



U.S. Citizenship
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Services

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FILE: SRC 04 123 50831 Office: TEXAS SERVICE CENTER Date: DEC 22 2005

IN RE: Petitioner:
Beneficiary:

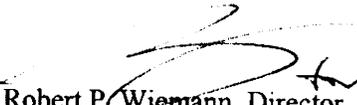
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

The petitioner, a corporation organized under the laws of the State of Florida in October 2003, claims that it is a new office engaging in the manufacturing and installation of fine wood products. The petitioner claims to be a wholly-owned subsidiary of [REDACTED] located in Lima, Peru. It seeks to employ the beneficiary temporarily in the United States as its general manager, 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 has failed to show that (1) the beneficiary was employed by the foreign entity in a managerial or executive capacity for one continuous year within the three years preceding the filing of the petition, or that (2) the beneficiary would be employed in a managerial or executive capacity by the U.S. entity.

The petitioner subsequently filed an appeal on Form I-290B. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, the petitioner asserts it has submitted sufficient evidence to show that the beneficiary has been performing in a managerial or executive capacity with the foreign company for at least one year out of the three years previous to filing the petition. The petitioner acknowledges that it has not established clearly the beneficiary's role with the U.S. subsidiary or the organizational structure of the U.S. subsidiary, but attributes this deficiency to language issues and poor assistance in preparing the petition. The petitioner submits a brief and additional evidence to support its assertions on appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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 in part 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.

Moreover, pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), 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 first issue in this proceeding is whether the petitioner has established that the beneficiary was employed by the foreign entity in a managerial or executive capacity for one continuous year within the three years preceding the filing of the petition.

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 undated letter accompanying the initial petition, the petitioner described the beneficiary's employment with the foreign entity as follows:

[The beneficiary's] most recent position with [the foreign entity] [i]s as a General Director, a position that he has held since February 26th 2001 [sic], when the company was established. In this position, [the beneficiary] has full responsibility for the staff and work of the commercial department. This responsibility included the recruitment and training of staff, over which he had hiring and firing authority. He was also responsible for creating marketing strategies to be followed by the marketing department and setting of sales policies to be practiced by the sales department. [The beneficiary], in this position, assured compliance with schedule needs, creation and administration of standards for work and service quality. He exercised complete day-to-day discretionary authority over the work of the above-mentioned departments.

On April 7, 2004, the director requested additional evidence. Among other things, the director requested (1) an organizational chart for the foreign entity and the educational levels of the employees the beneficiary managed; (2) a statement describing the foreign employment of the beneficiary, establishing that he had been employed for one continuous year during the three years preceding the filing of the petition as an executive or manager, and that the beneficiary's prior education, training and employment qualifies him to perform the

intended services in the United States; and (3) the official payroll records from the foreign company showing that the beneficiary had worked for the foreign company during the requisite period.

In response, the petitioner submitted what appears to be an organization chart of the foreign entity as of December 15, 2003, the payroll records of the foreign entity for the year 2003, and diplomas and educational certificates of the beneficiary, all in Spanish without translation into English. The petitioner also submitted a letter in English from the foreign entity, dated April 12, 2004, stating that the beneficiary has held the position of general manager of the foreign entity since February 26, 2001, and that the employees he manages in the foreign entity include a company manager, a company chief of operations, and a sales manager.

On April 23, 2004, the director denied the petition. The director determined that the petitioner has not established that the beneficiary was employed by the foreign entity in a managerial or executive capacity for one continuous year within the three years preceding the filing of the petition. The director found the record does not establish that the beneficiary managed other managers or professionals within the foreign entity. The director noted that while the petitioner did submit an organization chart for the foreign entity, the names and education levels of that entity's employees were not furnished as requested.

On appeal, the petitioner asserts it has submitted sufficient evidence to show that the beneficiary has been performing in a managerial or executive capacity with the foreign company for at least one year out of the three years previous to filing the petition. The petitioner submits a brief that elaborates upon the beneficiary's role in the foreign entity, his expected role in the U.S. entity, and the relationship between the two entities, and further evidence in support of its assertions in the brief.

At the outset, the AAO notes that the petitioner submits further evidence on appeal, including a new organizational chart of the foreign entity listing the name, position title, and educational background and/or professional experience of each employee, and a diploma issued to one of the beneficiary's subordinates. However, this is evidence previously requested by the director, which the petitioner failed to provide prior to adjudication of the petition. 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). Moreover, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. The appeal will be adjudicated based on the record of proceeding before the director.

On reviewing the petition and the evidence before the director, the AAO finds that the petitioner has not established that the beneficiary has been employed in a managerial or executive capacity by the foreign entity. 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.* On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary did on a day-

to-day basis while employed by the foreign entity. For example, the petitioner states that the beneficiary's duties include "recruitment and training of staff, over which he had hiring and firing authority," "creating marketing strategies," "setting sales policies," "assur[ing] compliance with schedule needs, creation and administration of standards for work and service quality [sic]." The petitioner also indicated that the beneficiary "exercised complete day-to-day discretionary authority over the work of the [sales and marketing] departments." However, the petitioner did not define the strategies and policies created by the beneficiary, or clarify what his quality assurance and compliance tasks entailed. Nor did the petitioner provide an adequate description of the staff that purportedly carried out the day-to-day work under the beneficiary's supervision. 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).

Furthermore, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Here, the petitioner asserts that the beneficiary was managing a subordinate staff in the foreign entity, but the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. As noted earlier, in response to the director's request, the petitioner submitted a number of documents, including an organization chart for the foreign entity, in Spanish with no English translation. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether such evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. The petitioner did submit a letter dated April 23, 2004 confirming the beneficiary's employment and indicating that the beneficiary supervised three employees having the titles of company manager, company chief of operations, and sales manager. However, the record does not indicate that any of these employees supervised subordinate staff members or managed a clearly defined department or function of the petitioner, such that they could have been classified as managers or supervisors. Further, though requested by the director, the petitioner did not furnish any information regarding the level of education required to perform the duties of the beneficiary's subordinates. Thus, the record is insufficient to demonstrate that these employees possessed or required an advanced degree, such that they could have been classified as professionals. Moreover, as previously noted, any 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 all, the petitioner has not shown that the beneficiary's subordinate employees were supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

In light of the foregoing, the AAO concludes that the evidence is insufficient to establish that the beneficiary was employed by the foreign entity in a managerial or executive capacity for one continuous year within the three years preceding the filing of the petition.

The second issue in this proceeding is whether the beneficiary will be employed by the U.S. entity in a managerial or executive capacity, and whether the U.S. entity will support a primarily managerial or executive position, within one year of approval of the petition.

In the letter accompanying the initial petition, the petitioner described the beneficiary's anticipated position within the U.S. entity as follows:

[The beneficiary] will fill the position of [g]eneral executive-president in charge of the development of a market for the products in services offered by the company. The position will require that [the beneficiary] manages and sets [sic] standards for the following assignments[:]

- 1) To hire and dismiss personnel;
- 2) To set marketing guidelines and policies to be followed by the subsidiary;
- 3) To create and set sales strategies already followed by the main company; in order to enlarge the market range to be reached by the subsidiary;
- 4) To coordinate the sales department as to assure the supply of quality services, aiming to achieve the profitability goals set by the main company.

To proceed to these tasks [the beneficiary] will hire as many employees as he considers necessary to carry out the business of [the U.S. entity]. These employees shall work directly under the supervision of [the beneficiary] who will report only to the Stockholders of [the foreign entity].

In response to the director's request for further evidence, the petitioner also submitted a proposed business plan for the U.S. entity indicating that in addition to the beneficiary, the management team of the U.S. entity would include a vice president/sales manager and a production manager.

In her decision denying the petition, the director stated that "[t]he petitioner has failed to establish that the duties for an executive or manager with [the U.S. entity] meet Title 8, Code of Federal Regulations, Section 214.2(L)(B) or (C) [sic]."

On appeal, the petitioner acknowledges that neither the beneficiary's role with the U.S. entity nor the organizational structure of the U.S. entity has been established clearly, but attributes this deficiency to language issues and poor assistance in preparing the petition. The petitioner offers the following description of the beneficiary's role in the U.S. entity:

[The beneficiary's] position as *President* for the development of [the U.S. entity] involves complete responsibility for the set up and control of the subsidiary and includes the following duties:

- Formulate policies and direct the set up of the business;
- Direct the company's financial goals, objectives and budgets;
- Hire, train, assign, supervise and remove company managers;
- Approve projects, programs and recruitment efforts.

Additionally, during the initial set up of the operations of the U.S. company, [the beneficiary] will undertake the role of **Marketing Manager**, in charge of the efforts to establish a company brand.

The petitioner also submits on appeal an organizational chart for the U.S. entity, which indicates that in addition to the beneficiary, a sales manager, and a production department manager, there also would be "administrative services" and a sales department manager to be recruited locally, and a production team of undetermined number.

Because the petitioner is a new office, the relevant regulations mandate consideration of (1) whether the proposed employment involved executive or managerial authority over the new operation, and (2) whether the U.S. entity, within one year of approval of the petition, would support the beneficiary in a primarily managerial or executive capacity. See 8 C.F.R. § 214.2(l)(3)(v)(B) and (C). The AAO notes that the director's decision with respect to the beneficiary's proposed employment with the U.S. entity does not reflect consideration of the applicable regulations at 8 C.F.R. § 214.2(l)(3)(v); indeed, the director's decision does not cite to the correct regulations. Therefore, the director's statement that "[t]he petitioner has failed to establish that the duties for an executive or manager with [the U.S. entity] meet Title 8, Code of Federal Regulations, Section 214.2(L)(B) or (C) [sic]" will be withdrawn. However, upon reviewing the evidence of record, the AAO concludes that the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity by the U.S. entity, or that the U.S. entity will support the beneficiary in a primarily managerial or executive capacity, within one year of approval of the petition.

With respect to the beneficiary's proposed job duties with the U.S. entity, the petitioner has provided two different job descriptions, one with the initial petition and one on appeal. However, both descriptions of the beneficiary's duties are vague and non-specific and fail to demonstrate what the beneficiary would do on a day-to-day basis. For example, the petitioner stated initially that the beneficiary would "hire and dismiss personnel;" "set marketing guidelines and policies;" "create and set sales strategies;" and "coordinate the sales department." On appeal, the petitioner described the beneficiary's duties as "formulat[ing] policies and direct the set up of the business;" "direct[ing] the company's financial goals, objectives and budgets;" "hir[ing], train[ing], assign[ing], supervis[ing] and remov[ing] company managers;" and "approv[ing] projects, programs and recruitment efforts." The petitioner did not provide any specifics with respect to the company's goals, policies, objectives or strategies, or the staff the beneficiary would supervise. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. As noted earlier, 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. at 1103.

Furthermore, the petitioner has not provided adequate documentation to establish that the U.S. entity will sufficiently support the beneficiary in a managerial or executive position within one year of approval of the petition. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level, and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose information

regarding "[t]he proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;" as well as "[t]he 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." See 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The petitioner did submit a "business plan" for the U.S. entity. However, this document, consisting of less than two pages of text, describes the company in the most general terms and provides no detailed information regarding "the scope of the entity, its organizational structure, and its financial goals." Specifically, it is unclear from the record what the intended organizational structure of the U.S. entity will be, nor is there a timeframe provided for when additional staff would be hired. The business plan indicates that there would be a vice president/sales manager and a production manager in addition to the beneficiary. However, there is no evidence in the record that these persons have already been hired, or will be hired at any particular point in time. Similarly, the petitioner stated in the letter accompanying the initial petition that the beneficiary "will hire as many employees as he considers necessary" to carry out the business of the U.S. entity, without any specific timeframe or number. However, 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 such, the record does not satisfactorily demonstrate that the U.S. entity will have a staff that would sufficiently support the beneficiary in a managerial or executive position within one year of approval of the petition.

Based on the evidence presented, the AAO finds that the petitioner has not established that the beneficiary will be employed in the U.S. entity in a primarily managerial or executive capacity, or that the U.S. entity will support a managerial or executive position, within one year of the petition.

Beyond the director's decision, the AAO notes that there is a material discrepancy in the record regarding the share ownership of the U.S. entity that the petitioner has failed to address in this proceeding. The petitioner indicated on the L supplement to the Form I-129, and in the accompanying letter of support, that the U.S. entity is 100% owned by the foreign entity. However, the only evidence of share ownership in the U.S. entity that the petitioner has submitted is a copy of the U.S. company's share certificate number 1, issued on March 22, 2004, showing that the foreign entity holds "seventy 70% shares [sic]" rather than 100% of the shares of the U.S. entity. The petitioner has neither acknowledged nor explained this inconsistency. 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. *Id.* For this additional reason, the petition will not be approved.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.