

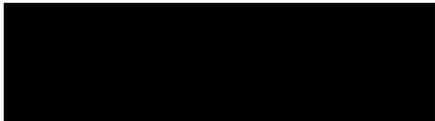


U.S. Citizenship  
and Immigration  
Services



File: SRC-02-264-51946 Office: TEXAS SERVICE CENTER Date: **OCT 28 2004**

IN RE: Petitioner:  
Beneficiary:



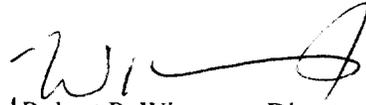
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

identifying data deleted to  
prevent disclosure of unarranted  
invasion of individual privacy

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OCT 28 2004 02D7101

**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 its Marketing Manager 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 import and export of fish and fish by-products. The petitioner claims that it is the subsidiary of W&W Representaciones Servicios Sociedad Anonima Cerrada-Huiracocha, located in Lima, Peru. The petitioner seeks to employ the beneficiary for a period of one year to open a new office.

The director denied the petition concluding that the petitioner did not establish that the beneficiary had been employed abroad for one year 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 the evidence of record shows that the beneficiary was employed abroad full-time for over one year, and that she is eligible for L-1A classification. In support of the appeal, counsel submits additional evidence, and cites a decision from the Board of Immigration Appeals.

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)(3)(v) provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii) (B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

The primary issue in the present matter is whether the beneficiary has been employed abroad for one year 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 filed on September 9, 2002, the petitioner described the beneficiary's job duties as follows:

[The beneficiary's] most recent foreign position with [her foreign employer] was as Marketing Manager. In this position she had the full responsibility of marketing the company's products through the various Media Outlets in Peru, she had authority to enter into agreement with advertising in the Media and she would oversee the overall marketing strategy of the company. . . . The key element of these duties is the management and overseeing of [the] Sales and Finance department.

On the petitioner's Form I-129, the petitioner stated that the beneficiary worked with her foreign employer from February 2001 to the present. In an attached letter dated August 30, 2002, the petitioner indicated that the beneficiary had been employed with her foreign employer "for the last two years," and that "[the beneficiary's] two years of experience with [the foreign entity] gives [her] the experience required to fill the duties of Sales and Financial Manager." In a document dated August 26, 2002 and titled "Certificate of Employment," the beneficiary's foreign employer stated that the beneficiary had been "working as [the] Marketing and Service Manager since the month of February of 2001 to the present date." A resume for the beneficiary indicated that she worked with her foreign employer part time from February 1, 2001 to the present, and she worked for the petitioner from May 1, 2002 to the present.

On October 15, 2002, the director requested additional evidence. Specifically, the director requested: (1) evidence of the funding or capitalization of the petitioner, such as copies of wire transfers showing transfers of funds from the foreign entity, or copies of bank statements for checking accounts; and (2) evidence of the staffing level of the foreign entity, including the position titles and job duties of all employees, or in the alternative, an organizational chart listing the number of employees in each department.

In response, the petitioner submitted: (1) a list of the foreign entity's employees, including their names and titles; (2) copies of bank statements for the petitioner for October, November, and December 2002; (3) copies of wire transfer notices, reflecting funds transferred from the foreign entity to the petitioner on October 28 and December 30, 2002; (4) a copy of a letter from a vendor, dated November 20, 2002, confirming that product samples were shipped to the petitioner; (5) copies of invoices for fish and fish products shipped to the petitioner, dated in December 2002; and (6) copies of website pages indicating products that the petitioner offers, dated December 30, 2002.

On April 16, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary's work for the foreign entity was managerial or executive in nature. The director highlighted that the petitioner failed to provide a description of the job duties of each of the foreign entity's employees as requested, and it did not establish that the beneficiary completed one year of full time employment with her foreign employer. The director noted that the omission of the beneficiary's name from the foreign entity's employee list calls into question her employment there. The director further noted that the record indicates that the beneficiary began working with the petitioner in May 2002, which is not permitted by her current status as a B-2 visitor for pleasure.

On appeal, counsel for the petitioner asserts that the evidence of record shows that the beneficiary meets the requirements for classification as an L-1A intracompany transferee. Counsel states that the beneficiary has been employed with the foreign entity for over one year. Counsel claims that this fact is supported by the Form I-129, the petitioner's letter of support, and the certificate of employment issued by the foreign employer. Counsel indicates that the beneficiary's resume incorrectly states that the beneficiary worked part-time abroad due to a typographical error, and no other evidence refutes her full-time status. Counsel explains that the beneficiary was not included on the list of the foreign entity's employees because the beneficiary's employment status was addressed in other submitted documentation, and the petitioner believed that the director's request for evidence was "requesting information of other employees."

Counsel asserts that the beneficiary did not engage in unlawful employment in violation of her B-2 status. Counsel states that the beneficiary entered the United States in B-2 status on March 8, 2002. Counsel explains that "she properly filed her change of status . . . in a timely fashion and did not begin her employment until her change of status was filed with the Service. Once she filed for the change of status from B-1/B2 [sic] for L-1, she began her employment in the Florida office."

Counsel submits additional evidence, including detailed position descriptions for the petitioner's and the foreign entity's staff, as well as an organizational chart for the foreign entity. Counsel asserts that the petitioner has established the beneficiary's eligibility pursuant to *Matter of Brantigan*, I&N Dec. 493 (BIA 1966).

Upon review, counsel's assertions are not persuasive. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the instant matter, the director issued a request for evidence, specifically instructing the petitioner to submit evidence of the staffing level of the foreign entity, including the position titles and job duties of all employees, or in the alternative, an organizational chart listing the number of employees in each department. In response, the petitioner provided a list of the foreign entity's employees and their titles, yet no accompanying job descriptions, and no organizational chart. Counsel now provides complete job descriptions and an organizational chart on appeal.

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

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.* In the instant matter, the foreign job description submitted by the petitioner was brief and vague, providing little insight into the true nature of the tasks the beneficiary performed with her employer abroad. 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). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job description does not allow the AAO to determine the actual tasks that the beneficiary performed, such that they can be classified as managerial or executive in nature.

Further, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner has fails to document what proportion of the beneficiary's duties were managerial functions and what proportion were non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spent on them. This failure of documentation is important because the job description indicates that the beneficiary's daily duties included non-managerial tasks, such as marketing the foreign entity's products. For this reason, the AAO cannot determine whether the beneficiary was primarily performing in a managerial or executive capacity as defined in sections 101(a)(44)(A) and (B) of the Act.

The petitioner indicates that "[t]he key element of [the beneficiary's] duties [was] the management and over[sight] of [the] Sales and Finance department." Counsel has provided no description of the sales and

finance departments, and no indication as to what is required to manage these alleged divisions. In reviewing the employee list for the foreign employer, the AAO finds three employees with titles that indicate they may function within a sales or finance department, including "Finance Manager," "Marketing," and "Advertising." Although the beneficiary was not required to supervise personnel, if it is claimed that her duties involved supervising these or other employees, the petitioner must establish that the subordinate employees were supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary managed professional employees, the AAO must evaluate whether the subordinate positions required a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). As noted above, despite the director's request for evidence, the petitioner declined to provide complete job descriptions for the foreign entity's employees. Thus, the AAO is unable to determine whether the beneficiary managed subordinate personnel, and if so, whether such subordinates were supervisory, professional, or managerial as contemplated by section 101(a)(44)(A)(ii) of the Act.

As correctly noted by the director, the petitioner has not clearly established the length of time the beneficiary worked abroad for the foreign entity. The record contains unresolved inconsistencies on this issue. For example, the petitioner's Form I-129 states that the beneficiary worked with her foreign employer from February 2001 to the present. As "the present" is understood to mean the date of filing the petition, September 9, 2002, this representation indicates that the beneficiary worked abroad for one year and seven months. In a letter dated August 30, 2002, the petitioner indicated in two locations that the beneficiary was employed abroad for "two years." While counsel states that the beneficiary's resume contains a typographical error, the resume reflects that the beneficiary worked for the foreign employer part-time from February 1, 2001 to the present. The record further reflects that the beneficiary has been in the United States since March 8, 2002. If the beneficiary commenced employment abroad with the foreign entity in February 2001, the resume shows that she stopped working abroad for the foreign entity after 13 months. 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). Counsel has provided no documentation to clarify these inconsistencies, beyond his own statement that the beneficiary's resume contains a typographical error. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel further refers to a decision issued by the Board of Immigration Appeals, *Matter of Brantigan*, I&N Dec. 493 (BIA 1966). Counsel has offered no explanation or evidence to establish that the facts of the instant

petition are analogous to those in the referenced matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Thus, the petitioner has not established that the beneficiary has been employed abroad for one year in a primarily managerial or executive capacity as required by the regulation at 8 C.F.R. § 214.2(l)(3)(iii) and (iv). For this reason, the appeal will be dismissed.

Though the director did not base her denial of the petition on the beneficiary's unlawful employment, the director stated that the beneficiary violated her nonimmigrant B-2 status by engaging in unauthorized employment with the petitioner beginning in May 2002. In response, counsel explains that the beneficiary entered the United States in B-2 status on March 8, 2002. Counsel asserts that "she properly filed her change of status . . . in a timely fashion and did not begin her employment until her change of status was filed with the Service. Once she filed for the change of status from B-1/B2 [sic] for L-1, she began her employment in the Florida office." Thus, counsel maintains that the beneficiary did not engage in unlawful employment.

There is no appeal from the director's determination regarding the beneficiary's violation of nonimmigrant status. 8 C.F.R. § 214.1(c)(5). It is noted that the beneficiary's B-2 status is defined by section 101(a)(15)(B) of the Act. The regulation at 8 C.F.R. § 214.1(e) provides:

A nonimmigrant in the United States in a class defined in section 101(a)(15)(B) of the Act as a temporary visitor for pleasure . . . may not engage in any employment. . . . Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.

The regulation at 8 C.F.R. § 214.1(c)(4) states that "[a]n extension of stay may not be approved for an applicant who failed to maintain the previously accorded status." Further, the regulation at 8 C.F.R. § 248.1(b) provides that "a change of status may not be approved for an alien who failed to maintain the previously accorded status . . . ." The fact that the petitioner filed a Form I-129 requesting to change the beneficiary's status to L-1A and extend her stay does not immediately afford the beneficiary the benefits of L-1A classification. The beneficiary's status is not properly changed from B-2 to L-1A until the petition is approved by CIS.<sup>1</sup> As there is no appeal from the director's determination, the AAO will not disturb the director's determination.

Beyond the decision of the director, the petitioner has not established that the size of its United States investment is sufficient to commence doing business in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(2). With the initial petition, the petitioner submitted a checking account statement, dated August 12, 2002, showing a balance of \$1,514.46. The director requested additional evidence of the funding or capitalization of the petitioner, such as copies of wire transfers showing transfers of funds from the foreign

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<sup>1</sup> Counsel states that the beneficiary began employment with the petitioner in May 2002, after the petitioner properly filed the present petition. The AAO notes that the petition was filed on September 9, 2002, four months after the beneficiary commenced employment with the petitioner.

entity, or copies of bank statements for checking accounts. In response, the petitioner submitted copies of bank statements for October, November, and December 2002, and copies of wire transfer notices, reflecting funds transferred from the foreign entity to the petitioner on October 28 and December 30, 2002. 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). As the new documentation submitted by the petitioner reflects its financial status and activity after the date of filing the petition, it is not probative of whether the petitioner was properly capitalized and ready to commence business on September 9, 2002, the date of filing. Accordingly, the petitioner has not established that, with \$1,514.46, it was sufficiently capitalized as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). 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.