's handwritten invoices (printed on yellow carbon paper) are out of sequence. Specifically, invoice number 32 is dated 7/10/02, whereas invoice number 31 is dated 7/11/02. In addition, the invoices jump sporadically between numbers 23 and 39, with many of the numbers in between

unaccounted for. Finally, several of the invoices provided in the record merely identify a person or entity called "Ad Gustum," and additionally, a number of invoices are drawn on the letterhead of a company called "Amaro Foods Enterprises, Inc." 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Finally, the petitioner has submitted a large number of corporate documents pertaining to the foreign entity. The petitioner, however, has failed to provide an English translation of these documents. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Specifically, the documentation provided with respect to the foreign entity allegedly supports the petitioner's claims that the foreign entity is still doing business, and that the foreign entity employed the beneficiary for at least one continuous year within three years preceding the beneficiary's application for admission to the United States. Without a certified English translation, the AAO is unable to ascertain the contents of these documents. Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

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.