

U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: WAC 03 042 51767 Office: CALIFORNIA SERVICE CENTER Date: OCT 15 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

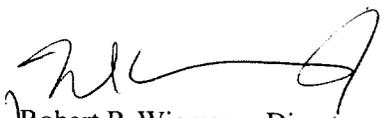
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as a business engaged in the interstate transportation of automobiles and the distribution of pure water. The petitioner claims to be a subsidiary of Springs S.R.L., located in Buenos Aires, Argentina. The petitioner declares 7 to 12 employees and \$361,000.00 in gross annual income. It seeks to extend its authority to employ the beneficiary temporarily in the United States as its marketing manager for three years, at an annual salary of \$36,000.00.

The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary's duties would be primarily managerial or executive in nature.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties will be managerial or executive in nature.

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)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary 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 (1)(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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity will be primarily managerial or executive in nature.

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.

The petitioner described the beneficiary's proposed duties in the petition as being responsible for managing and directing secondary companies opened by the U.S. entity; supervising managerial personnel; establishing franchises; and making all administrative decisions.

In response to the director's request for additional evidence on the issue, the petitioner submitted copies of the U.S. entity's organizational chart, a listing and description of employees, and a description of the beneficiary's duties. The petitioner also submitted copies of the company's IRS Form 1120 for the years 1999 through 2001, and additional state tax documents.

The petitioner described the beneficiary's proposed duties as:

Directs all business promotions and advertising campaigns; directs, through subordinate supervisory personnel the human resources, administration and sales departments.

The petitioner further described the beneficiary's duties as:

1. Primary focus of the product marketing manager is the participation in the development and setting of the vision from which strategic goals and operational objectives can be derived.
2. Requires extensive investigation covering both market and competitive analyses.
3. Managing business issues on a short-term horizon by building pricing and packaging models to meet P&L expectations.
4. Supporting revenue-generating activities on a day-to-day basis. These activities include traditional functions such as developing supporting materials.
5. Working in coordination with the sales management teams to define the appropriate selling strategies to maximize market penetration and achieve targeted goals.

* * *

[The beneficiary] spends 50% of her working time on marketing activities for both [REDACTED] and 50% managing the sales force for [REDACTED]

The U.S. entity's organizational chart depicts the beneficiary as marketing manager. The chart also demonstrates that a HR administrative supervisor, a truck mechanic, assistant mechanic, four drivers, two assistant drivers, and a loader for the truck driving business; and a sales manager and salesmen for the pure water business are all under the direction of the beneficiary.

The director denied the petition determining that the record was insufficient to establish that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity. The director noted that the record was void of any comprehensive description of the beneficiary's proposed duties. The director stated that the evidence did not demonstrate that the beneficiary would manage a subordinate staff of professional, managerial or supervisory personnel who would relieve the beneficiary from performing non-qualifying duties.

On appeal, counsel disagrees with the director's decision and asserts that the evidence submitted is sufficient to demonstrate that the beneficiary will be employed primarily in a managerial or executive capacity. The petitioner contends that the beneficiary has the human resources/administrative supervisor, sales manager, sales personnel, and drivers under her direction. And, that they in turn supervise assistant drivers, loaders, and the supervisor of the mechanics' department. The petitioner describes the beneficiary's duties to include: "plans, organizes, controls, integrates and evaluates the work of the human resources/administrative departments and sales department." The petitioner summarized the beneficiary's duties as establishing company policy, entering into contracts, maintaining fiscal control of the company, and making day-to-day operational decisions for the company.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been employed in a 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). 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 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).

The petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as sales and marketing, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. In the instant matter, the petitioner contends that the beneficiary will be responsible for managing the human resource supervisor, sales manager, and their subordinates. However, there has been no evidence submitted to demonstrate that these subordinates actually perform supervisory or professional duties. Furthermore, the petitioner has indicated that the general manager and the beneficiary will be supervising the same individuals. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Where the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

A critical analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employees relieve the beneficiary from performing non-qualifying duties. Rather, it appears from the record that the only individual performing any marketing-related functions is the beneficiary. As no other employee is engaged in the marketing aspect of the business, it can only be assumed, and has not been proven otherwise, that the beneficiary is performing all marketing functions, including devising marketing plans, contacting advertisers, and performing any public relations tasks. 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. 593, 604 (Comm. 1988). Accordingly, the appeal will be dismissed.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.