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FILE: EAC 03 010 52407 Office: VERMONT SERVICE CENTER

Date: JUN 14 2005

IN RE: Petitioner:
Beneficiary:



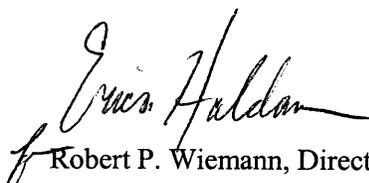
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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, DZI Works, Inc. endeavors to classify the beneficiary as a nonimmigrant manager or executive 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 claims it is a subsidiary of Ricochet Records AB, located in Sweden. It states that it is engaged in the music production, artist representation, and A & R consulting business. The initial petition was approved for one year to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for two years as the U.S. entity's president and chief executive officer. The petitioner was incorporated in the State of New York in 2001.

The director denied the petition because the petitioner failed to establish that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. entity.

On appeal, the petitioner's counsel refutes the director's decision and asserts that the director misunderstood the nature of the position and the petitioner's business.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. 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. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(3) state 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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act 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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether the beneficiary will be primarily performing managerial or executive duties for the United States entity.

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.

On January 28, 2003, the petitioner filed the Form I-129 describing the beneficiary's proposed duties in the United States as "[e]xpand and develop the company's business in North America including the roster of artists and music producers; [c]onsult with major record labels."

Additionally, the petitioner stated in an October 7, 2002 supporting letter that it has "applied for a J-1 visa for [REDACTED] a Swedish national who will become a salaried employee of the company pending." The petitioner also described the beneficiary's U.S. duties in the letter as:

Solely responsible for establishing the operations of [the petitioner]. Including the planning of business objectives, developing organizational policies and directing the creative direction of the company in the United States market. He was also responsible for establishing working relationships for [the petitioner] as a consultant to major record companies and assisting, supervising and coordinating the production of recordings embodying the performances of musical artists as well as developing new talents for these companies.

On October 21, 2002, the director requested additional evidence from the petitioner that included a comprehensive description of the beneficiary's managerial or executive duties, a list of the petitioner's employees identifying them by name and position title, a complete job description for each employee, and a copy of the employees' W-2 forms and paycheck stubs.

The petitioner responded to the request for additional evidence by submitting a January 13, 2002 letter stating:

[The beneficiary] has been involved in the establishment of the organization's operations and presence in the United States. Inherent in this senior capacity is the planning of business objectives, developing organizational policies and directing the creative direction of the company in the United States market. His primary responsibility during this start-up phase has been the establishment of working relationships for [the petitioner] as a consultant to major record companies and assisting, supervising and coordinating the production of recordings embodying the performances of musical artists as well as developing new talents for these companies.

Because this is the first year of this new venture and due to the unique nature of the music industry, [the beneficiary] has been acting alone in developing these relationships with artists and record labels. **In every aspect of business during this start-up phase, [the beneficiary] is [the petitioner].** The company and individual are one entity and are interchangeable

It should be clear that [the beneficiary] has been acting in an executive capacity under the L-1 regulations. He has directed all aspects of getting this company off the ground, establishing new business relationships and generating revenues. In this crucial start-up phase, it has not been necessary to have a staff in the United States office. This will change over the next two years as the company enters into new deals. (currently in negotiation) and completes the building of a new recording studio. At present, [the petitioner] has hired one individual to work with [the beneficiary] and it is also anticipated that [the petitioner] will be hiring at least three more individuals in the upcoming year to assist [the beneficiary] to move this new company forward. (Emphasis in original).

On January 28, 2003, the director denied the petition stating that the petitioner failed to establish that “in an organization the size and nature of the United States company, the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. entity.” The director found that the beneficiary will be engaged in the non-managerial, day-to-day operations of the business.

On appeal, the petitioner’s counsel claims that the director’s decision “ignored statutory definitions of managerial capacity.” Counsel claims that all clerical day-to-day functions are “carried out by an executive assistant,” “[a]ll accounting functions are carried on by outside accountants/bookkeepers,” “all legal matters are ultimately referred to the company’s attorneys,” and “there is no need for a large staff per se, especially at the start-up stage.” Counsel states, “during the next two years of the company’s existence, there would be additional hiring of managerial-level staff who will be able to oversee the company in [the beneficiary’s] absence.” Counsel further states that the director ignored the nature of its business and “focused on the fact that there were no employees to be supervised.”

In this matter, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. A petitioner must establish that a 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 the beneficiary is both an executive and a manager.

On review, the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. In examining the executive or managerial capacity of the beneficiary, the AAO will first look to the description of the beneficiary’s U.S. job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Although the director requested a comprehensive description of the beneficiary’s duties, the petitioner’s January 13, 2003 response letter failed to provide a more

specific description of the beneficiary's duties. For example, the petitioner stated that the beneficiary's proposed U.S. duties included "planning of business objectives," "developing organizational policies," and "direct[ing] all aspects of getting this company off the ground." The petitioner did not, however, define or clarify these broad responsibilities. 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).

In addition, the beneficiary was described as "establishing new business relationships" and the petitioner indicated that his primary duties include "assisting, supervising and coordinating the production of recordings" and "developing new talents" for record companies. This description indicates that the beneficiary spends his time generating new business. Thus, the beneficiary himself is selling and providing the services of the business and, based on the petitioner's representations, these are his primary duties. For example, the beneficiary is personally responsible for performing consulting services under the petitioner's agreement with Sony Music, and the petitioner indicates that the beneficiary has been "acting alone" to the extent that "the company and the individual are one entity and are interchangeable." The AAO notes that 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).

Moreover, a critical analysis of the nature of the petitioner's business indicates that there are no subordinate employees to relieve the beneficiary from performing non-qualifying duties. Rather, it appears from the record that the only individual operating the business is the beneficiary. In the January 13, 2003 letter, the petitioner claimed, "At present, [the petitioner] has hired one individual to work with [the beneficiary]." In addition, on appeal, counsel claims, "With regard to the day to day functions of the company, all clerical day-to-day functions are carried out by an executive assistant." and "there is no need for a large staff per se, especially at the start-up stage." However, to establish that the petitioner has staffed the new operation in the previous year, the petitioner must submit a description of staffing, including the number of employees and the types of positions, as well as evidence of the wages paid to the employees. 8 C.F.R. § 214.2(l)(14)(ii)(D). In the absence of such evidence as pay stubs and payroll records, the petitioner has not established that the petitioner employs a subordinate staff that would relieve the beneficiary from performing non-qualifying duties. Additionally, 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).

The AAO notes that although counsel states on appeal that the petitioner has contractual employees in the areas of accounting and bookkeeping, and legal services, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. 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)).

Further, the term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an “essential function” within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The petitioner stated that the beneficiary is responsible for “directing the creative direction of the company.” However, if a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary’s daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary’s daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. As previously stated, 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). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

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, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary’s job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary’s performance of non-managerial or non-executive duties. 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.

The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be “primarily” employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Finally, the petitioner indicated that it plans to hire “at least three more individuals” in the future “to assist [the beneficiary] to move this new company forward.” However, 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. In addition, 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). 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 reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

In sum, based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. After careful consideration of the evidence, the AAO concludes that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that it is eligible for an extension of the initial one-year "new office" validity period. As previously noted, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not satisfied all of the enumerated evidentiary requirements. The petitioner has not submitted evidence that the United States and foreign entities are still qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has not submitted evidence that the United States entity has been doing business for the previous year as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H). Finally, the petitioner has not submitted evidence of the financial status of the United States operation. For all of these reasons, the petition may not be approved and the appeal will be dismissed.

Another issue in this proceeding, also not raised by the director, is whether the petitioner has established that it has secured sufficient physical premises to house the new office. The petitioner has submitted a copy of its lease. The heading of the contract indicates a "Residential Lease." Although numbers four and five of the contract have been crossed out, there is no indication such as a notarized letter from the lessor that these terms have been disregarded. The terms expressly restrict the use of the premises exclusively as a "private single family residence" that may not be utilized for "the purpose of carrying on any business." Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient space to house the new office.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.