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FILE: SRC 04 214 52216 Office: TEXAS SERVICE CENTER Date: AUG 30 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)

ON 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, 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 in the ship building business. The petitioner states that it is a subsidiary of Industria Naval do Ceara S.A. ("INACE") located in Brazil. 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 vice president.

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. The director specifically noted several discrepancies between the organizational chart of the U.S. company submitted by the petitioner and the company's quarterly tax returns.

On appeal, counsel for the petitioner states that the beneficiary is employed in an executive capacity as demonstrated in the detailed job description previously submitted. In addition, counsel for the petitioner clarifies the discrepancies between the U.S. organizational chart and the employer's quarterly tax returns. Counsel for the petitioner submits documentation evidencing all the current individuals employed by the U.S. organization, and evidence that these individuals were in fact listed in the U.S. organizational chart. Counsel submits a brief and supporting documentation 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 August 4, 2004. The Form I-129 indicates that the beneficiary will be employed in the position of vice president for the petitioner. The beneficiary's proposed duties in the U.S. are described as the following: "To continue supervising subsidiary operations in the U.S. market." The petitioner indicated that it has five employees in the United States.

On August 25, 2004, the director determined that the petitioner did not submit sufficient evidence to process the petition. The director requested that the petitioner submit additional evidence in support of its petition. In part, the director requested the following: U.S. Federal Income Tax Return for 2002 and 2003; the duties and educational background of all other employees of the U.S. company; an organizational chart of the U.S. company; an explanation of how the beneficiary will not engage in the day-to-day operations of the business, and will be primarily engaged in managerial or executive duties; copies of the petitioner's state quarterly tax return for the past two quarters; and a copy of the petitioner's IRS Form 940 EZ, Employer's Annual Deferral Unemployment Tax Return. In response, the petitioner submitted all the requested evidence on November 10, 2004.

In response to the director's request regarding information of the duties that the beneficiary will perform, the petitioner submitted a detailed job description for the position of vice president. The petitioner also submitted an organizational chart of the U.S. company and a brief job description and the educational level of all the beneficiary's subordinates. The organizational chart for the U.S. company indicates that the beneficiary will supervise the general manager who supervises the secretary, parts purchaser and yacht salesperson. The organizational chart also indicates three independent contractors. The petitioner states that the three outside contractors are an accountant, freight adviser/freight forwarder, and a project manager and yacht repair manager. As discussed, the petitioner also submitted a detailed job description for the duties that will be performed by the beneficiary. The duties are as follows:

- Direct/coordinate marketing research and development of new products and services for the company.....20%
- Have daily phone meetings with the different department directors of the parent company (the shipyard) to discuss technical and development issues as well as administration topics, and participate via phone in the weekly board meeting.....22%
- Contact and meet with Yacht brokers and clients to negotiate new application to price and terms negotiation.....25%
- Coordination of exhibitions, Boat Shows and events for the presentation and sales of the company's products.....1%
- Hiring and training of employees for the sales and purchasing, establishing targets and goals for the marketing teams.....1%
- Meet with the general manager and the different departments personnel to analyze the department performance and set the new goals ahead.....15%
- Approval of proposals and fund allocation according to company's Budget and payment schedules.....10%
- Analysis of contracts and financial planning.....6%

In addition, in its response, the petitioner submitted a brief job description for each employee of the U.S. organization. The petitioner indicated that the position of vice president will “oversee the company operations in general, maintaining direct contact with the Board members of the parent company in Brazil, making decisions related to Yacht contract negotiations with clients, approve the marketing and its budget, oversee and authorize any and all financial transactions related to the company.”

The director issued a Notice of Intent to Deny dated November 24, 2004 requesting additional information in order to complete the processing of the petition. Specifically, the director noted that the September 2004 IRS Form 941, Employer's Quarterly Federal Tax Return, listed six employees, however, only two of the employees listed on the Form 941 were also listed on the U.S. entity's organizational chart. The director requested that the petitioner explain this discrepancy and submit the a Form 941 that lists the same employees identified on the submitted organizational chart.

The petitioner submitted a response dated November 26, 2004 explaining that the submitted organizational chart indicated ten employees, including outside contractors and direct employees. Counsel for the petitioner explained that there is a discrepancy in the original organizational chart and the Employer quarterly report for the quarter ending September 30, 2004 due to the fact that the U.S. company recently hired a new employee. The new employee was not included in the originally submitted organizational chart because he was not employed at the company when the petition was initially filed.

The director denied the petition on December 8, 2004 on the ground that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director also noted that the evidence does not support a finding that the petitioner will be supervising a subordinate staff of professionals, or managers. In addition, the director stated that the “duties of the beneficiary were general in nature and did not establish the beneficiary is primarily engaged in executive duties.” Furthermore, the director noted that only two employees listed on the organizational chart are also listed in the employer's quarterly tax return. The director went on to note that five individuals listed on the

organizational chart are not listed on the June 30, 2004 IRS Form, 941, Employer's Quarterly Federal Tax Return.

On appeal, counsel for the petitioner asserts that the petitioner submitted a detailed job description for the position of vice president which establishes that the beneficiary will be primarily engaged in executive duties. In addition, counsel for the petitioner asserts the following:

The fact remains that [the beneficiary], a successful multinational executive for many years, is in every way the individual charged with responsibility for a wide range of executive, discretionary decision-making on behalf of his multinational organization, in every way meeting the statutory definition. He should not be prejudiced by the uniqueness of his niche within his industry, or by differences between cultures and the use of wording.

Counsel also submits evidence to clarify the perceived discrepancy between the petitioner's organizational chart and the employees identified on the company's Florida Form UCT-6, Employer's Quarterly Report. The evidence submitted demonstrates that the company did employ five direct employees, including the beneficiary, as of the date the petition was filed.

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 proposed duties suggest that the beneficiary's actual duties include a number of non-managerial and non-executive duties.

The job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will spend on various duties. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive. Thus, the AAO must attempt to glean the nature of the beneficiary's proposed duties from the vague descriptions submitted.

The petitioner indicates that the beneficiary will spend 20 percent of his time to "direct/coordinate marketing research and development of new products and services for the company." The record does not resolve whether the beneficiary will perform the day-to-day tasks to develop and implement the

marketing programs and policies, or whether he will direct others to do so. The petitioner provided a vague description of the duties performed by the general manager who is supervised by the beneficiary, however, the duties of the general manager do not appear to include managing the marketing operations for the U.S. company. The lack of employees for the beneficiary to “direct and coordinate” raises questions as to whether the beneficiary is managing these activities or actually performing the petitioner’s marketing duties.

The petitioner further states that the beneficiary will spend 22 percent of his time to “have daily phone meetings with the different department directors of the parent company (the shipyard) to discuss technical development issues as well as administration topics, and participate via phone in the weekly board meeting.” Without additional clarification from the petitioner regarding the managerial or executive duties involved, the AAO cannot distinguish the beneficiary’s daily phone meetings from routine administrative tasks. The petitioner has not clearly described the purpose of the phone meetings or what the beneficiary achieves from the meetings. These duties have not been shown to be managerial or executive in nature. 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)).

In addition, the petitioner states that the beneficiary will spend 25 percent of his time to “contact and meet with Yacht brokers and clients to negotiate new application to price and terms negotiation.” The petitioner has not explained how meeting with clients and brokers and negotiating contracts qualify as managerial or executive-level duties. Instead, it appears that the beneficiary is performing the tasks necessary to produce a product or to provide services rather than managing others to produce the product or provide a service. The lack of managers or subordinate employees for the beneficiary to direct in the sales and negotiating tasks for the U.S. company, and the job description indicating that the beneficiary is directly in charge of negotiating and meeting with clients, raises questions as to whether the beneficiary is managing these activities or actually performing duties related to sales and client relations. 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 had four additional employees at the time the petition was filed. It appears that the beneficiary will supervise the general manager who will supervise the secretary, part purchaser and the yacht salesperson. According to the brief job descriptions submitted for these additional positions, there is no evidence that the U.S. company has hired employees to perform the marketing, promotion, and accounting operations that are necessary to produce or provide services. Thus, the petitioner has not explained how the services of the additional employees obviate the need for the beneficiary to primarily perform non-qualifying duties associated with the petitioner’s marketing and finance operations. 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)).

In addition, although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial

employees. *See* section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. The petitioner submitted an organizational chart indicating that the beneficiary will supervise a general manager, one secretary, one part purchaser and one yacht salesperson. Although the general manager is a supervisory position, the duties to be performed by the beneficiary does not indicate that a large portion of his time is devoted to supervising employees. Thus, while the company has one supervisory employee, the beneficiary will not be deemed to be employed in a managerial capacity simply because he devotes a small percentage of his time to supervising the general manager. Furthermore, the petitioner has not submitted evidence that the secretary, the part purchaser and the yacht salesperson are supervisory, professional or managerial employees. It appears that these subordinates will be in charge of clerical, administrative and basic sales functions. Thus, the petitioner did not establish that the subordinate staff is composed of supervisory, professional or managerial employees.

Furthermore, if the position offered to the beneficiary is executive in capacity, the statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* According to the organizational chart for the United States entity, it appears that the president will supervise the beneficiary. The petitioner has not described the president's role in the organization. It is unclear if the beneficiary will have wide latitude in discretionary decision-making, nor has the petitioner indicated that the beneficiary will establish the goals and policies of the organization. Thus, the petitioner has not established that the position is in an executive capacity.

Counsel states on appeal that the petitioner utilizes contractual employees in the areas of accounting, freight and yacht purchasing operations who perform the tasks necessary to provide petitioner's services. However, the petitioner has neither presented evidence to document the existence of these employees nor identified the specific services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees 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).

Thus, even if the petitioner does utilize the services of independently contracted employees, the record does not reflect that the employees are professional, maintain supervisory positions, work on a full-time basis, or that they take direction from the beneficiary in performing their duties. There is no evidence of formal agreements or contracts entered into by the petitioner that explains the usage of outside sources.

The petitioner has failed to submit job descriptions or duties performed by the independent contractors. There is no evidence on record to show that the claimed independent contractors would engage in the day-to-day operations of the business or that they would relieve the beneficiary from performing other routine, non-qualifying tasks associated with the business' daily marketing, sales, administrative, clerical and financial functions.

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 an executive or manager as contemplated by the governing statute and regulations.

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 vice president. 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.

The petition 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.