

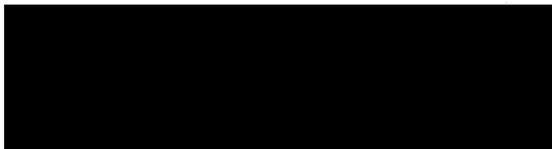
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U.S. Citizenship
and Immigration
Services



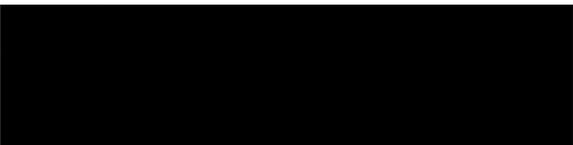
D7

File: SRC 03 215 50905 Office: TEXAS SERVICE CENTER Date: MAR 17 2005

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

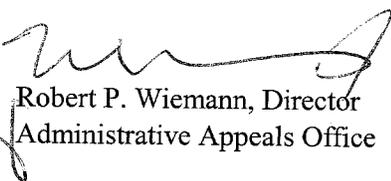
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, 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 and general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida that is engaged in the business of landscape gardening. The petitioner claims that it is the subsidiary of [REDACTED] located in Ra'anana, Israel. 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 the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the denial was erroneous in that it was incorrectly based on the staffing levels of the U.S. petitioner. Counsel further contends that the beneficiary clearly satisfies the requirements for a manager or executive. In support of these contentions, counsel submits a brief and additional new evidence for consideration.

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 managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary issue in this 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, counsel submitted a letter dated July 21, 2003 from the petitioner detailing the nature of the beneficiary's duties. Specifically, the petitioner stated it was seeking to extend the beneficiary's stay for an additional two years in order for him to function as the petitioner's president and general manager. The petitioner stated:

In this capacity, he will continue to have diverse duties and responsibilities including overseeing and directing the overall management of our subsidiary. He will establish policy, set sales targets, liaise with all outside professional services as necessary and will approve all budgets and key contracts. [He] will continue to actively recruit a management team and will direct, supervise and coordinate the efforts of all lower level management & personnel and will continually monitor performance. In summary, [the beneficiary] will manage and direct all commercial activities of our subsidiary functioning autonomously with only minor supervision from our Israeli parent company. We will continue to provide whatever financial or technical support is necessary to achieve success in this expanding market.

Based on the evidence submitted with the initial petition, the director concluded that the petitioner only employed two employees, including the beneficiary. Thus, on August 6, 2003, the director requested additional evidence. Specifically, the director requested evidence establishing whether the beneficiary was functioning as a manager or an executive, as well as evidence that he had enough support staff to ensure that his managerial or executive duties were his primary duties. In addition to payroll records, the director requested a list of employee names, titles, duties and qualifications to document the petitioner's claimed staffing levels. Furthermore, the director requested an overview of the beneficiary's daily duties supported by the percentage of time spent devoted to each duty, as well as photos of the beneficiary's workspace and the business premises as a whole.

In its October 17, 2003 response, the petitioner, through counsel, submitted evidence of wages paid to its employees as well as a list of employee positions and duties. With regard to the beneficiary's duties, the petitioner submitted the following breakdown:

- Supervision and Management of all Staff:
50%
- Marketing and Financial Budget/Business Plan Development and Implementation:
15%
- Recruitment, Hiring, Discipline, and Training of Staff:
10%
- Liaising with Parent Company:
10%
- Liaising with Outside Professional Services:
10%
- Premises Management:
5%

On November 4, 2003, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, concluded that the beneficiary was not supervising a staff of professional, supervisory, or managerial employees and did not employ a sufficient number of employees which would relieve the beneficiary from performing the day-to-day tasks associated with the operation of the business. The director acknowledged that although the petitioner subsequently employed additional staff members after the filing of the petition, this factor was irrelevant since the petitioner is required to establish eligibility at the time of filing.

On appeal, counsel asserts that the beneficiary's duties are in fact executive and managerial in nature, since 50% of his time is spent supervising and managing his staff. Counsel further alleges that an additional 10% of the beneficiary's time is spent recruiting, hiring, disciplining and training his staff. Specifically, counsel claims that the beneficiary supervises the works manager, who in turn supervises the sub-contractors hired to perform actual landscaping duties. Consequently, counsel concludes the beneficiary is not performing any of the day-to-day tasks associated with the operation of the business. In addition, counsel challenges the validity of the denial, asserting that the director erroneously relied on the staffing level of the U.S. petitioner in reaching the decision. Finally, counsel restates the definition of executive capacity and avers that the beneficiary meets the criteria of an executive.

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.

As previously discussed, the initial description of the beneficiary's duties was insufficient. Consequently, the director requested additional details in the request for evidence. The petitioner's response further clarified the beneficiary's proposed duties, and explained that the beneficiary would devote 60% of his time supervising, hiring, and training staff. On appeal, counsel again directs the AAO's attention to this statement, and relies upon this percentage of the beneficiary's duties as a basis for establishing his qualifications as a manager or executive. The AAO, however, disagrees with this assertion.

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.

The petitioner did not provide the level of education required to perform the duties of its managers and support staff. In fact, the petitioner confirmed in its response to the director's request for evidence that none of the subordinate employees possessed educational degrees. Absent evidence to the contrary, the AAO must conclude that an advanced degree is not necessary to perform the duties of the works manager or the other proposed managers listed on the organizational chart. Thus, the petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Although the petitioner has submitted evidence of subcontractors working below the works manager, subcontractors are not considered "employees" for purposes of this discussion. Furthermore, the petitioner did not staff these additional persons at the time of the filing of the extension request, but only employed one subordinate manager to the beneficiary. Thus, 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 AAO will next examine the director's conclusion that the beneficiary was primarily engaged in day-to-day tasks as opposed to managerial or executive duties based on the small staff employed by the U.S. petitioner. Counsel correctly asserts that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. It is appropriate, however, for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C); see, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Systronics Corp. v. INS*, 153 F. Supp. 2d at 15.

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, such as developing and implementing marketing and financial policies and managing the business premises. The petitioner fails to explain the justification for these non-managerial and non-executive duties, yet continually asserts that the beneficiary performs only managerial or executive tasks. 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).

Furthermore, 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. As previously stated, 60% of the beneficiary's duties at the time of filing were allotted to the supervision and hiring of a non-professional and non-supervisory subordinate staff of one employee. These duties, which constituted the majority of the beneficiary's time, are akin to a first-line supervisor as opposed to a true manager or executive as defined by the Act. 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. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Since the additional duties, such as premises management, are also non-managerial in nature, the AAO cannot conclude that the beneficiary will be engaged in primarily managerial or executive tasks. Based on the evidence contained in the record, the AAO finds that the beneficiary must in fact be engaging primarily in non-qualifying duties in order to maintain the operation of the petitioner's business.

Finally, counsel on appeal alleges that the beneficiary meets the criteria of "executive" as defined by the regulations. This assertion is not persuasive for two reasons. First, 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 petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. In this case, counsel and the petitioner continually allege that the beneficiary meets both criteria, but fails to establish which criteria it relies upon as the primary basis for this petition. Second, the record contains no additional independent evidence or explanation establishing that the beneficiary is truly working as an executive and/or a manager. Merely claiming that the beneficiary is a manager or an executive, as the petitioner and counsel do in this matter, is insufficient to establish eligibility. 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). In addition, without documentary evidence to support his claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 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).

The petitioner has failed to establish that the beneficiary has been and will continue to be employed in a managerial or executive capacity, as required by 8 C.F.R. §214.2(l)(3)(ii) and (iv). 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 reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this additional reason, the petition may not be approved.

Beyond the findings in the previous decision, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship still exists between the petitioning entity and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has not demonstrated that a qualifying relationship still exists with a foreign entity and has not persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. Specifically, the only evidence alluding to a qualifying relationship is the allegation set forth in the petition that the foreign entity is the sole owner of the petitioner supported by a photocopy of a stock certificate. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not enough to establish this relationship. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. As the previous decision will be affirmed, this issue need not be examined further.

In addition, while not directly addressed by the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. In this case, the petitioner submits copies of invoices for the period from March 2003 to June 2003. No further documentation is presented for the period from August 2002 to February 2003 and July 2003 to August 2003 to support a finding that the petitioner has been regularly and systematically doing business as defined by the regulations. Again, as the appeal will be dismissed on other grounds, this issue need not be examined further.

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.