

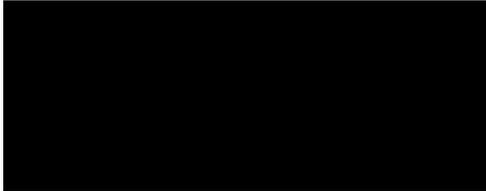
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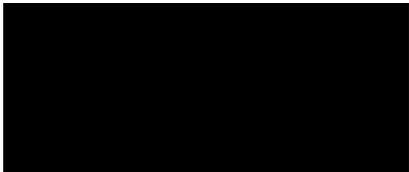


File: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAY 23 2005

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 nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims that it is a subsidiary of Invest One Sp. z.o.o., located in Poland. The petitioner is a distributor of print media products. The U.S. entity was incorporated in Arizona on October 24, 2001. The petitioner seeks to hire the beneficiary as a new employee to open its U.S. office. Accordingly, in April 2002, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for two years. The petitioner endeavors to employ the beneficiary's services as the U.S. entity's chief operating officer.

On May 20, 2002, the director denied the petition because the petitioner has not established that the beneficiary has been employed abroad in a managerial or executive capacity. The director also determined that the beneficiary will not be employed in a primarily executive or managerial capacity for the U.S. entity and that the U.S. entity will not support a managerial or executive position within one year of operation.

On appeal, the petitioner's counsel claims that the petitioner is exempt from the new office regulatory requirements. Counsel also states that the beneficiary's duties abroad are primarily executive and that the petitioner will support a manager or executive within one year.

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 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.

Pursuant to 8 C.F.R. § 214.2(l)(3), 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.

(v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or(C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The first issue in this proceeding is whether the petitioning entity is considered a new office as defined by 8 C.F.R. § 214.2(l)(1)(ii)(F).

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(F) and (H) state:

(F) New office means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

(H) Doing business means the 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.

On appeal, counsel asserts that the new office standard should not be applied because at the time of filing the L-1 petition the U.S. entity can already support the services of a full-time manager or executive. At the time of filing on April 25, 2002, the petitioner submitted the employment contracts dated March 18, 2002 and a copy of its payroll records for the periods ending April 5, 2002, April 19, 2002, and May 3, 2002 for these two employees.

On review, the AAO finds that the petitioning entity has been doing business less than one year. The petitioning entity was incorporated on October 24, 2001. The petitioner filed for L-1A classification for the beneficiary on April 4, 2002. In addition, at the time of filing, the petitioner indicated on Form I-129 that the beneficiary was coming to the U.S. to open a new office. Since the petitioner has been doing business less than one year, it qualifies as a new office as defined by 8 C.F.R. § 214.2(l)(1)(ii)(F) and (H).

The AAO notes that counsel cites a letter issued by the Office of Adjudications to support counsel's assertion regarding the new office standard. However, the letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official Citizenship and Immigration Services policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

The AAO now turns to the second issue in this proceeding of whether the beneficiary has been employed in a managerial or executive capacity 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.

In the initial filing, the petitioner described the beneficiary's foreign entity duties as the "CEO of [REDACTED] and distribution and investment company. Oversee company operations. Oversee establishment of new subsidiaries."

The petitioner also submitted an organizational chart describing the foreign entity's hierarchy. The foreign entity's organizational chart indicated that the beneficiary supervises four employees including a vice president, office director, advertising director, and one secretary. The petitioner described the beneficiary's duties as:

40%: Manage on a daily-basis all investment of corporate finances (includes analysis of cash flow, allocation of financial resources in foreign currency diversifying investments and stock portfolio, review of stock market quotes in Polish stock market and international stock markets and coordination of stock investments.) Establish investment goals for the company

30%: Direct and oversee establishment of new corporate subsidiaries; participate (in capacity as President/CEO on Invest [REDACTED] on board of directors for new corporate subsidiaries.

20%: Attend exhibitions to locate new investment opportunities and market current investments; for locating and determining new business opportunities (e.g. via investment publications and the Internet)

10% Communicate with lawyers, financial advisors, partners, vendors, and clients via e-mail and telephone; meet with same

The petitioner also submitted an April 24, 2002 letter stating that “the beneficiary has been continuously employed in an executive capacity since January 1999 and is talented in marketing and management.”

In a request for additional evidence, the director requested a copy of the foreign entity’s organizational chart listing the employees under the beneficiary’s supervision. The director also requested a more detailed description of the beneficiary’s duties abroad indicating the percentage of time the beneficiary spends in each of the listed duties.

In response, the petitioner resubmitted the foreign entity’s organizational chart described above. In the May 14, 2002 response letter, the petitioner stated that the number of employees is not determinative. The petitioner stated that the beneficiary is an executive and reiterated the statutory definition of an executive pursuant to section 101(a)(44)(B) of the Act.

In his decision, the director denied the petition and determined that the petitioner had not established that the beneficiary had been employed abroad in a primarily managerial or executive capacity. The director found that the beneficiary was providing the services of the business. The director also found that the employees working under the supervision of the beneficiary perform the duties of their particular position rather than work through other executives, managers, or professionals.

On appeal, counsel states that the beneficiary’s duties as president and CEO of the foreign entity are primarily executive in nature. Counsel states the beneficiary directs the company’s investment activities which is a major function of the organization. Counsel describes the beneficiary as being “directly responsible for the investment by overseeing the investment of all corporate finances and is directly responsible for the investment opportunity. He establishes goals and policies for the investment component of the foreign entity and all investment decisions are completely within his discretion.” In addition, counsel asserts that the beneficiary fits into the definition of an executive because he acts independently and receives no supervision or direction from higher-level executives. Finally, counsel asserts that the director’s findings were based on the fact that the foreign entity is small.

In 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). On review, the petitioner has failed to establish that the beneficiary is employed in a managerial or executive capacity abroad as required by 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner provided a vague and nonspecific description of the beneficiary’s duties that fails to establish what the beneficiary does on a day-to-day basis. The beneficiary’s foreign duties include “analysis of cash flow, allocation of financial resources in foreign currency diversifying investments and stock portfolio, review of stock market quotes in Polish stock market and international stock markets and coordination of stock investments.” The petitioner did not, however, define or clarify these duties, or explain how they are executive in nature. 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). 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)).

In addition, the beneficiary attends exhibitions to locate new investment opportunities and markets current investments. The petitioner describes the beneficiary as being involved in the negotiating process of setting up prospective investments. Since the beneficiary actually researches, markets, and negotiates, he is performing the tasks necessary to provide a service or product rather than directing a function of the foreign entity. 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).

The AAO will now turn to whether the beneficiary is acting as a function manager for the foreign entity. On appeal, the petitioner claims that the beneficiary is an executive who directs a function of the foreign entity. 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). 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*, *supra*. In this matter, the petitioner claims that the beneficiary is directly responsible for the function of investment opportunities. However, to allow the broad application of the term "essential function" to include such broad claims, without identifying a specific function, would render the term meaningless. The beneficiary's duties indicate that the beneficiary is performing the function rather than directing the function.

Moreover, counsel also asserted that the director based his decision on the small size of the foreign entity. 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. Counsel correctly observes 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 nonimmigrant visa to a manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for 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, 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. *Id.*

After careful consideration of the evidence, the AAO concludes that the beneficiary has not been employed in a qualifying managerial or executive capacity abroad. For this reason, the petition may not be approved.

The third issue in this proceeding is whether the petitioner will support an executive or managerial position within one year of operation. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

On April 25, 2002, the petitioner filed Form I-129. On Form I-129 the petitioner described the beneficiary's proposed U.S. duties as:

Overseeing the initial start-up of the Company, representing the shareholders, managing the corporation, naming, hiring and supervising officers, and developing new business opportunities, including attending major product shows to advertise the [U.S. entity's] folio.

In addition, the petitioner described the beneficiary's proposed duties in an April 24, 2002 letter as the chief operating officer in a new office who will perform the duties listed above in addition to reporting directly to the foreign entity.

On June 28, 2002, the director denied the petition and determined that the proposed duties did not establish that the beneficiary will be employed in a primarily executive or managerial capacity within one year if the petition was approved. The director stated that "given the fact that the foreign entity does not support the beneficiary in an executive or managerial capacity, it is not clear how the petitioning entity will support the beneficiary in a managerial or executive capacity within one year if the petition was approved."

On appeal, counsel states that the director's decision to deny the petition stating that the new office will not support the beneficiary in a primarily "executive or managerial capacity within one year is entirely based on the erroneous determination that [the beneficiary] is not primarily engaged in executive duties with the foreign entity."

As previously stated, in 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). On review, the AAO is not persuaded that the beneficiary will be employed in a primarily managerial or executive capacity or that the petitioner will support a managerial or executive position within one year of the visa approval. The petitioner has provided a very brief, vague, and nonspecific description of the beneficiary's proposed duties that fail to establish what the beneficiary's duties will be on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "Overseeing the initial start-up of the Company, representing the shareholders, managing the corporation" However, these duties are generalities that fail to describe how the beneficiary will oversee the initial start-up phase or manage the corporation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra.*

In addition, the petitioner describes the beneficiary as being involved in developing new business opportunities. Since the beneficiary will actually be developing the business opportunities, he will be performing a task necessary to provide a service or product. 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, supra*. The beneficiary's proposed duties suggests that the beneficiary will not be relieved from performing nonqualifying managerial or executive duties within the first year of operation. Although the petitioner stated that it supports two full-time managers, the petitioner failed to provide evidence of the claimed employees or adequately describe the organizational structure of the U.S. entity. It is also unclear how the foreign organization supports the petitioner's business plan or its relationship to the U.S. entity. 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, supra*.

After careful consideration of the evidence, the AAO concludes that the petitioner will not support a managerial or executive position within one year of operation. For this additional reason, the petition may not be approved.

Beyond the decision of the director, a related issue is whether the petitioner has established that it has secured sufficient physical premises to house the new office. The petitioner submitted a copy of its lease. However, the lease that the petitioner submitted is a residential rental agreement rather than a commercial lease for the distribution of its print media products. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient space to house the new office. 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). For this additional reason, the petition may not be approved.

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.