



U.S. Citizenship
and Immigration
Services

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File: WAC 03 247 50295 Office: CALIFORNIA SERVICE CENTER Date: **AUG 30 2009**

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

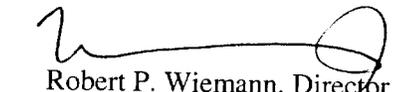
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

DISCUSSION: The Director, California 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 extend the employment of its president and general 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 California that operates a gas station and convenience store. The petitioner claims that it is the subsidiary of the beneficiary's former employer, located in Dubai, United Arab Emirates. The petitioner has employed the beneficiary since May 1999 and now seeks to extend his status for an additional two-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States 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 beneficiary has been and will continue to render services that are primarily managerial or executive. Counsel contends that the director arbitrarily and capriciously applied standards when making his determination and that the director has improperly speculated on the existence and extent of the beneficiary's duties. Finally, counsel contends that CIS approved two previous petitions on behalf of the beneficiary based on the same facts, and that the beneficiary's responsibilities have only increased over time.

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 issue in the present matter 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), 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 an August 23, 2003 letter appended to the I-129 Petition, the petitioner's vice president/day shift manager indicated that the beneficiary "has full responsibility for and is solely in charge of all aspects of our operations and employees."

[The beneficiary] continues to refine and monitor operating systems and procedures to make sure that they are consistently and uniformly applied throughout the three shifts. He has complete responsibility for personnel decisions (recruitment, hiring, assignment, promotion, salary review and discharge) of employees at both the managerial and clerk level. [The beneficiary] handles all relations with our suppliers and vendors and our banks, attorneys, and accountants, and hires and directs the activities of all our contractors and other outside professional and non-professional services.

The day shift manager added that the business is open 16 hours a day, seven days a week and claimed that the first-line supervisors included himself (the day shift manager), the second shift manager, and the weekend manager. The day shift manager noted that the "managers" directed all of the subordinate employees in providing the gas/oil, repair/maintenance, washing/detailing, and food/beverage services.

On September 9, 2003, the director requested: (1) a copy of the petitioner's organizational chart including the names of all executives, managers, supervisors, and number of employees within each department; (2) a brief description of job duties, educational level, and annual salary for each employee under the beneficiary's supervision; (3) a more detailed description of the beneficiary's duties; (4) copies of the petitioner's Federal Forms 941, Quarterly Wage Reports for the last four quarters; (5) copies of the U.S. company's payroll summary, W-2s and W-3s evidencing wages paid to employees; and (6) copies of the petitioner's California Forms DE-6, Employer's Quarterly Wage Report for the last four quarters.

In a November 17, 2003 response to the request for evidence, the petitioner's vice president partially re-stated the initial description of the beneficiary's duties and added the following:

[The beneficiary] also dispatches the undersigned and the other supervisor to visit competing automobile-related and retail establishments to find out their prices, policies and systems. We report back to him and he puts any desired changes into effect, orally through the supervisors, or directly with all employees through written notices or notes.

Since [the beneficiary] is the majority, but not the sole, shareholder of the corporation, he also serves, and has duties, as Chair of the Board of Directors. In this capacity, he makes sure that the points of view and needs of the minority ownership of the business are taken into account for all major decisions.

[The beneficiary] also directs the financial reporting, tax payment and other correspondence of the business. He assigns the paperwork for our secretary to undertake and reviews and signs correspondence and tax forms.

The petitioner provided its organizational chart showing the beneficiary as president/general manager, a salaried store manager, a salaried day shift manager, a weekend manager, four cashiers, and a secretary. The California Forms DE-6 confirmed the employment of these individuals, although it appeared that the secretary, the weekend manager, and three of the cashiers worked part-time.

The director determined that the beneficiary's job description did not establish that the beneficiary primarily directed the management of the organization. The director also considered the petitioner's type of business and its organizational structure and determined it would be unreasonable to believe that the beneficiary would not be assisting in day-to-day operations of the business. The director further determined that the lower-level managers on the organizational chart were not managers because they did not supervise professional employees; thus, the beneficiary's position was not managerial, because the position was essentially a first-line supervisor position over non-managerial and non-professional employees. The director concluded that the petitioner's organization does not possess the organizational complexity to warrant having an executive.

On appeal, counsel suggests that the beneficiary's initial job description presents the level of detail that is contemplated in the Act and the regulations. Counsel asserts that CIS approved two previous petitions based on the same set of facts and that the director erred in re-adjudicating the petition. Counsel further contends that even if the beneficiary performs some non-qualifying duties, he is not precluded from establishing executive or managerial eligibility as long as he is primarily engaged in managerial and/or executive duties. Counsel also claims that an individual in charge of an entire business is qualified as a functional manager because an individual in charge of a major division or function of a business is eligible for multinational immigrant status. Finally, counsel asserts that there is no legislative, case law or regulatory support for finding that the head person of a multi-million dollar business is a first-line supervisor.

Upon review, counsel's assertions are not persuasive. The description of the beneficiary's duties does not demonstrate that the beneficiary will perform primarily managerial or executive duties. 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. *See* 8 C.F.R. § 214.2(l)(3)(ii). A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Counsel for the petitioner refers to the beneficiary both as an executive, and as a manager managing an essential function. Although the regulations do not preclude an individual from performing in both an executive and managerial capacity, the petitioner must establish that the 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 that a beneficiary is both an executive and a manager. The petitioner has not done so in this matter.

Contrary to counsel's contention that the provided job description meets the statutory requirements, the petitioner has provided a nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary has "full

responsibility for, and is solely in charge of, all aspects of our operations and employees,” and directs all aspects, makes all executive and managerial decisions, and manages the function of the entire business. The petitioner did not, however, further define the beneficiary’s actual daily duties. These general statements are akin to a description of an owner’s responsibility that may or may not include duties that are primarily managerial or executive. While the petitioner states that the beneficiary is “handling all duties as Chair of the Board of Directors” the petitioner does not elaborate further regarding the duties associated with this role or the amount of time allocated to them by 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 Soffici*, 22, I&N Dec. 158, 165 (Comm. 1998) (citing *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).

The petitioner also indicates that the beneficiary “handles all relations with our suppliers and vendors and our banks, attorneys, and accountants, and hires and directs the activities of all our contractors and other outside professional and non-professional services,” and makes all decisions on “business policies, pricing, goods to carry and services to render.” These more specific duties are indicative of an individual who is involved in the day-to-day administrative and operational tasks of the petitioner. 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). The actual duties themselves reveal the true nature of the employment. *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).

The petitioner also describes the beneficiary as “refin[ing] and monitor[ing] operating systems and procedures to make sure that they are consistently and uniformly applied throughout the three shifts,” and having “complete responsibility for personnel decisions.” These duties involve supervisory components, however, the record does not substantiate that the beneficiary’s subordinates primarily perform supervisory, managerial, or professional duties. Contrary to the petitioner’s classification of three of the beneficiary’s subordinates as first-line supervisors, the totality of the record shows that the three “managers” are, at most, the senior employees on staff when the petitioner’s business is open.

The petitioner’s business of operating a gas station and food market requires employees that carry out the mundane tasks of operating such a business. For the petitioner to operate 16 hours a day, seven days a week, with only four full-time and four part-time employees, the subordinate employees that the petitioner identifies as first-line supervisors/managers necessarily must assist in carrying out the operational tasks of cashier, repair/maintenance, and providing gas, oil, food, beverage, and related goods. Moreover, the petitioner’s remuneration of the beneficiary’s subordinate employees does not reflect that the “managers” are compensated at a higher level than the individuals holding the position of cashier.

The petitioner may not create artificial layers of employees to suggest that an organization is sufficiently complex to support an executive or manager; instead the petitioner must substantiate that the duties of a beneficiary’s subordinates correspond to their placement in an organization’s structural hierarchy.

Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business, when examining the managerial or executive capacity of a beneficiary. An individual whose duties encompass duties of 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. The petitioner has not submitted sufficient evidence to establish that the beneficiary's subordinates hold professional positions. As observed above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Counsel correctly observes that even if the beneficiary is involved in performing some non-qualifying duties, he is not precluded from establishing executive or managerial eligibility. However, here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be 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 spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as dealing with "suppliers and vendors and [the petitioner's] banks, attorneys, and accountants" and making all decisions on "business policies, pricing, goods to carry and services to render," do not fall directly under traditional managerial duties as defined in the statute. In addition, the time the beneficiary spends on first-line supervisory duties is not considered managerial. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel's contention that the head of an organization should automatically be considered a "function manager" is not persuasive. To allow the broad application of the term "function manager" to include all individuals who head organizations would render the term meaningless. If counsel claims that the beneficiary is directing or managing a function, the petitioner must identify the function with specificity, articulate the nature of the function, and establish the proportion of the beneficiary's daily duties attributed to directing or managing the function. In addition, the petitioner must provide a comprehensive description of the beneficiary's duties demonstrating that the beneficiary directs or manages the function rather than performs the duties relating to the function. In this matter, the petitioner has not provided evidence that the beneficiary directs or manages a particular function.

Finally, counsel's implicit assertion that the head of a company cannot be a first-line supervisor is not persuasive. Again, the totality of the record does not support a conclusion that the beneficiary's subordinates are primarily supervisors, managers, or professionals; instead the beneficiary's subordinates perform the actual tasks of operating the gas and food market. The beneficiary's actual duties relating to the petitioner's personnel are first-line supervisory duties. The petitioner has not described an organizational structure substantiated by the record sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisory role. The beneficiary also handles the petitioner's administrative and operational tasks of dealing with banks, vendors, and suppliers, and setting prices, and determining the goods to carry and the services to render. These duties include the routine tasks necessary to operate the petitioner's business and are non-qualifying duties. Although the petitioner references that the beneficiary also explores opportunities to invest in other businesses, the petitioner has not substantiated that this is the beneficiary's primary

assignment. Finally, as determined above, the petitioner has not provided a credible understanding of the beneficiary's actual daily duties. The record shows that the beneficiary is a first-line supervisor who also performs operational and administrative tasks. The AAO cannot speculate on the beneficiary's undefined daily duties. The record does not support a conclusion that the beneficiary's assignment is primarily managerial or executive.

The petitioner noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.