



U.S. Citizenship
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File: SRC 04 179 50801 Office: TEXAS SERVICE CENTER Date: **OCT 28 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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida that is engaged in the retail and wholesale business.¹ The petitioner claims that it is the subsidiary of [REDACTED] located in Caracas, Venezuela.² 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 for two more years.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, the petitioner submits a statement in which it asserts that the director's denial of the petition was erroneous because the petitioner had established that the beneficiary qualified as a manager and/or executive.

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.

¹ It should be noted that, according to the Florida Department of State, Division of Corporations, the petitioner has been administratively dissolved due to its failure to satisfy the state's annual report requirements. Therefore, regardless of whether the petitioner's annual report issues in Florida can be easily remedied or not, it raises the critical issue of the company's continued existence as a legal entity in the United States.

² The AAO notes that the stock certificate submitted lists the owner of the petitioner's 1000 shares of stock as "Almacenes Laidy, S.R.L." The AAO presumes that this is the Spanish spelling of the foreign entity named in the petition as the parent company abroad. 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).

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;

- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, the petitioner submitted a letter dated May 27, 2004 in which it claimed that it currently employed the beneficiary and that the beneficiary was acting as its general manager. With regard to the beneficiary's role in the petitioner's organization, the petitioner stated:

[The beneficiary's] current position in [the petitioner] is General Manager, she is in charge of market development for the products and services offered by this Company[.] [The beneficiary] manages and set[s] standard[s] for the following: 1.- To hire and dismiss personnel, 2.- To set marketing guidelines and policies to be followed by the subsidiary, 3.- To create and set sales strategies already established by the main Company, in order to enlarge the market range to be reached by the subsidiary, 4.- To coordinate the sales department and assure the supply of qualities [sic] services, aiming to achieve the profitable goals set forth by the main company. To proceed to these tasks our General Manager ([the beneficiary]) can hire as many employees as she considers necessary to carry out the business of [the petitioner][.] [T]hese employees shall work directly under [the] supervision of [the beneficiary], who reports only to the Stockholders of [the foreign entity].

On July 7, 2004, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization. The director further concluded that the petitioner had not reached the point where it could employ the beneficiary in a primarily managerial or executive capacity, noting that at the time of the petition's filing it employed only one other person in addition to the beneficiary.

On appeal, the petitioner restates the beneficiary's qualifications, and asserts that the short time in which the petitioner has been a functioning company should be considered when reviewing the actual duties performed by the beneficiary. Furthermore, the petitioner asserts that the beneficiary is planning to hire subordinate staff members, but until then she will continue to perform the day-to-day duties of the business.

Upon review, the petitioner's assertions are not persuasive. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is an executive by virtue of her position title, experience, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed executive duties. 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).

At the time of filing, therefore, the petitioner was an almost two-year old retail and wholesale establishment that claimed to have a gross annual income of \$32,500. The firm employed the beneficiary as general manager. The description of the beneficiary's duties, provided in the initial letter of support, is vague and seems to merely repeat the regulatory definitions. Specifically, the identification of duties such as "hire and dismiss personnel," "set marketing guidelines and policies," and "create and set sales strategies" do little to clarify what the beneficiary does on an average workday. In fact, these duties are extremely similar to and simply paraphrase the executive duties set forth in Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co.*, 724 F. Supp. at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). In addition, another duty identified as "coordinate the sales department" is inconsistent and contradictory to the petitioner's statements, since by the petitioner's own admission, the beneficiary is the sole employee of the petitioner and thus there is currently no evidence of a sales department.

The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co.*, 724 F. Supp. at 1108. In reviewing the beneficiary's stated duties, it appears that the majority of her time is devoted to the company's marketing and acquisitions. Furthermore, it appears that based on the petitioner's statements, the petitioner is still in a start-up phase. Since the beneficiary is the sole employee of the petitioner, it appears that all sales and customer service tasks are likewise performed personally by the beneficiary. 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).

Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as general manager and no subordinate staff. The petitioner indicates that the business is still developing, and once fully operational, it will hire additional employees. It is evident, therefore, that without the required staff, the beneficiary is required to perform the duties that would normally be delegated to subordinate employees in order to keep the business operational. Although the petitioner asserts that the beneficiary is truly acting in a managerial capacity, the petitioner provides no independent evidence to corroborate these claims. 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. 158, 165 (Comm. 1998).

CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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. Although the petitioner on appeal alleges that numerous new employees will soon be retained, and that the delay in becoming fully operational is attributed to the start-up phase of the petitioning entity, these assertions are not persuasive. The petitioner must establish eligibility at the time of filing. 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). In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties would be primarily managerial or executive in nature. For this reason, the petition may not be approved.

Beyond the decision of the director, the petition also may not be approved because there is insufficient evidence that the petitioner has been doing business for the previous year as required by the regulations. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "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." 8 C.F.R. § 214.2(l)(1)(ii)(H). There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, although the petitioner has entered into a commercial lease and submits pamphlets and promotional materials, there is no evidence that it has been continually providing goods or services during the previous year as required by the regulations. For this additional reason, the petition may not be approved.

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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.

ORDER: The appeal is dismissed.