



U.S. Citizenship
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FILE: SRC 04 106 50860 Office: TEXAS SERVICE CENTER Date: JUL 17 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 filed this nonimmigrant petition seeking to extend the employment of its president and chief executive officer 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, a Florida corporation, claims to be the affiliate of ██████████ C.A., located in Caracas, Venezuela. The petitioner is engaged in real estate maintenance services. 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.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was not supported by the facts and evidence, and that contrary to the director's findings, the beneficiary was in fact employed in a primarily managerial or executive capacity. Specifically, counsel alleges that the director erroneously focused on the small size of the U.S. entity in reaching the decision.

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)(14)(ii) 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 primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter from counsel dated February 26, 2004, the beneficiary's duties were described as follows:

As President/Chief Executive Officer, [the beneficiary] is responsible for establishing and directing all aspects of [the petitioner's] U.S. business operations including all financial and

budgetary programs, operating systems/procedures, and hiring and firing decisions, with a particular emphasis on the development and implementation of key marketing and business development initiatives. He is the company's most senior employee, with complete hiring, firing, and promotion powers and ultimate discretionary decision making authority over all day-to-day business and corporate matters. In addition to [the beneficiary], [the petitioner] presently employs over four additional personnel including an administrative manager, receptionist, two full-service contractors (engaged primarily in remodeling and lawn service), and various other contractors.

Additionally, the beneficiary, on behalf of the petitioner in his capacity as president, submitted a letter dated February 24, 2004, which stated:

As President/Chief Executive Officer of [the petitioner] and as the company's most senior employee, I am specifically responsible for establishing, directing, and implementing the company's entire U.S. business operations including all financial and budgetary programs, operating systems and procedures, marketing and expansion initiatives, and hiring and firing decisions. I oversee all day-to-day business operations, set all corporate standards, and have complete discretionary decision-making authority over all company decisions. As we enter the important second year of business operations, I will continue to develop and fine-tune our overall business plan; aggressively seek new marketing venues and client sources (including, in particular, new commercial contracts to supplement our current focus in the residential market); and implement new business ideas to enable the company to continue growing in terms of revenues, profits, personnel, and overall operations.

The petitioner also provided copies of its quarterly wage reports for the previous four quarters. The records indicate that the petitioner had no employees until the second quarter of 2003, when the beneficiary was hired. The beneficiary was also the sole employee during the third quarter of 2003, and the return for the fourth quarter showed that during that period the petitioner employed two employees in addition to the beneficiary, namely [REDACTED] assistant manager [REDACTED] secretary.

On May 13, 2004, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit a more detailed description of the beneficiary's duties and those of his co-workers, as well as a list of all subordinates of the beneficiary, with a description of each person's position title, their duties, and their educational backgrounds. In addition, the director requested the petitioner's most recent quarterly tax return for the quarter ending March 31, 2004, and asked for details regarding employee work schedules and information pertaining to independent contractors.

In a response dated July 30, 2004, the petitioner, through counsel, responded to the director's request. Counsel submitted an organizational chart showing that he and his two co-workers worked laterally with one another, and there were no subordinate employees under any of their supervision. The petitioner's quarterly tax return for the first quarter of 2004 also verified that these three persons were the petitioner's only employees. Finally, counsel submitted copies of contractor agreements and work orders with sub-contractors

who were hired to perform various services, including lawn care services and remodeling, on behalf of the petitioner.

On October 13, 2004, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary would be managing professional, supervisory, or managerial employees.

On appeal, counsel for the petitioner asserts that the beneficiary is in fact functioning in a primarily managerial or executive capacity by virtue of his position and level of responsibility. Counsel further alleges that the director erroneously concluded that the beneficiary was performing non-qualifying tasks.

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 initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a generic description of the nature of his duties, and paraphrased the regulatory definitions. As previously stated, the initial evidence submitted was insufficient to warrant approval, and consequently, the director requested more specific information, including a more detailed overview of the petitioner's organizational hierarchy and the beneficiary's position therein.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. First, the petitioner failed to specifically articulate the nature of the beneficiary's duties. For example, the petition claims the beneficiary is the president and chief executive officer. The organizational flowchart submitted in response to the director's request for evidence, however, indicates that the beneficiary operates on the same level as the assistant manager and secretary, as opposed to directly supervising their work. His updated duties in the flowchart indicate that he "controls the operations of the office" and offers tenants a portfolio of services. These duties, accompanied by the overly broad descriptions provided in the initial letters of support, fail 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).

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. Although the petitioner provided a broad statement of the beneficiary's duties in the initial petition and again in response to the request for evidence, this description did not articulate what a specific day in the role of the beneficiary would consist of. Instead, the descriptions merely provided a brief synopsis of the beneficiary's managerial/executive duties, and failed to discuss or identify job-specific tasks or obligations the beneficiary

is required to perform. Essentially, the petitioner equates managerial and executive capacity with the beneficiary's title of president, yet fails to provide solid examples of how this managerial or executive capacity is actually attained. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.*; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner has failed to show that the beneficiary oversees a staff of professional, supervisory, or managerial employees. Although the beneficiary is not required to supervise personnel, if it is claimed, as it is in this case, that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

The petitioner did not provide the level of education required to perform the duties of its assistant manager and secretary, and failed to submit enough details about their job duties to ascertain the exact nature of their role in the company. In addition, while the petitioner claims that the beneficiary is the highest ranking official in the company, the flowchart shows the beneficiary on the same level as the secretary and assistant manager, and not as their supervisor. The petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's co-workers are his subordinates, and additionally, has not shown that they are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Although the petitioner claims that the beneficiary oversees contractors, insufficient evidence has been submitted to establish his managerial capacity by virtue of his supervision of such workers. The contractor agreements, for services such as lawn care and remodeling, indicate that the petitioner has contracted with specific companies or organized entities. It does not appear that the petitioner is hiring individual workers to perform services for the petitioner itself; rather, it appears that the petitioner is utilizing the services of other companies that specialize in providing maintenance services the petitioner requires. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. 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). While the petitioner does not claim that the beneficiary actually cuts lawns or performs landscaping services, the petitioner has failed to show that the beneficiary engages primarily in managerial or executive duties.

Counsel's final argument on appeal is that the director erroneously penalized the petitioner due to its small size. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See *e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15

(D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the director noted that the beneficiary's employment capacity with the petitioner, accompanied by the small number of alleged subordinates, did not appear to be primarily managerial or executive. The AAO notes that at the time of the petition's filing, the assistant manager and secretary were employed full-time by the petitioner.¹ 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 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 petition may not be approved.

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

ORDER: The appeal is dismissed.

¹ The AAO notes that in the denial, the director concludes that at the time of the filing of the extension in March 2004, the petitioner employed only one other person in addition to the petitioner. The AAO notes that this erroneous conclusion was undoubtedly based on the director's review of the first page of the quarterly tax return for the first quarter of 2004, which lists only two employees on the first page. The third employee, however, is clearly listed on the second page, a document possibly overlooked by the director.