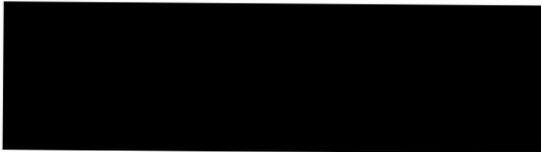


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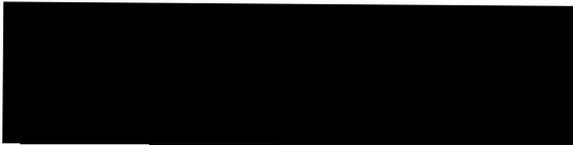
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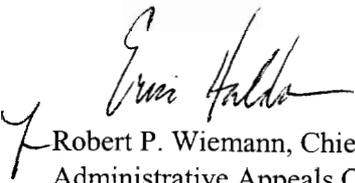
IN RE: Petitioner: 
Beneficiary: 

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)

ON BEHALF OF PETITIONER:



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, Chief
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, a Florida corporation, claims to be engaged in the wholesale purchase and sale of automotive accessories. The petitioner claims to be a subsidiary of Industrias Inoxcars La Original, C.A. located in Venezuela. Accordingly, the United States entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act as an executive or manager for two years. 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 in order to continue to fill the position of general manager.

The director denied the petition concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner states that the beneficiary is employed in a managerial capacity and the director erred by denying the petition. In addition, counsel for the petitioner indicates that the two other employees hired by the U.S. company provide the actual services and not the beneficiary himself. Counsel submits a brief in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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 issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means 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), provides:

The term "executive capacity" means 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 nonimmigrant petition was filed on December 1, 2004. The Form I-129 indicates that the beneficiary will be employed in the position of general manager for the petitioner. The beneficiary's proposed duties in the U.S. are described as the following:

This position is a key managerial position. He [the beneficiary] directs the management of the organization, plot[s] strategies for the expansion of the company, develop[s] business objectives and improve[s] the communication between the U.S. and the foreign company. He also reviews the company's financial statements, sales and activities reports to ensure that the company's objectives are achieved. Directs non-merchandise business activities, such as advertising, purchasing, credit and accounting services.

In addition, the petitioner submitted a job description for the beneficiary's position which included the following:

Inoxcars Racing Corp. has been established since 2003 and is engaged in the wholesale purchase and sale of automotive accessories. The transferee, [the beneficiary], will undertake a temporary assignment as the General manager and/or Chief Executive officer of the United States office in Miami. The duties of the position will be the following:

- Direct, plan and implement policies and objectives of organization for the US company;
- Direct activities inside the organization, establish responsibilities and coordinate the company functions;
- Analyze operations to evaluate company's performance and to determine area of cost reduction and program improvement;

-Review financial statements, sales and activity reports to ensure that the company's objectives are achieved;

-Direct and coordinates [sic] activities of business concerned with production, pricing, sales and/or distribution of products;

-Direct non-merchandise business's activities, such as advertising, purchasing, credit and accounting's services.

The petitioner submitted its IRS Forms 941, Employer's Quarterly Federal Tax Return, and its Florida Forms UCT-6, Employer's Quarterly Report, for the first three quarters of 2004. The documents show that the company had three employees as of September 30, 2004.

The director determined that the petitioner submitted insufficient evidence to process the petition. On December 20, 2004, the director requested that the petitioner submit the United States company's organizational chart including the names, job titles and detailed job description for all employees. The director also requested a more specific description of the day-to-day duties of the beneficiary's position including the percentage of time spent on each duty.

The petitioner submitted a response to the director's request for additional evidence on February 15, 2005. The petitioner submitted an organizational chart of the U.S. company indicating that the beneficiary holds the position of chief executive officer and general manager and supervises the administrative service manager who in turn supervises the customer's service representative. The chart indicates that the duties of the administrative service manager are the following: "oversees the day to day operations of the company, implement procedures to fulfill the goals established by the General Manager, coordinate and direct support company's services, including payroll." The job duties of the customer's service representative were described as: "Interact with customers to provide information in response to inquire about services and to handle general company's complaints, communicate with customers through a variety of means, either in person, by telephone, e-mail or regular mail correspondence, fax or internet."

In addition, the petitioner submitted a revised job description for the beneficiary. The revised petition states the following:

Direct the management of the organization, plot strategies for the expansion of the business in Florida and improve the communications between the U.S. and the foreign company; (30%)

Work closely with the U.S. customers, interacting with them and locate new clients; (20%)

Directs and coordinates activities related with pricing, sales and/or distribution of products, establishing policies to improve customer's service and company's performance. (10%)

Responsible for establish [sic] policies and objectives for the growth and development of the company, including the hiring and direction of all company's personnel; (10%)

Directs all company's activities, including banking, marketing and contract negotiations; (5%)

Exercise discretion over the day to day operations of the company, instructing The Administrative Service Manager of any specific company decision that must be taken; (5%)

Expand the company market and negotiate contracts with additional providers; (5%)

Analyses operations to evaluate company's performance; (5%)

Reviews financial statements, sales and activity reports to ensure that the company's objectives are achieved; (5%)

Directs non-merchandise business's activities, such as advertising, purchasing, credit and accounting's services. (5%)

The director denied the petition on March 11, 2005 on the ground that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director observed that since the United States company consists of only two other employees, in addition to the beneficiary, it is likely that the beneficiary will perform the duties required for the functions and day-to-day operations of the business, rather than oversee the functions and/or the personnel that perform those duties.

On appeal, counsel for the petitioner asserts that the position offered to the beneficiary is a key managerial position. The appeal also goes on to repeat some of the duties listed above. In addition, counsel for the petitioner states "the two other company's employees provide the actual services and not the beneficiary, which is compatible with the Service's requirements that the beneficiary's functions must be primary managing or directing, rather than performing the function."

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. 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 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 prove 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).

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner's description of his current and proposed duties suggests that the beneficiary's actual duties are and will continue to be providing the services of the business.

The beneficiary's proposed job description includes vague duties such as the beneficiary "directs and coordinates activities related with pricing, sales and/or distribution of products, establishing policies to improve customer's service and company's performance," and "responsible for establishing policies and objectives for the growth and development of the company, including the hiring and direction of all company's personnel." 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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).

The job description also includes several non-qualifying duties such as the beneficiary will "expand the company market and negotiate contracts with additional providers," "directs non-merchandise business's activities, such as advertising, purchasing, credit and accounting's services" and "work closely with the U.S. customers, interacting with them and locate new clients." It appears that the beneficiary will be providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I & N Dec. 593, 604 (Comm. 1988).

According to the petitioner, in addition to the beneficiary, the company has hired an administrative service manager and a customer's service representative. According to the brief job descriptions submitted by the petitioner, it appears that the administrative service manager and the customer's service representative are involved with the administrative and clerical operations of the U.S. company. Thus, there is no evidence that the U.S. company has hired employees to perform the marketing, promotion, shipping, merchandising, purchasing, credit and accounting operations that are necessary to produce or provide services. Further, the petitioner has not presented evidence to document the existence of these additional employees. The petitioner submitted its Form UTC-6 Florida Department of Revenue Employer's Quarterly Report indicating that the total number of full time and part time employees for the quarter ended on September 30, 2004 was three. However, the names of the employees listed on the petitioner's employee list are not the same individuals listed on the employer's quarterly report. The petitioner fails to submit pay statements or W-2 Forms to confirm the employment of these individuals. It is not clear if these employees were employed part-time or full-time, or whether they were employed when the petition was filed in December 2004. Additionally, the petitioner has not explained how the services of the other employee obviate the need for the beneficiary to primarily perform non-qualifying duties associated with the petitioner's marketing function. 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)(citing *Matter of Treasure Craft of California*, 14 I & N Dec. 190 (Reg. Comm. 1972)).

As the United States company has only three employees (two of which cannot be verified if they are in fact employed by the company), it can only be assumed, and has not been proven otherwise, that the beneficiary is directly performing sales, promotion, purchasing, marketing and financial development, and all of the various operational tasks inherent in operating a company on a daily basis, such as acquiring

products, maintaining inventory, paying bills, and customer service. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. Accordingly, the director reasonably concluded that the beneficiary will be performing the day-to-day operations and directly be providing the services of the business rather than directing such activities through subordinate employees.

Furthermore, the petitioner has not established that the beneficiary will be managing an essential function of the U.S. company. 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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 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)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

As discussed above, the beneficiary's job description included primarily non-qualifying duties associated with the petitioner's day-to-day functions, and the petitioner has not identified any other employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations.

Finally, on appeal, the counsel for petitioner asserts: "The fact that the beneficiary would have to engage in some way in the day to day activities of the company is not an impediment to qualify the position as managerial, especially when the company has only two years of existence." Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. In the present matter, 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.

Based upon evidence submitted, it appears that the beneficiary has been and will be performing the services of the U.S. entity rather than performing primarily managerial or executive duties as its president and general manager. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

Furthermore, beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish the existence of a qualifying relationship between the United States entity and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. 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 Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The petitioner claims to be a wholly-owned subsidiary of Industrias Inoxcars LA Original, CA, located in Venezuela. In response to the director's request for evidence of the ownership and control of the U.S. entity, the petitioner submitted a stock certificate, number two, stating that Elvio Bugatti [the beneficiary] is the owner of 500 shares of stock of the petitioner. The petitioner did not submit stock certificate number one, thus it is not possible to determine the ownership of the U.S. entity. 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 at 591-92. 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. *Id* at 591. For this additional reason, the petition cannot 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).

The petitioner will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 appeal will be dismissed.

ORDER: The appeal is dismissed.