

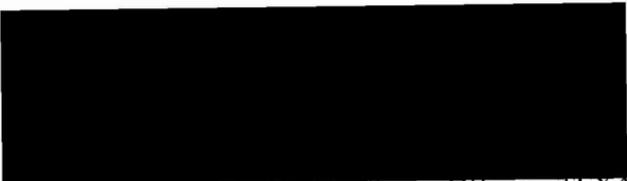


U.S. Citizenship
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File: SRC 04 133 52573 Office: TEXAS SERVICE CENTER Date: APR 03 2006

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:



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 seeks to employ the beneficiary 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 acquisition and refurbishing of houses and other structures. The petitioner claims that it is the subsidiary of [REDACTED] located in Nassau, Bahamas, and seeks to employ the beneficiary as its vice-president.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) the beneficiary was employed abroad in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's decision was incorrect as a matter of law, and that the beneficiary was in fact a qualified manager or executive. In support of this assertion, counsel submits a detailed 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.
- (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.

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

In a letter dated April 4, 2004, counsel for the petitioner explained that the beneficiary would be in charge of the day-to-day operations of the U.S. entity and that she would further be in charge of the management of the company's residential property division. No additional information was submitted.

Consequently, the director requested additional evidence on May 8, 2004. Specifically, the director requested more information to establish that the beneficiary would be employed in a capacity that was primarily managerial or executive. The director requested documentary evidence establishing this, and also requested copies of W-2 forms for the U.S. entity's employees for the previous year in order to verify the petitioner's claimed staffing levels.

In a response dated August 5, 2004, counsel for the petitioner provided a more detailed description of the beneficiary's duties. Specifically, counsel stated:

[The beneficiary] will resume her position of Executive Vice President of [the petitioner] and the Director of the Property Division. Currently, [the petitioner] is using a property management company . . . to oversee the redevelopment and management of twenty-five properties [the petitioner] owns in St. Petersburg, Florida. Upon [the beneficiary's] L-1A approval, she will take over this responsibility as well as duty for [the petitioner's] day-to-day operations. [The beneficiary] will be working closely with local housing officials as many of the homes are HUD homes and rented via the Section 8 provisions with specific rules and regulations in the amount of rent allowed and property standards.

No further information was submitted, and counsel advised that the petitioner's forms W-2 were not yet available.

On August 27, 2004, the director denied the petition. The director determined that the petitioner had failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. On appeal, counsel submits additional evidence in the form of contract sheets, and claims that in the industry, it is common for one principal to work with a small subordinate staff and sub-contractors.

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.* In this case, the initial description of the beneficiary's duties was too unspecific to determine the nature of her proposed position. In the request for evidence, definitive documentation establishing the managerial and/or executive capacity of the proposed position was requested. However, the petitioner, through counsel, provided another vague overview of the petitioner's business, and merely indicated that the beneficiary would take over the duties of the property management company currently providing these services for the petitioner. This updated description of duties was likewise insufficient. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In this case, it appears from the limited evidence in the record that the beneficiary, under the pretence of an executive title, will merely be operating a property management company. There is no evidence in the record

to establish that she will be overseeing a staff of managerial, supervisory, or professional employees. Although the record claims that the petitioner employs fifteen persons, no evidence of their actual employment has been submitted. In fact, counsel asserted that the W-2 forms establishing the employment of these persons were unavailable; however, no other evidence, such as payroll records or cancelled paychecks, were submitted in lieu of the W-2 forms. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). In addition, despite the director's specific requests for evidence, nothing definitive with regard to the exact nature of the beneficiary's day-to-day duties has been submitted.

Therefore, the record is not persuasive in establishing that the beneficiary will operate in a primarily managerial or executive capacity. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In conclusion, absent evidence to the contrary, it appears that by virtue of the minimal evidence and the statement that the beneficiary will "be in charge of the day-to-day operations" of the petitioner, it appears that the beneficiary will be primarily engaged in the tasks essential to the viability of the petitioner's business. Since there is no evidence of a subordinate staff who could relieve the beneficiary of these non-qualifying duties, the only feasible conclusion is that she will perform them herself. 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).

For this reason, the petition may not be approved.

The second issue in this matter is whether the beneficiary was employed abroad in a primarily managerial or executive capacity.

The petitioner provided no information regarding the beneficiary's duties abroad with the initial petition, aside from a brief comment on the L Supplement which stated that she supervised the daily activities of international property rentals. In response to the director's request for evidence, counsel merely stated in his August 5, 2004 letter that "[the beneficiary] was a Director and the Executive Vice President" of the foreign entity. No additional information was provided.

The director subsequently denied the petition on the alternative basis that the beneficiary had not been employed abroad in a managerial or executive capacity as required by the regulations based on the lack of evidence in the record. On appeal, counsel states that a director, officer or shareholder of a corporation, by definition, is an executive. No additional information was submitted.

Again, the petitioner's assertions are not persuasive. Whether the beneficiary will be a manager or executive employee turns on whether the petitioner has sustained its burden of proving that her 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 was a qualified executive abroad by virtue of her position title. However, the petitioner failed to provide a description of her duties, and the information contained in the record is vague and unpersuasive. 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, *aff'd*, 905 F.2d 41.

The record, once again, is not persuasive in establishing that the beneficiary was employed abroad in a primarily managerial or executive capacity. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner has failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioner and the foreign entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N at 362. Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control. This evidence was requested for both the petitioner and the foreign entity in the request for evidence issued on May 8, 2004. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence, yet now submits some corporate documentation on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

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 at 1043, *aff'd*. 345 F.3d 683.

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.