

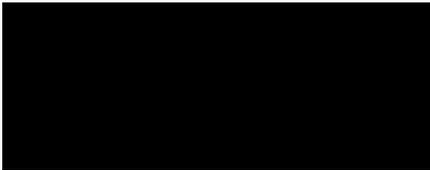
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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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Services

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AUG 01 2005

FILE: SRC 02 218 50812 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



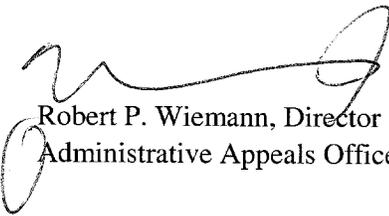
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

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

According to the evidence contained in the record, the petitioner was established in 1999 and is described as a marketing research and consulting firm. The petitioner claims to be the result of a joint venture entered into by Taco Tipico and Eddy International, S.A. de C.V., located in Mexico. The petitioner declares three employees and \$78,377.15 in gross annual income. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its vice president. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, the petitioner 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 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 to be addressed in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity primarily 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.

In a letter dated June 28, 2002, the petitioner described the beneficiary's job duties as:

- Hiring, training, and managing all of [the U.S. entity's] employees.
- Meeting with [the U.S. entity's] clients to identify and articulate their needs.
- Conducting the marketing and financial research required to address these needs.
- Analyzing all data and knowledge to develop appropriate marketing and financial methodologies for the client.
- Guiding, consulting, and assisting the client through the whole process of initiating their new venture in the United States.

In response to the director's request for additional evidence on the subject, the petitioner described the beneficiary's job duties as:

[The beneficiary's] current duties include managing all [the U.S. entity's] employees (approximately 15% of his workload), conducting the marketing and financial research required by the client (approximately 40% of his workload), searching for available commercial sites and assessing their feasibility in relation to the client's needs (approximately 25% of his workload), talking to the client about their project through personal meetings or by telephone (approximately 10% of his workload), other miscellaneous business activities (approximately 10% of his workload).

The petitioner stated that the U.S. entity employed two additional employees whose titles were finance and accounting manager and marketing and research manager. The petitioner further stated that the two subordinates report directly to the beneficiary and support his activities as needed.

The director, in denying the petition, stated that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity. The director also stated that the beneficiary would not be performing in a managerial or executive capacity since he would not be managing other professionals or managers. The director further stated that the beneficiary would have to engage in the day-to-day activities of the organization, since it did not appear that the two subordinates would perform all the duties associated with the company.

On appeal, the petitioner disagrees with the director's decision and asserts that the beneficiary's primary day-to-day duties consist of directing the marketing and research department, and finance and accounting departments. The petitioner also asserts that the two subordinates are professionals with college degrees. The petitioner contends that the beneficiary directs the course of the marketing and finance departments rather than performing the functions himself. The petitioner further contends that the beneficiary performs executive duties in that he establishes all goals and policies of the U.S. entity, is in charge of most of the major decisions of the company, and receives only general supervision from higher-level executives.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been employed in a managerial or executive capacity. In evaluating whether the beneficiary is employed in a primarily managerial or executive capacity, the AAO will look first to the petitioner's description of the beneficiary's 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 petitioner asserts that the beneficiary performs both managerial and executive duties but fails to distinguish the extent to which he performs in each category. Further, 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). In the instant matter, the petitioner contends that the beneficiary is employed by the U.S. entity in an executive and managerial capacity in that he directs the management of the entire organization, establishes goals and policies, and receives only general supervision from senior executives. However, a review of the beneficiary's job descriptions fails to demonstrate that the beneficiary primarily performs in either capacity or that the organization is able to support a managerial or executive position. Consequently, there is insufficient evidence to show that the beneficiary will perform the high-level responsibilities as defined, or that he will primarily perform those duties rather than spending the majority of his time performing day-to-day functions of the organization.

The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he would direct the management of the organization, establish goals and policies, exercise a wide latitude in discretionary decision-making, and receive only general supervision or direction from higher-level individuals. 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). Paraphrasing the regulations as a substitute for a comprehensive description of the beneficiary's 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 will be established by the beneficiary in his capacity. Further, in the letter of support and response to the director's request for evidence, the petitioner stated that the beneficiary spends 40 percent of his time "conducting the marketing and financial research required by the client" and 25 percent of his time "searching for available commercial sites and assessing their feasibility in relations to the client's needs." Based upon the percentages, it appears that over 60 percent of the beneficiary's time is spent performing non-qualifying, non-executive duties.

The record does not demonstrate that the U.S. entity contains the organizational complexity to support a managerial or executive staff position. While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other pertinent factors such as the nature of the petitioner's business. Together, these facts can be used as indicators to help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant matter, the latter more accurately describes the beneficiary's role. Initially, the petitioner stated that the beneficiary conducts the marketing and financial research required by the company's clients. On appeal, the petitioner asserts that the beneficiary doesn't actually perform the services but directs them instead. 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). 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. *Matter of Ho, Id.* 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). Based upon the evidence of record, it appears that the beneficiary will spend the majority of his time performing sales, marketing, and administrative duties. There has been insufficient evidence

presented to demonstrate what the subordinate's duties actual are. Therefore, it cannot be determined that there are individuals currently available to perform the functions of the organization or to relieve the beneficiary from performing non-managerial duties such as marketing, selling, and researching the viability of the petitioner's product or services.

Furthermore, although the petitioner asserts that the beneficiary will be 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. The director requested that the petitioner submit additional evidence of the U.S. entity's proposed staffing levels by year's end, and to list the proposed employee's titles and proposed job duties. In response to the director's request for additional evidence, the petitioner listed the two employee titles as finance and accounting manager and marketing and research manager respectively. The petitioner asserted that the two employees would report directly to the beneficiary and would support him in all of his activities as needed. On appeal, the petitioner asserted that professionals with college degrees would manage the marketing and finance departments. There has been no evidence submitted to substantiate these claims. 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, supra*. 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. Because the beneficiary will be primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the minimal documentation of the parent company's and the petitioner's business operations raises the issue of whether there is a qualifying relationship between the U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). In addition, there is insufficient evidence contained in the record to demonstrate that the foreign entity will continue doing business pursuant to the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H). The record fails to show that the foreign entity will be engaged in the regular, systematic, and continuous provision of goods and/or services during the beneficiary's temporary stay in the United States. For these additional reasons, the petition may not 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.