



U.S. Citizenship  
and Immigration  
Services

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[Redacted]

FILE: SRC 02 155 50594 Office: TEXAS SERVICE CENTER Date: OCT 15 2002

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

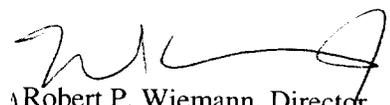
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[Redacted]

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

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**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 employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to § 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 operating as an import and export company. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Buenos Aires, Argentina. The petitioner now seeks to employ the beneficiary as its general manager for three years.

The director denied the petition concluding that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director noted that counsel had acknowledged in his response to the director's request for evidence that the beneficiary would spend half of his time performing the non-managerial day-to-day operations of the business.

On appeal, counsel claims that the beneficiary would perform primarily managerial duties while employed in the United States. Counsel contends that when determining the beneficiary's employment capacity Citizenship and Immigration Services (CIS) is required to take into account the reasonable needs of the organization rather than focusing exclusively on the number of workers employed by the petitioner. Counsel also claims that the beneficiary's wife is a "gratuitous employee" of the petitioning organization and performs many of the petitioner's non-managerial functions.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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 issue is whether the beneficiary would 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), 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

On the nonimmigrant petition submitted on April 22, 2002, the petitioner noted that as the general manager of the United States organization, the beneficiary would be responsible for the management, direction, operation, and administration of the business. The petitioner also noted that the beneficiary would handle the hiring, firing, and training of personnel. In an attached letter from counsel, dated April 18, 2002, counsel provided the following description for the beneficiary's position as general manager:

In this position, [the beneficiary] will also be responsible for the complete administration, operation and management, along with the hiring and training of the personnel. His years of management and executive level experience in this field, has given him the latitude to make these decisions without having to consult with any other person or entity. His position is at the executive level since he formulates policy and has the ultimate discretionary authority to make necessary changes in the structure of the business. His functions with the organization are purely executive since he performs only those executive functions and leaves the daily tasks to the company employees.

The purpose of the request for an L-1 is to place [the beneficiary] in the position to oversee, manage, supervise, and operate, with the assistance of a staff, the United States subsidiary. He will also direct the training of U.S. employees. It is the intention to make the subsidiary grow by giving international exposure to it so as to increase profits, as well as hire and train additional personnel in order to achieve this expansion.

[The beneficiary's] experience as General Manager with [the foreign organization] gives him the experience required to fill the duties of General Manager in the United States. Those duties are essentially similar to the duties filled in the overseas position. The key element of these duties is the management of personnel to assure that a suitable product is produced on a timely basis for clients. This coordination task is one requiring strong managerial skills, skills developed only after a number of years of preparation.

Counsel also submitted a list of the petitioner's two employees, a sales manager and a warehouse clerk, and provided the petitioner's state quarterly tax returns, which also identified these two workers.

In a request for evidence issued on June 13, 2002, the director requested that the petitioner submit a definitive statement of the beneficiary's proposed employment in the United States, including a list of all job duties to be performed, the percentage of time to be spent on each job duty, and the number of subordinate managers and workers who are employed by the petitioner.

Counsel responded in a letter dated June 21, 2002, in which he provided the same job description for the beneficiary as that in his April 2002 letter. Counsel noted that the beneficiary's time would be allocated among the following job duties: managerial direction and supervision, 50%; financial planning, 20%; marketing, 20%; human resources, 5%; and public relations, 5%. Counsel stated that the beneficiary's subordinate employees would include a sales manager, who is responsible for developing marketing strategies, advertising, and meeting with potential clients, and a warehouse clerk.

In a decision dated July 29, 2002, the director determined that the petitioner had failed to establish that the beneficiary would be employed by the U.S. organization in a primarily managerial or executive capacity. The director stated that the beneficiary would spend half of his time performing the non-managerial duties of financial planning, marketing, human resources, and public relations. The director also stated that the petitioner had not demonstrated that: (1) the beneficiary would manage or direct the management of a department, subdivision, function, or component of the organization; and (2) that the beneficiary would supervise and control the work of other supervisory, managerial, or professional employees who would relieve the beneficiary from performing the services of the business. The director noted that the United States business would not be able to support the services of a full-time, bona-fide general manager. Accordingly, the director denied the petition.

On appeal, counsel claims that the beneficiary is engaged in primarily managerial job duties. Counsel states that as a manager the beneficiary's responsibilities would include: (1) managing the organization; (2) supervising the work of the sales manager; (3) exercising authority over personnel; and (4) exercising discretion over the day-to-day operations of the business. Counsel explains that the beneficiary's wife, an attorney licensed to practice law in Argentina, is a "gratuitous employee" of the petitioning organization who performs the non-managerial functions of the business, such as financial planning, bill paying, marketing, and public relations. Counsel contends that the petitioner "really gets 'two' for one employee because [the beneficiary's wife] works for love and devotion not a salary." Counsel further notes that pursuant to section 101(a)(44)(c) of the Act, CIS may not focus exclusively on the number of workers employed by the petitioning organization when determining the employment capacity of the beneficiary, but is required to also consider the petitioner's reasonable needs and function in light of its overall purpose and stage of development. Counsel contends that the petitioner has demonstrated that the beneficiary is not merely a first-line supervisor, and is therefore, eligible for classification as an L-1A nonimmigrant intracompany transferee.

On review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

Counsel does not clarify whether the beneficiary would be performing primarily managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Counsel stated in his April 2002 letter submitted with the petition that the beneficiary's job duties are "purely executive," yet contends on appeal that the beneficiary "is primarily engaged in managerial duties." A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Moreover, a petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If a petitioner is representing the beneficiary is both an executive and manager, the petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. In the present matter, counsel has not clarified the beneficiary's "purely executive" and primarily managerial roles in the petitioning organization.

Additionally, as correctly noted by the director, the beneficiary's job description clearly identifies non-qualifying job duties to be performed by the beneficiary in his position as general manager. 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 the instant matter, the beneficiary would spend approximately 50% of his time performing the petitioner's financial planning, marketing, human resources, and public relations functions. Not only would the beneficiary be performing lower level job duties but also approximately half of his time would be dedicated to these non-managerial and non-executive tasks. Counsel has not accounted for the performance of these non-managerial and non-executive functions by either of the petitioner's presently employed workers. 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).

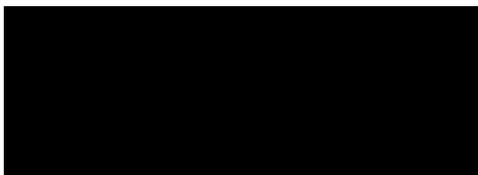
Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. At the time of filing, the petitioner was a nine-year-old import and export company that claimed to have a gross annual income of \$750,000. The firm proposed to employ the beneficiary as general manager, and employed one sales manager and a warehouse clerk. Counsel has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of the above-named non-managerial or non-executive duties. 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). Furthermore, 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).

Counsel's claim on appeal that the beneficiary's wife, as a "gratuitous employee" of the petitioning organization, would relieve the beneficiary from performing the non-qualifying job duties is without merit. Counsel first addressed the wife's role as a gratuitous employee after the issue was raised by the director in her decision. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Counsel's claim will not be considered.

Based on the foregoing discussion, the AAO cannot conclude that the beneficiary would be employed by the petitioning organization in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether a qualifying relationship exists between the beneficiary's foreign employer and the petitioning organization as required in section 101(a)(15)(L) of the Act. The regulations and case law further confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and 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*, *supra* at 595.

In the instant matter, the petitioner stated that the petitioning organization is a subsidiary of the beneficiary's foreign employer. Schedule K and Statement Four of the petitioner's 2001 corporate income tax return reflects ownership of 90% of the petitioning organization by the beneficiary's foreign employer. The record however contains stock certificates for the petitioning organization identifying the stock ownership as:



100 shares

100 shares

400 shares

400 shares

Counsel has offered no evidence clarifying this inconsistency. 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). Therefore, the AAO cannot conclude that a parent-subsidary relationship exists between the two organizations. For this additional reason, the appeal will be dismissed.

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).

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.