



U.S. Citizenship  
and Immigration  
Services



File: LIN 02 146 54653 Office: NEBRASKA SERVICE CENTER

Date: OCT 28 2014

IN RE: Petitioner:  
Beneficiary:



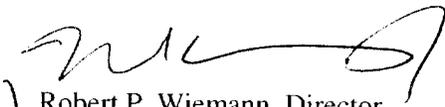
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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

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

The petitioner claims: (1) it is a corporation organized in the State of Oregon in 1994; (2) it imports and exports commodities; and, (3) it is a 50 percent owned subsidiary of Tor Co., Ltd., located in Khabarovsk, Russia. It seeks to temporarily employ the beneficiary as its vice-president. Accordingly, the petitioner endeavors to classify the beneficiary as a 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 director denied the petition concluding that the petitioner had not established that the beneficiary would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the director did not fully consider the evidence presented and that new developments regarding the company have arisen.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). 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 issue in this proceeding is whether the beneficiary will be employed in a primarily executive capacity for the United States entity. Counsel clarifies on appeal that the petitioner is requesting consideration of the beneficiary's position only in an executive capacity.

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 a March 28, 2002 letter appended to the petition, the petitioner stated it would like to continue to employ the beneficiary in the capacity of vice-president/product manager. The petitioner indicated:

In this capacity, [the beneficiary] will continue to be responsible for negotiating settlements between foreign and domestic shippers, negotiating with domestic customers as intermediaries for foreign customers to resolve problems and arrive at mutual arrangements, and negotiating with foreign shipping interests to contract for reciprocal freight-handling agreements. He will plan and direct the flow of air and surface traffic moving to overseas designations and supervise workers engaged in receiving and shipping the freight, documentation, waybilling, assessing charges, and collecting fees for shipments.

On July 19, 2002, the director requested additional evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director specifically requested that the beneficiary's intended employment with the United States be described and include information regarding the job titles, duties, and types of any employees supervised. The director also requested an organizational chart showing the beneficiary's current and proposed positions in relation to others in the company.

In response, counsel for the petitioner asserted that the beneficiary qualified under the criteria set out in the statutory definition of executive capacity. Counsel stated:

As the Vice President of the Company, [the beneficiary] is indeed responsible for major components of the U.S. operation. He is entirely in charge of the company's exporting of commodity items to the Russian Far East, setting the long term goals and policies of the U.S.

operation. [The beneficiary] is in charge of the Company's Logistics, Accounting, Finance, and Personnel divisions, and also serves as the Controller. In these functions, he has wide-latitude in discretionary decision-making in negotiating settlements between foreign and domestic shippers and negotiating with domestic customers as intermediaries for foreign customers to resolve problems and arriving at mutual arrangements. [The beneficiary] will also plan and direct the flow of air and surface traffic moving to overseas designations and supervise workers engaged in receiving and shipping the freight. In carrying out his duties, he receives little or no supervision from anyone above him.

The petitioner also provided an organizational chart showing the beneficiary in the position of vice-president/controller, logistics, accounting, and finance and an individual in the position of president/sales, purchasing, and personnel. The chart also depicted four offices in different locations in Russia under the supervision of the beneficiary and the president.

The director observed that from the description of the beneficiary's duties, it appeared the beneficiary would be doing all the work involved with shipping freight. The director determined that the beneficiary would not be directing the management of a function, but rather would be performing the duties of the function more than 50 percent of the time. The director noted that the beneficiary was not supervising or controlling other employees and that the beneficiary would perform the United States entity's functions rather than manage them. The director also concluded that the organization was not sufficiently complex to support the services of a vice-president.

On appeal, counsel for the petitioner clarifies that the petitioner is requesting that the beneficiary's position be considered in an executive capacity. Counsel contends that the beneficiary directs, not only one, but several major components of the organization, including logistics, accounting, finance, personnel, and the organization's controller.<sup>1</sup> Counsel asserts that the director's determination that the beneficiary would perform the duties of the functions is conclusory. Counsel also notes that the petitioner has had a dramatic increase in sales, has hired additional employees, and has obtained a larger office space. Counsel submits documents showing that the petitioner hired additional employees beginning in December 2002 and entered into independent contractual arrangements with two individuals in February 2003. Counsel argues that with the increase in the number of employees, the petitioner is sufficiently complex to require the services of a vice-president.

Counsel's assertions are not persuasive. 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. In this matter, the petitioner indicated that the beneficiary would negotiate

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<sup>1</sup> Counsel, in response to the director's request for evidence, indicated that the beneficiary acted as the petitioner's controller. 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).

settlements between shippers and customers and would negotiate for reciprocal freight-handling agreements. These duties are indicative of an individual providing the petitioner's customer and consulting services, not directing the management of a component or function. 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).

In addition to his negotiating duties, the petitioner indicated that the beneficiary would "plan and direct the flow of air and surface traffic moving to overseas designations and supervise workers engaged in receiving and shipping the freight, documentation, waybilling, assessing charges, and collecting fees for shipments." This statement indicates that the beneficiary will be involved in scheduling the movement of freight, again a duty that does not appear to be managerial or executive.

In response to the director's request for evidence, counsel for the petitioner indicated that the beneficiary would be "entirely in charge of the company's exporting of commodity items to the Russian Far East, setting the long term goals and policies of the U.S. operation," and would be "in charge of the Company's Logistics, Accounting, Finance, and Personnel divisions, and also serves as the Controller." However, the petitioner does not define the petitioner's goals and policies and does not clarify who performs the logistic, accounting, finance, and controller functions, if not for the beneficiary. 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). 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).

In addition, as counsel notes on appeal, the petitioner did not document what proportion of the beneficiary's duties would be executive functions and what proportion would be non-executive. The failure to quantify the beneficiary's tasks is important because the majority of the beneficiary's job duties, such as negotiating freight contracts and scheduling the movement of freight, are duties that are clearly not executive in nature.

Counsel's claim that the petitioner's sales have increased dramatically and that it has hired additional personnel is not relevant to this proceeding. 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 the instant matter, the petitioner claimed only two employees, the beneficiary and the president, when the petition was filed. The petitioner has not established that the beneficiary performs primarily executive functions through the work of others, rather than spending a majority of his time performing the petitioner's day-to-day operations.

The petitioner has not established that the beneficiary has been or will be performing in a primarily executive capacity.

Beyond the decision of the director, the petitioner has not established a qualifying relationship with the beneficiary's foreign employer in this matter. Upon review of the record, the petitioner has not submitted

evidence that it was incorporated in the State of Oregon. The petitioner submitted unfiled Articles of Incorporation. There is no evidence in the record that the petitioner is formally organized as a corporation. Moreover, the petitioner has submitted inconsistent evidence regarding its ownership and control. The petitioner submitted stock certificates 3 and 4 without explanation as to the circumstances surrounding stock certificates 1 and 2. Stock certificate number 3 allegedly evidences the issuance of 100 shares to the beneficiary's foreign employer. Stock certificate number 4 allegedly evidences the issuance of 100 shares to a co-owner of the petitioner. However, the petitioner also indicates in its "Company Profile" that two individuals, the beneficiary and the individual in the position of the petitioner's president, established the petitioner in May 1994.

Further, the petitioner's unfiled and uncertified 2001 Internal Revenue Service (IRS) Form 1120 for the petitioner's fiscal year beginning June 1 and ending May 31 shows at Schedule L, Line 22b, that the petitioner's common stock is valued at \$500. The petitioner's unfiled Articles of Incorporation indicate that the petitioner's common stock is valued at \$1 per share. 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. 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).

The petitioner has not established a qualifying relationship with the foreign entity in this matter.

In addition, the petitioner has not established that the beneficiary's duties for the foreign entity were primarily in an executive or managerial capacity. The petitioner claims that although the beneficiary did not manage subordinates in the Russian office, he did manage an essential function. The foreign entity stated that the beneficiary was responsible for directing foreign sales, negotiating sales contracts and arranging import of commodity items, as well as directing shipping activities. The foreign entity noted that the beneficiary interacted with sales personnel and distributors and represented the company in contract negotiations. This general description of duties is not sufficient to establish that the beneficiary is managing an essential function. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 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, supra*. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. As noted above, 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. at 604. In this matter, the foreign entity's description of the beneficiary's duties does not establish that the beneficiary managed an essential function, rather than providing the petitioner's necessary and operational services.

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). For these additional reasons the petition cannot 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.