

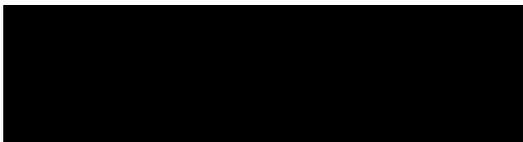
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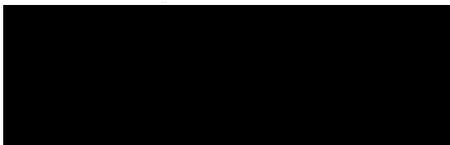
File: SRC-04-080-51516 Office: TEXAS SERVICE CENTER Date: **JUN 09 2005**

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)

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
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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its President 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 Florida that operates as a beauty salon and spa. The petitioner claims that it is the subsidiary of Secretos del Maquillaje 97, located in Caracas, Venezuela. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that: (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity, and (2) the petitioner has been doing business for the previous year.

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 petitioner has submitted sufficient evidence to show that the beneficiary will be employed in a primarily managerial or executive capacity. In support of this assertion, counsel submits a statement on Form I-290B, additional evidence, and previously submitted documents.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

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

The first 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 the initial petition filed on January 23, 2004, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] has been responsible for the overall continuing development of the [petitioner]. Her duties and responsibilities have included the hiring and firing of all personnel. Revision of all financial contracts and business relationships with suppliers, in order to assess the validity of these contracts. She has had total discretionary authority to reduce costs, so as to improve profits. Her years of management and executive level experience in this field, has given her the latitude to make these decisions without having to consult with any other person or entity. Her position is at the executive level since she formulates policies and has the ultimate discretionary authority to make necessary changes in the structure of the business. Her functions with the organization are purely executive since she performs only those executive functions and leaves the daily tasks to the company employees. [The beneficiary] has also had the discretionary authority to seek the purchase of any existing business and/or enter into negotiations of such an entity. Her executive level position permits her to do so and therefore creates a value for the subsidiary and parent company.

The petitioner submitted an organizational chart that reflects that it employs four individuals including the beneficiary, in positions including administrative manager, certified cosmetologist, and therapist. The chart further shows that the petitioner utilizes the services of contract employees, including a head stylist, manicurist, receptionist/secretary, and cleaning crew. The petitioner provided its Florida Department of Revenue Employer's Quarterly Report for the fourth quarter of 2003 that reflects that the petitioner employed the four staff members named on the organizational chart during the covered period. On Form I-129, the petitioner indicated that it employs seven individuals.

On January 31, 2004, the director requested additional evidence. In part, the director instructed the petitioner to submit evidence as follows:

- A definitive statement describing the United States employment of the beneficiary, including:
Executive or Managerial Positions (please provide)
- a. position title;
 - b. a list of all duties;
 - c. percentage of time spent on each duty;
 - d. number of subordinate managers/supervisors or other employees who report directly to the beneficiary;
 - e. a brief description of their job duties; if the beneficiary does not supervise other employees, specify what essential function within the organization he/she manages;
 - f. specific date that his/her employment began and ended in each position with your company;
 - g. indicate the qualifications required for the position;
 - h. indicate whether or not the beneficiary functions at a senior level within the corporation;
 - i. specify his/her position within the organizational hierarchy;
 - j. indicate who provides the product sales/services or produces the product of the business.

In a response dated April 7, 2004, the petitioner further described the beneficiary's duties as follows:

Percentage of time spent on each duty:

(35%) Managing the overall activities of the company including administrative and financial aspects; working closely with the company's accountant, financial consultant, and attorney.

(20%) Monitoring the activities of all employees including managers and employees.

(15%) Maintaining regular communications (via phone and e-mail) with the foreign parent company, including assisting as board meetings and phone-conferences with the foreign board of directors on behalf of the [petitioner].

(10%) Identifying new markets and developing new marketing strategies.

(5%) Networking with businesses in the community to identify and cultivate new information sources; attending trade shows and other events to keep abreast of industry changes.

(5%) Traveling nationwide to communicate with suppliers and potential clients.

(5%) Preparing a budget for new operations and marketing plan in conjunction with the company's CPA and financial consultant.

(5%) Evaluating and reviewing the services to be provided by the company.

The petitioner provided that it employs six individuals that report to the beneficiary, including an administrative manager, a certified cosmetologist, a therapist, a head stylist, a manicurist, and a receptionist/secretary.

On April 28, 2004, the director denied the petition. In part, the director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director stated that the petitioner did not establish that the beneficiary will supervise other supervisory, managerial, or professional employees who will relieve her from performing the services of the business. The director observed that some of the petitioner's invoices bear the beneficiary's name, and concluded that the fact that the beneficiary handles invoices suggests she is not performing managerial functions.

On appeal, counsel asserts that the petitioner has submitted sufficient evidence to show that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel states that "[t]here is ample evidence to support the Beneficiary's role as a management employee, including the assertion that she is in a supervisory capacity." Counsel further asserts that "an employee with [a] clearly Executive/Managerial title as President, should have wide powers possessed by [the beneficiary] in the operations of [the petitioner.]" Counsel states that the petitioner employs seven individuals. Counsel explains that the appearance of the beneficiary's signature on several invoices is only indicative of her role in providing customer service when a supervisor is required.

Upon review, 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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant case, the petitioner initially asserted that the beneficiary is primarily engaged with executive duties. Yet, on appeal counsel refers to the beneficiary as a management employee and asserts that she has supervisory authority. Thus, it appears that the petitioner intends to represent that the beneficiary is primarily engaged with both managerial and executive duties. To sustain such an assertion, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The breakdown of the beneficiary's duties fails to establish that she will be employed in a primarily managerial or executive capacity. For example, the petitioner provided that the beneficiary will devote 35 percent of her time to "[m]anaging the overall activities of the company including administrative and financial aspects." Yet, this statement is vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. The petitioner indicated that the beneficiary will devote ten percent of her time to "[i]dentifying new markets and developing new marketing strategies." However, without further explanation, this appears to be a non-qualifying marketing and sales function. The petitioner stated that the beneficiary will devote five percent of her time to "[t]raveling nationwide to communicate with suppliers and potential clients." Without further explanation, these appear to be a sales and purchasing functions that are not managerial or executive in nature.

The petitioner indicated that the beneficiary will commit 20 percent of her time to "[m]onitoring the activities of all employees including managers and employees." Yet, as will be discussed fully below, the petitioner has failed to show that any of the beneficiary's subordinates will be professional, managerial, or supervisory employees. Thus, this portion of the beneficiary's time is devoted to acting as a first-line supervisor. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals, managers, or supervisors. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988); section 101(a)(44)(A)(ii) of the Act. The portion of the beneficiary's time devoted to acting as a first-line supervisor is not deemed time acting in a managerial or executive capacity.

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). As discussed above, the breakdown of the beneficiary's duties shows that she will spend as much as 70 percent of her time performing non-qualifying duties.

The organizational chart submitted with the initial petition reflects that the petitioner employs four individuals including the beneficiary, in positions including administrative manager, certified cosmetologist, and therapist. The chart further shows that the petitioner utilizes the services of contract employees, including a head stylist, manicurist, receptionist/secretary, and cleaning crew. On Form I-129, the petitioner indicated that it employs seven individuals. However, the petitioner has only documented that it employs the administrative manager, certified cosmetologist, and therapist as the beneficiary's subordinates. The petitioner's Florida Department of Revenue Employer's Quarterly Report for the fourth quarter of 2003 shows that the petitioner employed the three individuals named on the organizational chart in the positions of the administrative manager, certified cosmetologist, and therapist. The petitioner failed to submit any documentation to establish that it employs independent contractors. 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)).

Although the beneficiary is not required to supervise personnel, if it is claimed that her 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.

In evaluating 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 a subordinate 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. In the instant case, the petitioner has not established that a bachelor's degree is actually necessary to perform the duties of the administrative manager, certified cosmetologist, or therapist. While the petitioner provided documentation to show that the cosmetologist is certified, the petitioner has not shown that a bachelor's degree is prerequisite for such certification.

Nor has the petitioner shown that any of the beneficiary's subordinates supervise other staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. While the organizational chart shows that the administrative manager has authority over the certified cosmetologist and the therapist, the description of his duties does not include supervising subordinates. The fact that he has a managerial title does not, by itself, establish that he is a manager. A review of his job description shows that he is primarily engaged with general clerical duties associated with running an office, and thus he is not deemed a managerial employee. Accordingly, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not established that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has established that it has been doing business for the previous year. *See* 8 C.F.R. § 214.2(l)(14)(ii)(B).

In denying the petition, the director concluded that the petitioner did not establish that it has been doing business for the previous year. Counsel and the petitioner failed to address this ground for denial on appeal. Thus, the petitioner concedes this point and the director's determination will not be disturbed. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(1)(ii)(G), as the petitioner has failed to establish that the foreign entity is a qualifying organization engaged in the regular, systematic, and continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). The regulation at 8 C.F.R. § 214.2(l)(ii)(G)(2) reflects that, in order for an entity to be considered a qualifying organization, the petitioner must show that it:

Is or will be doing business (engaging in international trade is not required) as an employer in the United States and at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee

The regulation at 8 C.F.R. § 214.2(l)(ii)(H) defines the term "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) requires the petitioner to submit “[e]vidence that the United States and foreign entities are still qualifying organizations.” The petitioner submitted numerous untranslated documents purportedly relating to the foreign entity's business operations. 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 documents are not probative and will not be accorded any weight in this proceeding. The remaining evidence is not sufficient to show that the foreign entity was engaged in “the regular, systematic, and continuous provision of goods and/or services” as of the date the petition was filed. *See* 8 C.F.R. § 214.2(l)(ii)(H). Thus, the petitioner has failed to show that the foreign entity is a qualifying organization. *See* 8 C.F.R. § 214.2(l)(ii)(G)(2). Accordingly, the petitioner has not established that it has a qualifying relationship with the foreign entity. *See* 8 C.F.R. § 214.2(l)(14)(ii)(A). For this additional reason, the petition may 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).

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.