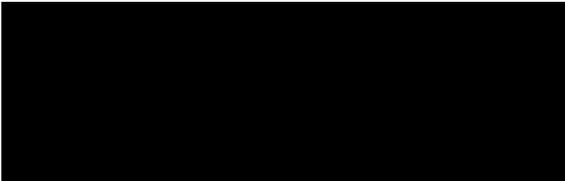


57

U.S. Department of Homeland Security  
20 Mass, Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services



FILE: EAC 02 062 54397 Office: VERMONT SERVICE CENTER Date: **OCT 20 2004**

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

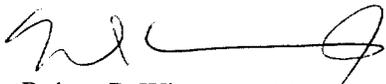
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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

Identifying data deleted to  
prevent unauthorized disclosure  
of information

**PUBLIC COPY**

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

The petitioner is described as being a supplier of medical and pharmaceutical tools and equipment. The petitioner seeks to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner failed to establish that the beneficiary would be primarily employed in a managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and submits a brief in opposition thereto.

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 (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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2000 and claims to be a supplier of medical and pharmaceutical tools and equipment. The petitioner claims that the U.S. entity is an affiliate of Permmedtchnika, located in Russia. The petitioner claims to have five employees. The petitioner seeks to employ the beneficiary for three years at an annual salary of \$30,000.

The issue presented in this proceeding is whether the petitioner has established that the beneficiary will be primarily 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.

The petitioner described the beneficiary's proposed job duties in the petition as: "[i]n charge, and the manager of all commercial transactions, contract negotiations, and realization of business plans; revision of the marketing research, development of business goals and strategies."

In a letter of support, dated December 4, 2001, the petitioner stated in relation to the beneficiary's proposed duties:

[The beneficiary], the President of [the U.S. entity] is going to be filling the position of an executive with the ultimate authority. Said position plays an important role in the setting of business and financial goals of the company, and its policies, as well as assuring that those goals are met in a most efficient way.

As President, [the beneficiary] will exercise control over the development of business relationships between the company and financial institutions, its business associates, and its clientele. She will manage and coordinate all operations and business transactions in which the company will engage and oversee the relationship between [the U.S. entity], the overseas company and the business partners throughout the world. Strong leadership abilities, in addition to the comprehensive knowledge of basic business operations, are required for the proper performance of these functions . . . .

In the petition, the Form I-129 stated that the entity employed five persons. The petitioner submitted a List of Corporate Officers for the U.S. entity, which indicates that the beneficiary held the position of vice president from May 2000 to December 2000, and the position of president from December 2000 to the present. The list revealed one other officer who held the positions of president and secretary from May to December 2000, and the position of vice president from December 2000 to the present. In a letter from the petitioner to its immigration counsel, dated October 26, 2001, and included with the petition, the petitioner listed U.S. entity staff members and their titles consisting of: vice president, marketing director, shipping manager, and two telemarketers. The petitioner also listed two outside consultants.

The petitioner submitted copies of the U.S. entity's U.S. Corporate Income Tax Return (form 1120) for 2000; Federal Quarterly Wage Withholding Report (form NYS-45) dated April 9, 2001 and July 31, 2001; Employer's Quarterly Federal Tax Return (form 941) dated April 9, 2001 and July 13, 2001; Wage and Tax Statement (form W-2) for 2001; and Federal Income Statements (form 1099) for 2001.

The director determined that the record did not establish that the beneficiary would be primarily employed in either a managerial or an executive capacity. The director stated that the evidence of record did not provide a comprehensive description of the beneficiary's duties sufficient to establish that the beneficiary will have

managerial control and authority over a subordinate staff of professional, managerial, or supervisory personnel who would relieve her from performing non-qualifying duties. The director further stated that it appeared that the beneficiary would be primarily performing sales duties while supervising the U.S. entity's other employee. The director also noted that the petitioner had failed to provide sufficient evidence of job descriptions for all company employees, which would enable the Service to accurately evaluate the company's personnel structure. The director also stated that based on the size of the company, it did not appear that the beneficiary would be employed in a qualifying capacity as required by the regulation.

On appeal, counsel disagrees with the director's decision and asserts that the petitioner has provided sufficient evidence to establish that the beneficiary will be employed in a managerial or executive capacity. Counsel further asserts that the beneficiary's duties will involve supervising, controlling, and hiring and firing the intermediate management of the U.S. entity. Counsel contends that once the beneficiary is transferred to the United States she will be involved in additional hiring and supervising additional professional personnel. Counsel also contends "the beneficiary's tasks will primarily require [the] beneficiary's expertise and business-savvy in order to accomplish the U.S. company's immediate and long-term goals." Counsel further contends "Non-managerial sales duties are, and will be, carried out by professional or supervisory personnel, who will relieve the [b]eneficiary from exercising such non-qualifying duties." Counsel asserts that "size" is merely one factor among others to be used in determining whether the beneficiary is a qualifying executive or manager, and only insofar as it demonstrates whether the beneficiary's duties are primarily managerial or executive in nature.

Counsel's assertions are not persuasive. The record as presently constituted does not demonstrate that the beneficiary will be employed by the U.S. entity in a primarily executive or managerial capacity. The record reveals that the petitioner had been doing business for more than one year at the time the petition was filed. Therefore, it is not to be considered a new office pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(F) for purposes of evaluating the beneficiary's proposed position. The petitioner infers that the U.S. entity is still in its developmental stages. However, 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended operation one year within the date of approval of the new office petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. In the instant case, the petitioner has failed to present sufficient evidence to establish that it has reached the point where it can employ the beneficiary in a predominantly managerial or executive position.

Furthermore, the information provided by the petitioner describes the beneficiary's proposed duties only in broad and general terms. 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(1)(3)(ii). There is insufficient detail regarding the actual duties of the assignment to overcome the issues raised by the director. The following duties are without any context in which to reach a determination as to whether they are qualifying as executive or managerial: responsible for the management of all commercial transactions, contract negotiations, and realization of business plans; revising marketing research; and developing business goals and strategies. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that she will be establishing goals and policies, that she will be exercising a wide latitude in discretionary decision-making, or that she would receive only general supervision or direction from higher level individuals. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Paraphrasing the regulations as a substitute for a description of the beneficiary's day-to-day job duties is insufficient to demonstrate that the beneficiary is acting in an executive or managerial capacity. *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*, 1977 WL 188942 at

\*5 (S.D.N.Y.). There has been no evidence presented to demonstrate what goals and policies have been and will be established by the beneficiary in her capacity.

Although the petitioner contends that the beneficiary will be responsible for the day-to-day development and operation of the U.S. company, there has been no documentary evidence submitted detailing how she will carry out those duties. The petitioner has provided no comprehensive description of the beneficiary's or the subordinate's duties that would demonstrate that the beneficiary will be directing the management of the U.S. entity. There is no evidence submitted to show what percentage of time will be attributed to each of the beneficiary's managerial or executive versus non-qualifying duties. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Furthermore, there is no evidence to show that the full-time employees' daily work will be sufficient to relieve the beneficiary from performing non-qualifying duties. Thus, the evidence of record demonstrates that the beneficiary will perform the services of the organization, rather than directing the activities of the organization. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service 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). In the instant case, the record indicates that the U.S. entity currently has a president. There has been no plausible explanation given for the need to hire another president and demote the current president to a vice-president's position. Furthermore, while the petitioner claims to employ outside contractors, there has been no evidence presented to show what the outside consultants do for the U.S. company, how often they do it, and how their duties would interrelate with that of the beneficiary.

Further, the petitioner listed a U.S. corporate staff consisting of a vice president, marketing director, shipping manager, and two telemarketers. The petitioner also listed two outside consultants. Contrary to the petitioner's list, the petitioner only submitted one form W-2 for 2001 listing the president as an employee, and four form 1099s, which indicate that the recipients received non-employee compensation for 2001. In addition, corporate tax forms 1120, 941, and NYS-45 indicate that the U.S. entity only employed one person in 2001, and did not pay out anything in salaries and wages. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based upon the evidence submitted it does not appear that the reasonable needs of the petitioning company would plausibly be met by the services of the beneficiary as president. Although counsel contends that the beneficiary will perform managerial or executive duties in that she will exercise control over the development of business relationships and will manage and coordinate all operations and business transactions on behalf of the U.S. entity; and that the non-managerial sales duties are and will be carried out by professional or supervisory personnel, there is no evidence in the record to substantiate this claim nor has it been demonstrated that the entity's current structure can support another managerial or executive position. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring and firing of personnel, discretionary decision making, and setting company goals and policies constitute significant components of the duties performed by the beneficiary on a day-to-day basis. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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). Nor does the record demonstrate that the beneficiary will manage an essential function of the organization.

In summary, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. Absent details concerning the beneficiary and her subordinates' duties and the percentage of time to be spent performing such duties, the record is insufficient to establish that the beneficiary will be performing primarily in an executive or managerial capacity. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The evidence of record does not demonstrate that the U.S. entity is currently structured to support a managerial or executive position, nor has it been shown that the petitioning entity possesses the organizational complexity to warrant supporting another managerial or executive position. 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.