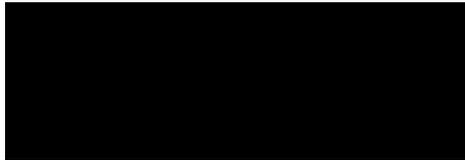


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Services

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File: SRC 03 114 53458 Office: TEXAS SERVICE CENTER Date: NOV 10 2005

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

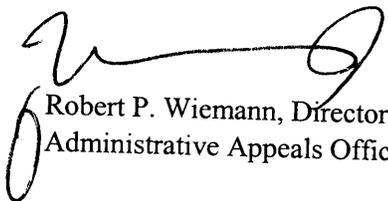
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Texas that operates a travel agency. The petitioner claims that it is the subsidiary of Amerinter Viajes y Turismo S.R.L., located in Caracas, Venezuela. The beneficiary was initially granted a one-year period of stay in L-1A status in order to open a new office in the United States, and the petitioner now seeks to extend his stay for a one-year period.

The director denied the petition concluding that the petitioner did not establish that: (1) the beneficiary would be employed in the United States in a primarily managerial or executive capacity; or (2) the petitioner had been doing business for the year preceding the filing of the petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner provides a new organizational chart and submits additional evidence to establish that the U.S. company has been doing business. The petitioner claims that the beneficiary is eligible for an extension of status based upon this additional evidence.

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 first issue in the present matter is whether the beneficiary will be employed by the United States entity in a 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.

The petition was submitted on March 14, 2003. The petitioner indicated on Form I-129 that the beneficiary would serve as president responsible for the "overall management of the corporation," and claimed to employ three individuals. The petitioner submitted a letter dated March 9, 2003, but did not include a description of the beneficiary's job duties. In addition, the petitioner provided an organizational chart depicting a president, a general manager, a marketing employee, a subcontracted accountant, a tourism packages coordinator overseeing cruises and ground packages, and a ticket sales employee overseeing national and international tourism. Finally, the petitioner submitted its Florida Forms UCT-6, Employer's Quarterly Report, for the last two quarters of 2002, which show four employees in each quarter.

On March 26, 2003, the director requested additional evidence. In part, the director requested a new organizational chart including its employees' names, positions, start date with the petitioner, and whether the employees are employed on a full-time or part-time basis. The director also instructed the petitioner to submit evidence establishing that the beneficiary is to be employed in an executive or managerial position. The director noted that the petitioner's statement must provide the number of subordinate managers, supervisors or other employees who report directly to the beneficiary and a brief description of their job titles and duties.

In a response received on May 5, 2003, the petitioner provided a letter from the foreign entity's president, who provided the following description of the beneficiary's duties:

[H]e directs the management of the corporation, he is directly responsible for all aspects of the corporation. [The beneficiary] directs the operations of the corporation through subordinated managerial and non-managerial personnel. . . .he has three employees whom report directly to him, they are:

1. Mr. [REDACTED] who is in charge of the Ticket Sales department, his task is to provide sales and reservations of airline tickets at national and international levels, reservations of hotels and cars for leasing and to provide customers information about documentation needed for international trips.
2. Mr. [REDACTED] who is in charge of the coordination of tourism packages, his task is to coordinate tourist packages for summer camps, winter events and singles packages, coordinate events and conventions, special tour packages for students and adults according to age and interest and be able to offer the adequate cruise according to the customer needs.
3. Mrs. [REDACTED] who is in charge of the marketing aspect of our corporation coordinating the designs and marketing plans to offer our products like tourist packages, airline tickets, cruises, hotel and auto reservations ensuring that quality control policies were enforced and the services satisfied clients' standards.

In addition [the beneficiary] conducts and controls all operations and strategic management activities of [the petitioner] in the United States, these [sic] includes setting and reviewing corporate objectives; supervise marketing coordinator, sales and purchasing; directing the expense controls of the corporation, including outsourcing services, personnel evaluation, periodic review of financial statements and analysis of corporation; development of business opportunities and review the progress and performance of the U.S. corporation.

[The beneficiary] has ultimate responsibility to establish goals and policies of the corporation in all areas and he exercises latitude with regard to discretionary decision-making.

In this executive position [the beneficiary] through subordinated managerial personnel ensures that [the petitioner] delivers and maintains the highest quality of services provided by our corporation.

The petitioner submitted a new organizational chart showing the beneficiary as president and general manager and depicting the organizational structure described in the foreign entity's letter. The chart indicates that the ticket sales employee and tourism packages coordinator are employed full-time, while the marketing employee works part-time.

The director denied the petition on May 16, 2003 concluding that the petitioner did not submit evidence that the beneficiary would be employed in a managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary's position "is of a managerial and executive nature." The petitioner submits a new organizational chart and claims that the person who prepared the previous chart "did not have the knowledge of that structure." The new chart depicts Joseph Bodner in the position of general manager and a different individual, [REDACTED] in the position of tourism packages coordinator, the position previously attributed to Joseph Bodner. The chart indicates that [REDACTED] was hired on a full-time basis in April 2002. The petitioner also re-submits copies of its Florida Forms UCT-6, Employer's Quarterly Report, for the last two quarters of 2002.

Upon review, the petitioner's assertions are not persuasive. As a preliminary matter, however, the AAO notes that the director failed to address the specific deficiencies in the petitioner's evidence in her decision to deny the petition. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. See 8 C.F.R. § 103.3(a)(1)(i). The reasons given for the denial in the directors May 16, 2003 decision are conclusory with no specific references to the evidence entered into the record. As the AAO's review is conducted on a *de novo* basis the AAO will herein address the petitioner's evidence & eligibility. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.

Rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For example, the petitioner indicates that the beneficiary "directs the management of the corporation," "has the ultimate responsibility to establish goals and policies of the corporation," and "exercises latitude with regard to discretionary decision-making." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The remainder of the description submitted by the petitioner was brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform for the U.S. company. For example, the petitioner states that the beneficiary's duties include "setting and reviewing corporate objectives," "directing the expense controls," and "development of business opportunities." The petitioner did not, however, define the beneficiary's objectives or describe what specific efforts the beneficiary takes to "direct expense controls," or "develop 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)). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The provided job description does not allow the AAO to determine the actual tasks the beneficiary performs, such that they can be classified as managerial or executive in nature.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

Although the petitioner indicates that the beneficiary "directs the operations of the corporation through subordinated managerial and non-managerial personnel," the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of operating a travel agency.

The AAO acknowledges the petitioner's submission of a new organizational chart on appeal that elevates the employee previously identified as "tourism packages coordinator" to the position of general manager, a position previously attributed to the beneficiary. The latest version of the organizational chart also includes a full-time employee, [REDACTED] who was not previously identified by the petitioner, although the petitioner claims that he was hired in April 2002. Although the petitioner asserts that there was simply an oversight in the preparation of the previous chart, the AAO notes that [REDACTED] does not appear on the petitioner's Florida Forms UCT-6, Employer's Quarterly Report, for 2002, nor was he mentioned in the description of petitioner's staffing levels provided by the foreign entity in response to the director's request for evidence. 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). The petitioner's unsupported claim that the person who prepared the petitioner's original organizational chart "was not knowledgeable of the structure" is not sufficient to establish that the chart submitted on appeal is an accurate representation of the petitioner's actual organizational structure. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. *See, e.g., Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Rather, it appears that the petitioner is attempting to add another level of management to the petitioner's structure on appeal in order to insulate the beneficiary from the appearance of being a first-line supervisor. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions.

Given the indefinite description of the beneficiary's job duties and the indiscriminate manner in which the petitioning company rearranged its organizational chart, the petitioner has not established that the beneficiary is to be employed in a primarily managerial or executive position. The description of the duties to be performed by the beneficiary in the proposed position does not persuasively demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties, or that the beneficiary will function at a senior level within an organizational hierarchy, other than in job title. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner has established that it has been doing business for the year preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(14)(B).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) states: “*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.”

The petitioner must therefore establish that the U.S. company has been doing business since the approval of the initial “new office” petition on March 27, 2002. In support of the initial petition, the petitioner submitted, in part, copies of nine invoices for airline tickets sold between October and December 2002, a Florida Seller of Travel License that expired on March 18, 2003, an expired commercial lease made between the petitioner and “Telexpress World,” and its 2002 IRS Form 1120, U.S. Corporation Income Tax Return showing gross receipts of \$458,352.

In her request for evidence, the director noted that the petitioner’s lease agreement expired on March 14, 2003 and requested a copy of a valid agreement. The director also requested photographs of the U.S. entity’s premises illustrating the outside of the building, the outside of the particular office, and the interior of the office. In response, the petitioner submitted photographs and a new lease agreement made between the petitioner and Telexpress World for the same location, valid from March 15, 2003 to March 14, 2004. The photographs show the storefront for Telexpress World, with a small sign identifying the petitioner’s name on the door.

The director denied the petition concluding that the petitioner failed to submit evidence that U.S. company had been doing business for one year.

On appeal, the petitioner submits copies of invoices and payment receipts, evidence of commissions paid to the U.S. company by travel service providers, commercial reference letters, and other documents in support of its assertion that the U.S. company had been doing business for the previous year at the time the petition was filed.

Upon review, the petitioner’s assertions are persuasive. The AAO notes that the initial filing did not include sufficient evidence to establish that the petitioner had been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(B). However, before denying the petition on these grounds, the director should have first requested additional documentation pursuant to 8 C.F.R. § 103.2(b)(8). Furthermore, as noted above, when denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). In her May 16, 2003 decision, the director merely concluded that the petitioner was not doing business without specifically addressing the deficiencies in the evidence submitted. Accordingly, the AAO will consider the newly submitted evidence.

The documents submitted on appeal are sufficient to establish that the petitioner was doing business as a travel agency during the year preceding the filing of the petition. Accordingly, the director’s determination with respect to this issue only will be withdrawn.

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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.

ORDER: The appeal is dismissed.