

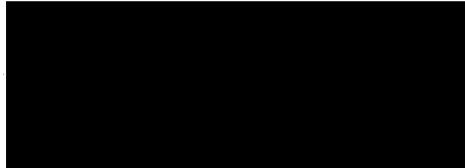


U.S. Citizenship
and Immigration
Services

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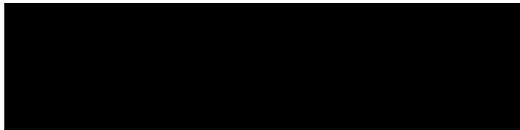
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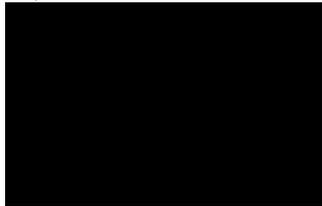
File: SRC 04 120 53109 Office: TEXAS SERVICE CENTER Date: NOV 28 2005

IN RE: Petitioner:
Beneficiary:



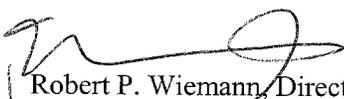
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 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 limited liability company organized in the State of Florida that is engaged in real estate development. The petitioner claims that it is the subsidiary of Nadal SA, located in Port-au-Prince, Haiti. 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 petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity with the United States entity.

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, counsel for the petitioner disputes the director's findings and asserts that the beneficiary's job duties will be "executive/managerial" in nature. Counsel offers further explanation as to how the beneficiary's duties qualify as executive responsibilities, and claims that he will not be engaged in the actual performance of the company's day-to-day functions. Counsel also clarifies that the petitioning company does not yet require support staff, but notes that the petitioner does supervise a certified public accountant and a real estate agent. Counsel submits a brief and additional evidence in support of the appeal.

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 the present 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.

The petition was submitted on March 23, 2004. On the Form I-129, the petitioner indicated that it "intends to hire 5 employees," and described the beneficiary's proposed duties as:

Manage and direct supervision of employees with the responsibility to hire and fire staff. Acquire investments for the corporation, implement marketing and advertising methods. Initiate business strategies and direct policies. Direct responsibility for the management of purchases.

The petitioner discussed its first year of operations and the beneficiary's duties in a letter dated March 16, 2004:

In this first year of operation [the petitioner] was mainly engaged in research and procurement of investment properties in order to establish a secure financial base for the company. Within the next 2 years [the beneficiary] will add three commissioned sales representatives responsible for promoting property sales, an accountant to be in charge of the company's financial matters, and a secretary to handle general office duties. . . . [The beneficiary] will remain as manager of [the petitioner] and will continue the day-to-day operations of the company. [The beneficiary] will also evaluate the performance of personnel, assign duties to the workers, recommend the hiring and the dismissal of workers, and control the budgeting for business entity. [The beneficiary] will have the discretionary authority in coordinating the projects and will be responsible for the proper execution of the work on all accounts.

On April 16, 2003, the director requested additional evidence, in part instructing the petitioner to: (1) identify any other employees and explain their duties and educational background; (2) explain how the beneficiary will not be engaged in the day-to-day operations of the business and will be primarily engaged in managerial

or executive duties; (3) provide copies of its Employer's State Quarterly Tax Return for the past two quarters with evidence of payments made; and (4) provide a copy of its IRS Form 940 EZ, Employer's Annual Federal Unemployment Tax Return.

In response, counsel for the petitioner submitted a letter dated June 22, 2004, in which he stated:

There are no other employees working for the Petitioner, as the nature of the business does not require additional employees. There are no day-to-day activities to be monitored such as supervision of employees, preparation of documents as all pertinent documentation is prepared by real estate agents/brokers, bankers, accountants and attorneys. The Petitioner...is engaged in the purchase and development of investment properties.

* * *

[The beneficiary] functions strictly in a managerial capacity as defined under INA 101(a)(44), 8 U.S.C. § 1101(a)(44); 8 C.F.R. § 214.2(l)(1)(ii)(B) as he is solely responsible for reviewing financial documentation in order to determine feasibility of investments and subsequent purchases thereof. Moreover, [the beneficiary's] duties cannot be delegated to employees or outsourced. He reviews monthly real estate analysis and negotiates business transactions with real estate developers and sellers. [The beneficiary] attends meetings with real estate developers, real estate agents/brokers and condo association board members in order to ascertain code and zoning regulations. [The beneficiary] allocates funds to execute investments. These duties do not occur on a day-to-day basis. For all the reasons stated above, [the beneficiary] does not and will not engage in the day-to-day operations of the business.

On July 8, 2004, the director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in a managerial or executive capacity. The director noted that the petitioner initially indicated that the beneficiary's duties included managing and directing employees, yet later stated that the nature of the business does not require additional employees. The director concluded that the evidence on record establishes that the beneficiary directly performs all of the day-to-day operations of the business rather than performing primarily managerial or executive duties.

On appeal, counsel for the petitioner asserts that the beneficiary will function in an "executive/managerial" capacity. Counsel cites the definition of "executive capacity" pursuant to section 101(a)(44)(B) of the Act and provides examples of the beneficiary's duties intended to demonstrate that the beneficiary's position satisfies each component of the statutory definition. Counsel claims that the beneficiary does not engage in the day-to-day operations of the company or perform clerical or administrative duties. Rather, counsel asserts that the beneficiary hires real estate agents/brokers, accountants, lawyers and bankers to be "the commercial arms and legs" of the company. Counsel claims that the beneficiary directs these professionals and reviews their work product. In addition, counsel emphasizes that the beneficiary has wide discretion to make investment decisions, to devise investment strategies in order to ensure profitability, to oversee the company budget, and to "coordinate all the projects and investments."

Counsel further asserts that the director placed undue emphasis on the fact that the beneficiary is the sole employee of the petitioning entity and claims that the changes implemented by the Immigration Act of 1990 prohibit decisions on executive capacity to be made on the basis of the number of employees supervised. Counsel notes that the beneficiary made the decision to purchase individual condominium units prior to completion, so the petitioner has no reasonable need for additional employees to file statements, collect rent, or assist with the other day-to-day operations of property management. Finally, counsel discusses the petitioner's future plans to purchase a car dealership, to establish a marketing branch, and to purchase and remodel single family homes, and concludes that "a one-year period in L-1A classification is not always sufficient time to get a business operating to its full potential." Counsel submits a letter from the petitioner's certified public accountant and a letter from a real estate agent, confirming that the petitioner utilizes the services of these individuals.

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.* A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

The petitioner has only provided a vague job description that fails to demonstrate what the beneficiary does on a day-to-day basis. A large portion of the petitioner's job description for the beneficiary merely paraphrases 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 "exercises wide latitude in decision making," "establishes the goals and policies of the organization," and "directs the operations of the corporation." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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.).

As noted by the director, other portions of the beneficiary's job description are unsupported by, or even contradicted, by evidence in the record. The petitioner initially indicated that the beneficiary would "manage and direct employees" and later revealed that it had no employees and no immediate need for or intention to hire additional staff. The petitioner claims that the beneficiary attends meetings with county commission officials, developers, business leaders, bankers, contractors, prospective investors, customers and "other executives," but does not explain the purpose of these meeting or identify or document any major investment projects which would actually require the beneficiary to meet with the majority of the listed parties. 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)). Given the petitioner's stage of development at the time the petition was filed, these duties appear to be prospective in nature.

The remainder of the beneficiary's job description involves engaging in property research, market research, and financial analysis, which the petitioner claims were the company's main activities during its first year of operations. The petitioner has not shown that these duties are managerial or executive in nature. As the petitioner had only reserved the right to purchase two condominium units at the time the petition was filed, it is reasonable to assume that the beneficiary will be required to continue to devote the majority of his time to these non-qualifying duties until the petitioner is sufficiently developed to generate income and support a staff. The record also contains a February 23, 2003 letter from the petitioner's accountant that states: "[The petitioner] has contracted with a local business to provide [the beneficiary's] time in a consulting capacity, and that revenue pays [the petitioner's] overhead." The beneficiary's IRS Form 1040, U.S. Individual Income Tax Return, on Schedule C, Profit or Loss From Business, describes the petitioner's business activities as "real estate, business consulting." These documents suggest that the petitioner has not provided a complete description of the beneficiary's actual duties, and that some portion of his time is devoted to personally providing consulting services to other businesses. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In the instant matter, the petitioner has failed to show that the company, which has one employee, appears to operate out of the beneficiary's residence, and owns the right to purchase two individual condominium units that were not yet completed at the time of filing, requires the beneficiary to primarily perform managerial or executive duties. The petitioner has not demonstrated that non-qualifying duties will not constitute the majority of the beneficiary's time.

Counsel's claim that the beneficiary directs and reviews the work of professionals such as bankers, real estate agents, accountants, and lawyers, who perform the day-to-day operations of the company is not persuasive. While it appears the petitioner may occasionally require the services of these individuals, a distinction must be drawn between regularly supervising employees and occasionally working with an outside professional in order to accomplish a specific task. For example, utilizing a bank to arrange a mortgage loan does not equate to "directing and reviewing the work" of the banker, as suggested by counsel's argument. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the market research duties required to develop the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

On appeal, counsel 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 visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, 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.

On appeal, counsel argues that the beneficiary is an "executive/manager" who manages the functions of the petitioner. 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 term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). Counsel's general argument that the beneficiary manages all of the company's functions is insufficient in the absence of the required detailed job description and evidence that the beneficiary primarily performs managerial or executive duties. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

The AAO acknowledges the petitioner's claims that it intends to purchase businesses with existing employees and hire its own additional staff in the future. 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). Furthermore, as noted above, 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.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record reflects that the U.S. entity has been operating out of the beneficiary's residence. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. 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 petition without evidence of the petitioner's physical premises.

Although not addressed by the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status as required by 8 C.F.R. § 214.2(l)(14)(B), or evidence of the financial status of the U.S. company as required by 8 C.F.R. § 214.2(l)(14)(E). The petitioner submitted purchase and sale agreements for two individual units at "Wisperwood Condominium" but there is no evidence to establish that either purchase was completed prior to the date the petition was filed. The petitioner also submitted evidence that it paid \$5,000 in October 2003 to reserve the right to purchase a condominium unit in a building that was still under development with no completion date mentioned. The petitioner paid \$11,790 in September 2003 to reserve a unit in another "proposed" condominium building. There is no evidence of other business transactions occurring during the first year of operations. As evidence of its financial status, the petitioner submitted partial copies of bank statements and a one-page balance sheet dated January 6, 2004 that shows investment property assets of \$16,790. There is no evidence that the petitioner has provided goods or services or generated income since the approval of the beneficiary's initial petition in March 2003. The petitioner has not established that it has been regularly doing business during the first year of operations. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. 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.