

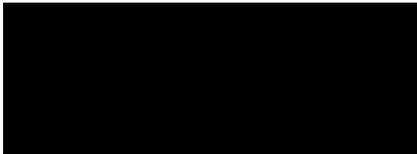
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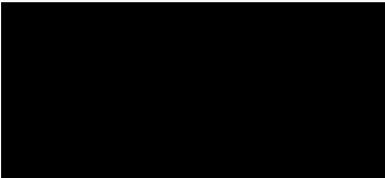


FILE: SRC 04 198 50728 OFFICE: TEXAS SERVICE CENTER Date: JAN 27 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

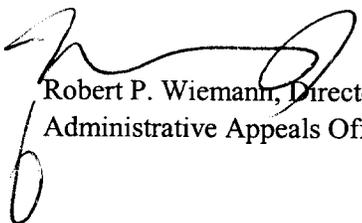
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its operations 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 Florida corporation that claims to be engaged in construction, transportation, and real estate development. It claims to be a subsidiary of Dero Construction CC, located in Newcastle, South Africa. The beneficiary was initially granted a one-year period in L-1A status in order to be employed in a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the beneficiary would not be employed in a managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner claims that the director misinterpreted the evidence and failed to recognize the full scope of the beneficiary's authority. Counsel claims that the additional evidence submitted on appeal establishes that the beneficiary will be employed in an executive capacity. Counsel submits a brief and additional evidence in support of the appeal.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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.

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 in this proceeding is whether the beneficiary would be employed by the petitioner in a 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 petition was filed on July 13, 2004. In a July 6, 2004 letter submitted in support of the petition, the petitioner described the beneficiary's duties as follows:

As Operations Manager at [the petitioner], [the beneficiary] will continue to be responsible for directing and managing the company's day-to-day operations. He will also continue to be responsible for supervising all employees, including various subordinate [sic] managers and staff in their day-to-day work for the company. In this role, the Operations Manager will also continue to exercise significant discretionary decision-making authority on the company's behalf. Specifically, this will include responsibility for:

- (1) All financial-related matters, including budgeting, pricing, and accounts receivables/payables;
- (2) Supply/quantity control;
- (3) Labor and industrial relations management, including recruiting, hiring, and training other employees and subordinate managers;
- (4) Strategic planning; and
- (5) Quality Control.

The petitioner also submitted an exhibit entitled "Beneficiary's percentage of time spent," which provided the following description of the beneficiary's duties:

- 1. Acquiring the company's construction and transportation equipment 2%

2. Directing the marketing of products and services 15%
3. Scouting and securing distribution, supply and retail sites 8%
4. Recruiting, hiring and training other employees including subordinate [managers] 5%
5. Overseeing all trade-related issues of [the petitioner's] products and services 20%
6. Handling labor and industrial relations management: and 5%
7. Strategic planning in conjunction with the parents [sic] company's top Management 10%
8. Responsible [sic] for supervising both subordinate and staff in their day to day work within the company 20%
9. Communicating and reporting to CEO 15%

In addition, the petitioner submitted an organizational chart accompanied by a table titled "List of Employee positions, Qualifications and duties." In this table, the nine duties described above are attributed to the petitioner's "director," Giuseppe Cartelli. The beneficiary's position is identified as "middle management" and his duties are described as follows:

1. All financial related matters including budgeting and pricing
2. Supply / quantity control
3. Labor and industrial relations management
4. Strategic [sic] planning for the US company
5. Report directly to the Director
6. Responsible for accounts receivable
7. Assist the director with hiring and training
8. Responsible [sic] for all administration functions on a day to day basis in the company.

The petitioner also provided job descriptions for two employees identified as "laborers" who are described as performing "casual labor" and "non artisan related construction work." The petitioner's organizational chart indicates that the petitioner's director oversees "investment, finances, funds," "realtors, architect, permits," and the beneficiary. The beneficiary is depicted as supervising: two laborers; "financial management," including budgets, payments, invoices, accountant, and banking; "office management," including communication, insurance and record keeping; and "site management," including program, employees, contractors, sub-contractors, quality control and material orders.

The petitioner indicated on Form I-129 that it has four employees. The petitioner provided its Florida Form UCT-6, Employer's Quarterly Report, for the first quarter of 2004, which confirmed the employment of the director, the beneficiary, and the two laborers during the month of March 2004. The petitioner did not report any wages for January or February 2004. The petitioner's 2003 IRS Form 1120, U.S. Corporation Income Tax Return, shows that the petitioner did not pay salaries or wages in 2003.

The director denied the petition on July 23, 2004, concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. The director acknowledged that the beneficiary "evidently exercise[s] discretion over the day-to-day operations," but found that he would also be required to perform many aspects of the operations and would not supervise professional employees. Rather, the director noted that the evidence presented showed that the beneficiary would serve as a first-line supervisor over two non-professional laborers. The director further observed that the petitioner did not

demonstrate that the beneficiary's primary assignment has been directing the management of the organization, nor that the beneficiary has been primarily directing or supervising a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that the director failed to understand the scope of the beneficiary's authority and contends that he will be employed by the petitioner in an executive capacity. Counsel claims that the beneficiary: (1) "directs a major function of the organization" by acting as a signatory for the petitioner's bank accounts; (2) "establishes goals and policies of the organization" by seeking investment property for development and presenting findings to the Board, and by exercising authority to sign property purchase agreements; (3) "exercises wide latitude in discretionary decision-making" by issuing checks for security deposits and signing U.S. tax returns as a director of the company; and, (4) "receives only general supervision/direction from the board of directors/shareholders of the organization," including responsibility for using his "discretionary powers" to sign legal and binding agreements and enter into mortgages. Counsel further states that the beneficiary "has hiring, monetary and all decision-making powers on behalf of the company for payments and on-site decisions during project development and construction."

Counsel further states that the director's interpretation that the beneficiary only supervises two laborers "is not a fair assessment of his full scope of authority. [The beneficiary] is responsible for each development project through the acquisition of property through the development and marketing."

Finally, counsel provides the following job description for the beneficiary's role as operations manager:

- Responsible for construction management, which includes general authority over the project, architects, planners, designers, and construction sub-contractors (which can number 20).
- Required to manage on-site activities to ensure that all procedures and quality controls, which are policies of the parent company, are met.
- Responsible for budget, cost analysis and corporate reports for each project.
- Responsible to submit architectural changes, liaise with government agencies, and negotiate construction financing; and
- Negotiate with sub-contractors and manage all aspects of project from beginning to end.

Counsel also objects to the director's reference to *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1998), asserting: "the facts of the case are not consistent with the facts of this Petition." The petitioner submits additional documentation, including letters from business associates attesting that they have dealt with the beneficiary "in an executive capacity," as well as copies of checks and other documents signed by the beneficiary on behalf of the petitioning company.

On review, the petitioner has not established that the beneficiary will be employed in a primarily 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(I)(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 in either an executive or a managerial capacity. *Id.* In the instant case, the petitioner has not consistently indicated whether the beneficiary would perform primarily managerial duties pursuant to

section 101(a)(44)(A) of the Act, or executive duties pursuant to section 101(a)(44)(B) of the Act. The petitioner initially described the beneficiary's position as "middle management," yet on appeal, counsel claims that the beneficiary has been and will be employed by the petitioner in an executive capacity. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity. *See* 8 C.F.R. § 214.2(1)(3)(ii).

Furthermore, 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 show 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). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower-level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

The petitioner initially submitted three different job descriptions for the beneficiary's position, and counsel now submits a fourth description on appeal. Although one of the petitioner's job descriptions provided a breakdown of the percentage of time the beneficiary would devote to each of his job duties, as noted above, the petitioner provided an identical job description for the director of the company in another exhibit submitted in support of this petition. 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). Given the petitioner's claims that it employed only four employees at the time the petition was filed, the AAO does not accept the proposition that the petitioner's "operations manager" and "director" perform identical job duties. Accordingly, the job description that provides a breakdown of the beneficiary's job duties is not credible and will not be considered in this proceeding. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. *See, e.g. Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Similarly, the new job description submitted by counsel on appeal is inconsistent with evidence previously provided in support of this petition. For example, the petitioner initially indicated on its organizational chart that the director of the company is responsible for direct oversight of the company's overall investments, finances, funds and permits, as well as communications with realtors and architects. On appeal, counsel attributes many of these responsibilities to the beneficiary and indicates that he acts as an executive for the company. However, as noted above, the petitioner initially described the beneficiary's role as "middle management" and placed more emphasis on operational, administrative and supervisory duties. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Given that the petitioner has, at most, four employees, including one who is senior to the beneficiary, counsel's claims

regarding the beneficiary's executive duties on appeal are not persuasive. Counsel's arguments are largely based on the beneficiary's authority to sign checks on behalf of the petitioning company, however, counsel does not adequately explain how signing checks equates to employment in an executive capacity as defined at section 101(a)(44)(B) of the Act. Rather, considering that the beneficiary's actual responsibilities appear to encompass making payments and performing day-to-day financial tasks in general, the AAO does not find his signature on company checks to be an indicator of his employment in an executive capacity.

The two remaining accounts of the beneficiary's duties describe an employee who handles accounts payable, accounts receivable, routine banking matters, budgeting, materials purchasing, supply and inventory control, daily office communications and record keeping, and first-line supervision of contractors and sub-contractors performing construction work. Although the beneficiary's role may involve some managerial components, such as "strategic planning" and responsibility for hiring employees, it is reasonable to conclude that the company's financial, administrative and first-line supervisory duties require the preponderance of the beneficiary's time on a daily basis. The beneficiary's authority may indeed extend beyond mere supervision of two casual laborers; however, the actual duties themselves 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 beneficiary's actual duties in this matter have not been shown to be primarily managerial or executive in nature. While the petitioner's contracted employees perform the day-to-day duties associated with the construction and renovation projects, the beneficiary's job duties performed in connection with the business' purchasing, finances and general administration may be deemed non-qualifying if they involve the actual performance of the function. These duties may be crucial to the proper functioning of the petitioner's business, but they are also the daily operational tasks and cannot be deemed managerial or executive in nature. Based on the evidence submitted, the beneficiary is personally performing these non-qualifying tasks rather than managing or supervising the performance of these routine duties by other subordinate employees. 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).

Although counsel objects to the director's reliance on *Matter of Church Scientology International* the AAO notes that the *Matter of Church Scientology International* decision remains a valid precedent decision that is binding on all CIS officers in the enforcement of the Act. See 8 C.F.R. § 103.3(C). Specifically, in *Matter of Church Scientology*, the AAO examined the claimed managerial capacity of a member of the Church of Scientology. After citing to the regulations and noting that the beneficiary's duties must be "primarily at the managerial or executive levels, the AAO stated: "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. at 604. The AAO continued to examine the specific job duties and concluded that the beneficiary appeared to function as a staff officer or specialist and not as a manager or executive.

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, 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.

In this matter, the petitioner, which was established in the beginning of 2003, paid wages to its four claimed employees for the first time in March 2004, paid only two employees in April and May 2004, and paid no wages in June 2004, the month preceding the filing of this petition. Since the petitioner has not established that it continued to employ the two laborers at the time the petition was filed, it is evident that the only employees were the beneficiary and the petitioner's "director." The petitioner 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 a director and an operations manager who both perform primarily managerial and executive duties. Rather, an analysis of the petitioner's staffing structure at the end of the beneficiary's first year in L-1A status supports the AAO's conclusion that the beneficiary is performing many non-qualifying tasks associated with the day-to-day operations of the petitioner's office. 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.

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 this reason, the appeal will be dismissed.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.