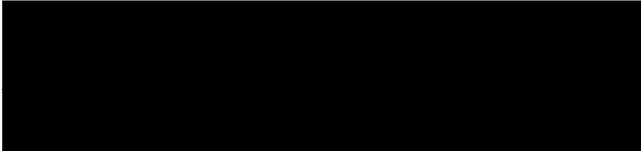
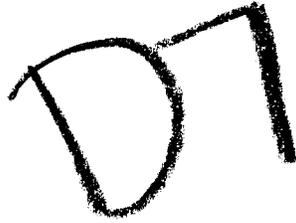




U.S. Citizenship
and Immigration
Services



FILE: SRC 03 040 50300 Office: TEXAS SERVICE CENTER Date:

SEP 02 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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

DISCUSSION: The Director, Texas Service Center,¹ 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 is an organization incorporated in July 2001 in the State of New York. It operates a courier service. It seeks to extend the employment of the beneficiary temporarily as its general manager. 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 petitioner claims that the foreign entity, Deposito De Materiales Jar, owns 55 percent of its shares and that Deposito De Materiales Jar is located in Bogota, Colombia.

The director denied the petition determining that the beneficiary as the petitioner's sole employee would not be relieved from performing the petitioner's operational tasks. The director concluded that the petitioner could not support a managerial or executive position.

On appeal, the petitioner asserts that the beneficiary is the general manager and has been working and will work in the United States in a managerial or executive capacity.

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) further 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

¹ The Form I-129, Petition for a Nonimmigrant Worker, listed the petitioner's address in Miami, Florida, thus within the jurisdiction of the Texas Service Center. However, when the director requested information regarding the petitioner's Miami address, the petitioner indicated that there is no company in Miami and that the Miami address was used only as a mailing address.

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)(14)(ii) also provides that a visa petition, that involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of position held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether the beneficiary will 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) 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.

In a November 15, 2002 letter appended to the extension petition, the petitioner indicated that the beneficiary “is responsible for conducting the management and the progress of the company. He [will] manage the operations of the business, and supervise the administrative functioning of it. He will continue establishing the policies and directives of the company in the United States. He will report the activities of the company to the parent company abroad.”

The petitioner also provided copies of its Employer’s Quarterly Wage Reports for the first three quarters of 2002. The first quarter wage report showed that the petitioner employed the individual identified as the petitioner’s operational manager, not the beneficiary. The second quarter wage report showed that the petitioner employed the beneficiary and the petitioner’s operational manager. The operational manager’s salary for the first two quarters was \$17,391.25. The third quarter wage report showed that the petitioner employed only the beneficiary.

On December 4, 2002 the director requested: (1) the petitioner’s organizational chart, including the names and positions of employees and whether the employees were full-time or part-time; (2) information on who performed the petitioner’s day-to-day operations; (3) copies of Internal Revenue Service (IRS) Forms 1099, Miscellaneous Income; (4) evidence establishing that the beneficiary would be employed in a managerial or executive capacity, including information on the number of subordinate managers, supervisors, or other employees who reported to the beneficiary and a brief description of their job duties; and, (5) if the beneficiary did not supervise employees, any essential function the beneficiary managed.

In a February 16, 2003 response, the petitioner claimed it employed two full-time employees, the beneficiary and an operations manager. The petitioner also listed an independent contractor in a sales/purchase position who worked part-time six hours per week; an accountant who performed duties for the petitioner once each month; and two part-time drivers whose hours depended on the volume of work. The petitioner also included its Employer’s Quarterly Wage Report for the quarter in which the petition was filed. The fourth quarter of 2002-wage report showed two employees but indicated that only one, the beneficiary, had been paid in the quarter. The petitioner provided IRS Forms 1099 for four individuals for the 2002 year. The IRS Forms 1099 showed that the individual who performed sales/purchase duties had been paid \$830.43; the individual who performed accounting duties had been paid \$449.12; and that one driver had been paid \$1,083.42 and the second driver had been paid \$5,048.20.

The petitioner also provided the following description of the beneficiary's duties for the petitioner:

The beneficiary had the authority to hire and fire personnel and independent contractors. The beneficiary manages and supervises the Operational Manager, who reports directly to the beneficiary. The employees report directly to the beneficiary.

As General Manager and President of the US entity, he is responsible for conducting the management and the progress of the company. The beneficiary exercises discretion over the day to day [sic] operation of the business, and supervises the administrative functioning of the company. His duties include: to establish the policies and directives of the company in the United States. He establishes marketing strategies and manages customer relations. He plans, directs and coordinates the operations of the company. He exercises wide latitude and discretionary decision[-]making, and receives general supervision from the stockholders of the US entity.

The petitioner also included a description of duties for the operational manager as well as its organizational chart. The chart depicted the beneficiary as general manager and president and the operational manager reporting directly to the beneficiary. The chart also showed the sales/purchase independent contractor, the accountant, two drivers, and an external payroll company reporting to the operational manager.

The director determined that the beneficiary as the petitioner's sole employee would not be relieved from performing the petitioner's operational tasks. The director concluded that the petitioner could not support a managerial or executive position.

On appeal, the petitioner provides the same documents submitted in response to the director's request for evidence with the addition of the first quarter-2003 employer's wage report. The petitioner asserts that the director did not consider that its operational manager was a full-time employee, and thus erroneously concluded that the beneficiary would be carrying out the day-to-day operations of the United States entity. The petitioner provides the operational manager's IRS 2002 Form W-2, showing that the operational manager was paid \$17,391.25 in 2002. The petitioner claims that it has qualifying employees. The petitioner also cites an unpublished decision that held that a sole employee who utilizes outside contractors may be a manager or executive.

The petitioner's assertions are not persuasive. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). 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). The petition in this matter was filed November 22, 2002. The petitioner has submitted evidence that it paid only the beneficiary for work in that quarter. The IRS Forms W-2 and 1099 do not establish that the operational manager or the independent contractors worked in the fourth quarter of 2002. 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).

In addition, even if the independent contractors were employed when the petition was filed, the record reveals that they were employed part-time and did not work a sufficient number of hours to relieve the beneficiary from performing the daily tasks associated with the petitioner's operational and administrative tasks. 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). Further, the petitioner indicated that the operational manager's duties, when she was employed, consisted of planning the day-to-day courier activities and that she was in charge of hiring and supervising drivers. This description is not sufficient to suggest that the operational manager would relieve the beneficiary from performing administrative functions, customer service, and marketing of the petitioner's services.

Finally, the petitioner has provided a vague description of the beneficiary's duties that borrows liberally from the definitions of both managerial and executive capacity. See sections 101(a)(44)(A)(i),(iii), and (iv) and 101(a)(44)(B)(ii), (iii), and (iv) of the Act. 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). Moreover, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A 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 if it is representing the beneficiary is both an executive and a manager.

In this matter, the petitioner has not provided an adequate description of the beneficiary's actual daily duties. The petitioner must first 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 has not provided this fundamental evidence. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The petitioner has not established that the reasonable needs of the organization justify the beneficiary's job duties and the petitioner has not specifically articulated why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties.

Of note, the petitioner's citation to an unpublished matter is not probative. The petitioner has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished matter. Moreover, unpublished decisions are not binding on Citizenship and Immigration Services (CIS) in its administration of the Act. See 8 C.F.R. § 103.3(c).

On review, the director's statement as it relates to the remuneration of the beneficiary will be withdrawn. The issue in this matter is whether the petitioner reasonably requires an executive or manager at this stage of its development, not whether the petitioner has the financial ability to remunerate the beneficiary. Furthermore, as the petitioning organization is not a new U.S. office, the petitioner is not required to establish the foreign entity's financial ability to remunerate the beneficiary. See 8 C.F.R. § 214.2(l)(3)(v)(C)(2). Therefore, the director's statement on this issue is withdrawn.

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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.