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File: LIN 04 214 52759 Office: NEBRASKA SERVICE CENTER Date: **APR 03 2006**

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: 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 R. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the petition for a nonimmigrant visa, and 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 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 Florida that is engaged in providing commercial and industrial exterior insulation and plastering. The petitioner claims that it is a wholly-owned subsidiary of [REDACTED], located in Montreal, Quebec, Canada. The beneficiary was originally granted a one-year period of stay in the United States which was subsequently granted for an additional year. The petitioner now seeks to extend the beneficiary's stay for an additional three 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. On appeal, counsel<sup>1</sup> for the petitioner contends that the beneficiary has been performing exclusively executive duties since the beginning of his employment with the U.S. entity. In support of this contention, counsel submits a brief and 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.

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<sup>1</sup> It is noted that the petition and appeal were prepared by an attorney in Canada. Although the petition is accompanied by a Form G-28, Notice of Entry of Appearance by an Attorney or Representative, the Canadian attorney has not established that she is a licensed attorney or an accredited representative authorized to undertake representations on a petitioner's behalf. See 8 C.F.R. §292.1. Moreover, the foreign attorney's claim to a right to notice in this proceeding under 5 U.S.C. § 500(f) is unfounded, as she has not demonstrated that she is qualified under either section 500(f) or (c) of that same title. Accordingly, the foreign attorney's appearance will not be recognized, and the assertions made by the foreign attorney will not be given any weight in this proceeding.

- (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 primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity. Although the petitioner alleges that the beneficiary has been operating in a capacity that is primarily executive, the AAO will consider the beneficiary's eligibility under the regulatory definitions of both managerial and 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.

With the initial petition, counsel submitted a letter of support from the petitioner's vice president, which described the beneficiary's duties as follows:

As president of [the petitioner, the beneficiary] will be in charge of the overall management, procedures, and operations as well as overseeing the hiring and training of key American personnel. He will also be responsible for the customer relations, market research and development and the overall administration of the company. He will be in charge of the administration of the corporation and head the negotiations with our clients.

The petitioner also provided an organizational chart which demonstrated the beneficiary's position in the petitioner's organizational hierarchy. Specifically, the chart indicated that the beneficiary oversaw the vice-president, and that both he and the vice-president, Raphael Francoeur, jointly supervised and/or were assisted by an unidentified executive assistant. The chart further demonstrated that below the vice-president were two unnamed supervisors, namely, an insulation supervisor and an exterior coating installation supervisor. Below these supervisors were multiple laborer positions, all of which were unfilled.

The director found this initial evidence to be insufficient, and consequently issued a request for evidence (RFE) on August 5, 2004. The RFE requested the petitioner to submit additional information that established that the beneficiary would function in a capacity that was primarily managerial or executive. Specifically, the director requested more specific evidence of the beneficiary's duties as president, along with an overview of his position in the organizational hierarchy of the petitioner and the duties and roles of his subordinates.

In a response dated August 20, 2004, the petitioner, through counsel, submitted the requested information. The petitioner indicated that the beneficiary was functioning in an executive capacity, and provided the following updated description of his duties:

***1. Direct the management of the organization or a major component or function of the organization[.]***

As President and founder of the Canadian and American company, [the beneficiary] has executive authority on all the operations of the companies [sic]. [The beneficiary] has created and managed the Canadian company since 1993. He has acquired proprietary knowledge that makes him the only possible choice as the President of the American company. He represents the company or delegate[s] representatives to act on behalf of the company in negotiations and/or other official functions. He has the last word on any direction the company takes.

***2. Establishes the goals and policies of the organization, component, or function[.]***

[The beneficiary] establishes the short-term and long-term goals for the company and decides on a series of strategies and policies to ensure that these specific goals are achieved in the most effective way. He is [the] individual responsible for the success of the company.

**3. Exercises wide latitude in discretionary decision-making[.]**

[The beneficiary]

- Allocates all material, human, and financial resources to implement company policies and programs;
- Establish[es] all financial and administrative controls;
- Approve[s] overall personnel planning.

**4. Receives only general supervision and direction from higher level executive[s], the board of directors, or stockholders of the organization[.]**

[The beneficiary] is the Owner and President of the company. He does not report to anybody.

The petitioner further provided information with regard to the staffing of the U.S. entity, and advised that in addition to the beneficiary and the vice-president [REDACTED] the petitioner also employed the following employees:

- [REDACTED] Polymer Specialist
- [REDACTED] U.S. Laborer
- [REDACTED] U.S. Laborer

The petitioner also provided copies of its W-2 Forms for 2003, which demonstrated that only the beneficiary and the vice-president were employed by the petitioner in 2003. The petitioner submitted quarterly wage reports for the quarters ending March 31, 2004 and June 30, 2004, both of which reported wages paid only to the beneficiary and the vice-president during this period. With regard to the newly-identified workers, the petitioner submitted some additional documentation, in the form of what appear to be payroll records, for various periods during 2003 and 2004.

On September 15, 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 and would act as a first-line supervisor as opposed to a manager or executive as required by the regulations.

On appeal, counsel asserts that the director's conclusion was erroneous and that the beneficiary in fact is primarily an executive. She claims that the beneficiary's proprietary knowledge of the petitioner's business makes his services absolutely essential to the success of the U.S. enterprise and that since the beneficiary

personally holds the necessary licenses essential to the petitioner's operations, his services in the United States are not expendable.

Upon review, counsel'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* §§ 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is primarily an executive by virtue of his position title, experience, and associated duties. However, the description of duties provided is vague and not comprehensive in that it fails to specify the exact nature of the claimed qualifying 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).

The description of the beneficiary's duties, provided in the initial letter of support as well as in response to the director's request for evidence, is vague and seems to merely paraphrase the regulatory definitions. More specifically, counsel on appeal addresses each prong of the regulatory definitions and summarizes the beneficiary's duties by inserting the key language of the regulations. The description of duties provided, however, does not specifically identify what the beneficiary actually does on a routine workday. The identification of duties such as "establish short-term and long-term goals," "establish all financial and administrative controls," and "approve overall personnel planning" did little to clarify what the beneficiary does on an average workday. In fact, some of these duties are extremely similar to the executive duties set forth in section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

Additionally, the director based his decision partially on the size of the enterprise and the number of staff employed by the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a 5-year-old exterior insulation and plastering business that claimed to have a gross annual income of \$456,977.00. The firm employed the beneficiary as president, plus a vice-president. In response to the request for evidence, the petitioner submitted copies of payroll documents dated March 27, 2004 and May 29, 2004 which suggested that wages were paid to a polymer specialist, and in addition, the petitioner submitted copies of payroll records from January and February 2003 which suggested that wages were paid to two laborers during that period. The petitioner relies on this scant evidence as support for its claim that the beneficiary is primarily an executive. This evidence, however, is not acceptable for several reasons.

With regard to the March 27, 2004 and May 29, 2004 wage documents suggesting the employment of a polymer specialist, there are numerous problems. First, the petitioner's quarterly wage reports for the quarters ending March 31, 2004 and June 30, 2004 do not list wages paid to the named polymer specialist. In fact, these documents indicate that wages were paid to only two employees during those two quarters; namely, the beneficiary and the vice-president. In addition, these documents are submitted in the French language without a certified translation. Because the petitioner failed to submit certified translations of the documents,

the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Consequently, the claim that the polymer specialist was employed by the petitioner at the time of filing is uncorroborated and cannot be established.

Second, the documentation showing wages paid to two laborers in January and February 2003 is likewise insufficient. As previously stated in the body of this decision, the petitioner submitted its W-2 and W-3 Forms for the calendar year 2003, which demonstrated that only two employees were paid wages by the petitioner in 2003; namely, the beneficiary and the vice-president. The wages allegedly paid to the laborers in the early months of that year are not documented. In addition, and most importantly, there is no evidence to indicate that these laborers were employed by the petitioner at the time the instant petition was filed. 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).

The petitioner, therefore, 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. 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 president and a vice-president, without any other employees to perform the actual labor involved in providing exterior insulation and plastering. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

On appeal, counsel alleges that although the petitioner has become operational, it is still in an expansion phase. Additionally, the organizational chart submitted for the record indicates that the petitioner intends to hire two supervisors and several laborers in the future. Finally, counsel alleges that based on its success in securing lucrative contracts, the petitioner is destined to become a successful operation in the near future with the beneficiary as its president. These contentions are not persuasive. As previously stated, 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. at 248.

In this matter, it appears that the beneficiary will be performing most of the day-to-day, non-qualifying tasks essential to the operations of the petitioner's business. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. § 101(a)(44) of the Act. In this case, however, the petitioner has failed to establish that the beneficiary has a sufficient subordinate staff to relieve him from performing these non-qualifying duties. 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)). Absent evidence to the contrary, the record indicates that the beneficiary is not acting in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.