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U.S. Citizenship
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FILE:



Office:

TEXAS SERVICE CENTER



Date:

MAY 23 2005

IN RE:

Petitioner:



Beneficiary:

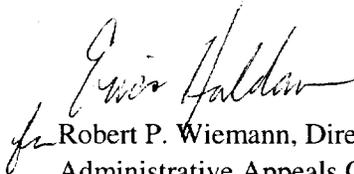
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner, Clafen Import-Export, L.L.C. d/b/a Dollar Party Store Plus, endeavors to classify the beneficiary as a 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 to be a subsidiary of Inversiones Nace, located in Colombia and is engaged in the retail store business. It seeks to extend the petition's validity and the beneficiary's stay for two years as the U.S. entity's general manager. The petitioner was organized in the State of Florida in 1999 and claims to have three employees.

In his decision, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity.

On appeal, the petitioner refutes the director's findings and submits additional evidence.

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)(14)(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.

The issue in this proceeding is whether the beneficiary has been and will be primarily performing executive or managerial 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 November 18, 2002, the petitioner described the beneficiary's proposed U.S. duties on the Form I-129 as "oversee[ing] the entire management of [U.S.] start-up operations, supervision of employees; budgeting." Additionally, in a November 15, 2002 supporting letter, the petitioner described the amount of time the beneficiary spends on the following duties:

(25%) Networking with business industries in community to identify and cultivate new information sources, attend trade shows and conferences to keep abreast of the retail sales industry; Travel to various parts of the Florida area to communicate with the various suppliers, distributors.

(20%) Monitor the activities of all employees, including the Sales Manager and Assistant Manager, and future employees when they are to be hired.

- (15%) Preparation of budget for the operations and monitor finances; Determination of needs of the [U.S.] company, including purchasing the equipment, and inventory that will be used.
- (10%) Evaluate and review the services ultimately provided by the company to ensure it meets proper customer standards, and the products to ensure the conformity with standards; ensure that all licensing and regulatory standards are complied with[.]
- (10%) Identify new markets for penetration and develop market strategy accordingly.
- (15%) Establish supplier and distribution chains for purchasing operations, and monitor same.
- (5%) Misc.

On January 22, 2003, the director requested additional evidence. Specifically, the director requested an explanation of a discrepancy in the record concerning the number of workers employed by the petitioner. The director found that on the Form I-129, the petitioner listed three employees working for the company; however, the record indicated five workers including two unnamed sales assistants. The director also requested a copy of the latest Quarterly Tax Return for the U.S. company.

In response, the petitioner's counsel stated that the petitioner "currently has three employees." Counsel explained that the current staff included the beneficiary; [REDACTED] (Sales Manager); and [REDACTED] (Assistant Manager). Counsel further explained that the record indicated "an intention to hire additional Sales Assistants in the next several months." Counsel submitted a copy of the petitioner's most recent Quarterly Tax Return confirming employment of the claimed employees at the time of filing.

In his decision, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The director found that the majority of the beneficiary's workday was spent on the day-to-day operations of the U.S. business.

On appeal, the petitioner provides a summary of its recent business activities and states that "the personnel plan adjusted to the structure organizational." The petitioner asserts "the business plan must be reviewed and frequently be fit to changes in personnel, sales, marketing and finances."

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). On review, the petitioner has not established that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The beneficiary's described duties are vague and fail to specify what the beneficiary will be primarily performing on a day-to-day basis. For example, the petitioner described the beneficiary's duties as will be "oversee[ing] the entire management of [U.S.] start-

up operations,” “evaluat[ing] and review[ing] services,” and “identify[ing] and cultivat[ing] new information sources.” However, it is unclear how the beneficiary will oversee the entire management or what managerial tasks he will perform to identify and cultivate new information sources and “evaluate” services. 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).

Further, the petitioner submitted a breakdown of the beneficiary’s proposed U.S. duties. For example, the petitioner claimed that the beneficiary will be spending 25 percent of his time “networking” and “attending trade shows;” 15 percent of his time establishing and monitoring supplier and distribution chains for purchasing; 15 percent of his time “prepar[ing]” the budget and “monitor[ing] finances;” and 10 percent of his time “identify[ing] new markets” and “develop[ing] market strateg[ies].” Therefore, the beneficiary spends 65 percent of his time engaged in the daily operational tasks of the business. It appears from the record that the only individuals performing any marketing-related functions are the beneficiary and possibly the sales manager. As the sales manager’s duties have not been described, it can only be assumed, and has not been proven otherwise, that the beneficiary is performing all other marketing functions, including devising marketing plans, contacting advertisers, and performing any public relations tasks. 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. 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 addition, in the November 15, 2002 supporting letter, counsel claimed, “the beneficiary has extensive experience in this position with the foreign organization, other commercial establishments, and the [U.S.] company. He is, therefore, amply qualified to continue to manage the U.S. entity.” However, counsel failed to explain how the beneficiary will draw upon this knowledge and extensive experience for the benefit of the company, and how the beneficiary will primarily manage the 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)).

Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary’s 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 stated on the Form I-129 that the beneficiary’s proposed U.S. duties included the “supervision of employees.” Additionally, in the November 15, 2002 supporting letter, counsel described the beneficiary as spending 20 percent of his time “monitor[ing] the activities of all employees, including the Sales Manager and Assistant Manager.” 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 the subordinate employees. 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 matter, the petitioner has not, in fact, established that a bachelors degree is actually necessary to perform the duties of the sales manager or assistant manager. At most, the beneficiary may be acting, on occasion, as a first-line supervisor of non-professional employees. 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).

The petitioner has also not established that the beneficiary will manage a subordinate staff of managerial or supervisory personnel. It has been noted in the record that there are only three employees working at the retail store and that the beneficiary maintains a full-time position. Since the petitioner claimed that the beneficiary supervised a sales manager and an assistant manager, it is unclear as to who would actually perform the services of the business. The AAO notes that all of the employees have managerial or executive titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. There is no evidence in the record of any nonqualifying positions that have been filled, such as the two sales assistants whom counsel claimed have not yet been hired. Collectively, this brings into question how much of the beneficiary’s time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

The AAO notes that counsel explained in the February 3, 2003 letter responding to the director’s request for additional evidence, that the record indicated “an intention to hire additional Sales Assistants in the next several months.” However, 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).

Moreover, 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 “oversees the entire management of [U.S.] start-up operations.” 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. at 593, 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

After careful consideration of the evidence, the AAO concludes that the petitioner has failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO finds that the beneficiary has not been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). As previously stated, to establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. *Id.* The petitioner submitted a limited and vague description of the beneficiary's foreign duties. For example, the petitioner described the beneficiary's duties as "responsible for the formation and growth of the foreign company" and fifty percent of his time "planning and management of the different projects of the company." 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 sum, the AAO is not persuaded that the beneficiary has been employed in a primarily managerial or executive capacity abroad. For this additional reason, the petition may not be approved.

Another issue beyond the decision of the director is whether the petitioner has established that it maintained a qualifying relationship with the foreign entity. The petitioner has submitted insufficient evidence to establish that it has maintained a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner claims it is a subsidiary of the foreign parent company based on majority (51 percent) ownership of its shares. The petitioner further indicated that the companies have the same relationship as they did during the beneficiary's one-year of employment abroad. However, based on the documents submitted, it is evident that the parent-subsidiary relationship, if it exists at all, did not exist until days prior to the filing of the instant petition. At the time of filing, it appears the foreign company was owned by eight individuals, one of who held a majority of the shares. The petitioner submitted a corporate resolution from a shareholders meeting held on November 14, 2002, indicating that the company was owned by the following members: the beneficiary (33.6 percent), [REDACTED] (44.9 percent), and [REDACTED] (21.5 percent). According to the meeting minutes, each member transferred a portion of their interest to the foreign entity so that the resulting ownership was: [REDACTED] Ltda (51 percent); [REDACTED] (22 percent); the beneficiary (15.46 percent); and [REDACTED] (10.54 percent). The petitioner submitted membership certificates numbered 13 through 16 issued to the above-named members. The instant petition was filed on November 18, 2002.

However, the beneficiary was first granted L-1A status in November 1999. Although the petitioner indicates that there has been no change in the corporate relationship, it is evident that

the foreign company had no ownership interest in the petitioner prior to November 2002. Based on the evidence submitted, at the time of the beneficiary's transfer to the United States, the petitioner was owned by twelve members, none of who had more than a 20 percent interest in the company. A certificate of existence for the foreign company, dated August 2000, indicates that it was owned by nine individuals, with no majority owners. There is no evidence of sufficient common ownership and control by an individual or group of individuals sufficient to establish an affiliate relationship. See 8 C.F.R. § 214.2(l)(1)(ii)(L). In order to qualify for this visa classification, the petitioner must establish that the beneficiary worked for a foreign parent, subsidiary, branch or affiliate of the petitioner for at least one year out of the three years preceding his transfer to the United States. In the present matter, either the petitioner did not comply with this requirement, misrepresented that they had complied, or the director committed gross error in approving the previous petitions without evidence of the petitioner's qualifying relationship with a foreign entity. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. See 8 C.F.R. § 214.2(l)(9)(iii).

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 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.

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



U.S. Citizenship
and Immigration
Services

D7

[Redacted]

File: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 26 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:
[Redacted]

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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a CIS office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office.

The record indicates that the director issued the decision on April 23, 2004. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. According to the date stamp on the Form I-290B Notice of Appeal, it was received by CIS on May 27, 2004, or 34 days after the decision was issued. Accordingly, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director declined to treat the late appeal as a motion and forwarded the matter to the AAO.

As the appeal was untimely filed, the appeal must be rejected.

ORDER: The appeal is rejected.