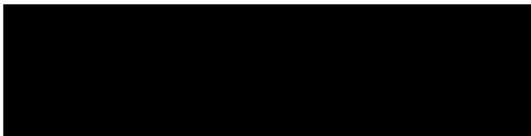


U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

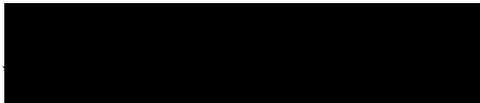
D7



FILE: SRC 03 136 51530 Office: TEXAS SERVICE CENTER Date:

JUL 26 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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 documentary evidence contained in the record, the petitioner was incorporated in 1991 and claims to be a warehouse and freight forwarding company. The petitioner claims that the U.S. entity is a subsidiary of A [REDACTED]. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for a period of three years. 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. The beneficiary was initially granted a one-year period of its stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

On appeal, counsel 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.

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.

The petitioner initially stated in the letter of support, dated March 6, 2003, that the beneficiary, as president, would be responsible for company projects, developing new accounts, staffing, locating products, and

marketing. The petitioner also stated that the beneficiary would have day-to-day discretionary authority to coordinate and direct the work of the distribution department, and would be responsible for the execution of the U.S. entity's policies and principles. The petitioner submitted as evidence copies of the U.S. entity's Articles of Incorporation, State Tax Returns and IRS Form 1120S, U.S. Corporate Income Tax Returns for 1998 through 2001, a payroll list dated October 1, 2001, IRS Forms W-3 and W-2 for 2001, IRS Form 941, Employer's Quarterly Federal Tax Return for the quarter ending December 31, 2001, IRS Form 940-EZ, FUTA Tax Return for calendar year 2001, a business financial statement, business invoices, and other documents.

In response to the director's request for evidence, counsel stated that the beneficiary was supervising four employees, three of which had professional degrees. Counsel also stated that the beneficiary did not perform the day-to-day duties of the U.S. entity. The petitioner submitted copies of the U.S. entity's organizational chart, list of employees, description of employee's duties, employee resumes, Employer's Quarterly Report for the past two quarters, IRS Form 941, Employer's Quarterly Federal Tax Return for the past two quarters, tax payment receipts from Ocean Bank, Miami, Florida, IRS Form 940-EZ, Employer's Annual Federal Unemployment Tax Return for the 2002 corporate year, one IRS Form W-3 and four IRS Form W-2 for the year 2002, and IRS Form 1120S, U.S. Income Tax Return for an S Corporation for the years 2001 and 2002, with schedules.

The U.S. entity's organizational chart depicted the beneficiary as president with a vice president, warehouse manager, ocean import-export manager, and air import-export manager under his direction. A description of the beneficiary's duties included:

1. Management the corporation [sic] involving a managerial oversight of the business activities. [The beneficiary] normally will represent the shareholder with other participants throughout the commercials [sic] project and commercial operations. **(30% of the total time)** (Emphasis in original.)
2. Coordination and supervision with the shareholders of the work performed by the managers and professional of the corporation; **(30% of the total time)** (Emphasis in original.)
3. Authority to represent the corporation before private and public organism [sic] and execute all kind of business transactions; **(5% of the total time)** (Emphasis in original.)
4. Be involved in all phases of commercial activities, from the initial discussion with the client through the entire commercialization and distribution process, in order to- [sic] designing, planning, set the policies and objectives, [sic] managing, supervising, direct and communicating with clients and providers. **(10% of the total time)** (Emphasis in original.)
5. Discuss the objectives, requirements, and budget of a project. Provide various commercial proposals and specifying the requirements the objectives and goals must meet [sic]; **(5% of the total time)** (Emphasis in original.)
6. Develop final objectives goals and commercial planification [sic] for the corporate plans of the business. **(20% of the total time)** (Emphasis in original.)
7. CEO and part of the Board of Directors. (overall depending on its needs). [sic]
8. Management the corporation [sic] involving a managerial oversight of the management's activities.
9. Coordination, control and supervision of the payroll, its compliance with the corporate regulations of the salary and the payment of taxes;
10. Authority to determine what employees to be hire or fired [sic];

11. Coordination and supervisions with the shareholders of the work performed by the Vice-President and Managers in the corporation;
12. Authority to represent the corporation before private and public organism [sic] and execute all kind[s] of business transactions;
13. Be involved in all phases of development, from the initial discussion with the client through the entire construction process. [The beneficiary's] duties require specific skills- designing, engineering, managing, supervising, and communicating with clients and builders;
14. Discuss the objectives, requirements, and budget of a project to be develop [sic] by the US Corporation;
15. Develop final plans and negotiations with the shareholders and members of the board of director[s].

The petitioner also submitted position descriptions for the U.S. entity's vice-president, ocean import-export manager, and the air import-export manager. The petitioner submitted the resumes of the beneficiary, [REDACTED]. In his resume, the beneficiary described his position with the U.S. entity as:

Director of [REDACTED] in Miami, Florida, U.S.A. In charge of Administration [sic] and processing and clearing imports and exportation of Air and Ocean shipments, containerized, loose, oversized, consolidated and hazardous freight and (Cartage) Trucking [sic]. Specializing in Bonded Cargo. Shipments originating with the U.S. to any foreign Country, including but not limited to foreign to foreign logistics [sic].

The director determined that the petitioner failed to establish the need for a president. The director stated that the record demonstrated the U.S. entity employed three employees, but that the beneficiary was not managing managers or professionals. The director further stated that it appeared the beneficiary would have to engage in the day-to-day business activities of the organization since three employees would not be able to perform all the business activities of the company.

On appeal, counsel argues that the U.S. entity employs five individuals, three of which are professional with university degrees. Counsel further argues that the employee's status is clarified in the petition, response to director's request for evidence, list of employees and duty descriptions, and IRS Form 941 submitted. Counsel asserts that with two professionals on the payroll, it is evident that the beneficiary will not perform all the day-to-day business duties of the organization. As evidence on appeal, the petitioner submitted copies of the U.S. entity's Employer's Quarterly Report for the quarter ending June 30, 2003, an Employee Check Record for the year 2003, and copies of resumes of the beneficiary, [REDACTED] and [REDACTED].

Counsel's assertions are not persuasive. 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. In the instant matter, although the petitioner claims the beneficiary performs managerial and executive duties, it has failed to demonstrate how much of the beneficiary's time will be devoted to each.

The petitioner has provided a vague and 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's duties include directing the management of the organization and establishing goals and policies. The petitioner did not, however, define the organization's goals and policies, nor clarify how the beneficiary directs the management of the U.S. entity. 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). Further, the petitioner stated the beneficiary would be spending 30 percent of her time "Management the corporation [sic] involving a managerial oversight of the business activities." 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 describes the beneficiary as being involved in the sales, marketing, finance, negotiation, and distribution of the petitioner's product and services. Since the beneficiary actually performs administrative work, sells the company product, provides its services, negotiates the contracts, and markets the petitioner's product, she is performing a task necessary to provide a service or product and this duty will not be considered managerial or executive in nature. 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).

Although counsel asserts that the beneficiary is 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. 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 Obaighena*, 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 contends the beneficiary is responsible for supervising four employees, three of which have professional degrees. Contrary to counsel's contention, the Employer's Quarterly Report for the quarter ending June 30, 2003 demonstrates that the U.S. entity employed only four individuals at the time the petition was filed. Of those four employees, only three resumes were presented, including the beneficiary's. The petitioner described [REDACTED] as the U.S. entity's vice-president. His resume indicated that he graduated from [REDACTED] Administracion y Hacienda Publica IUT in 1988, and that he had received various certificates for systems organization and calculation of the national added value. However, there is no independent documentary evidence in the record to substantiate this claim. 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*. The petitioner described Yaquelin Rodriguez as the U.S. entity's ocean import-export manager. Her resume indicated her highest level of education had been high school. 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 is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

The petitioner submitted a copy of [REDACTED] resume and described her as the U.S. entity's air import-export manager during the year 2002. However, the petitioner failed to provide an English translation of the resume or a copy of a degree or certificate attesting to the highest level of education she had obtained.

Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the 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.

In deciding whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require 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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. The petitioner has not established that a baccalaureate degree is necessary to perform the duties of a vice-president, warehouse manager, or import-export manager, who are among the beneficiary's subordinates.

Furthermore, although counsel and the petitioner claim that the beneficiary supervises five employees, recent quarterly tax records submitted by the petitioner reveal the U.S. entity employs only four individuals, including the beneficiary. 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).

Although the director based his decision partially on the size of the enterprise and the number of staff, the reasonable needs of the enterprise must also be taken into consideration. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner had been established since 1991 as a warehouse and freight forwarding company. The company employed the beneficiary as president, plus a vice-president, and two import-export managers. The AAO notes that all of the employees have managerial or executive titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly include a president and one other executive, and two managerial employees.

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.