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U.S. Citizenship
and Immigration
Services

D7



File: SRC 03 166 50384 Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2006

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, 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 a motion to reconsider. The AAO will grant the motion, withdraw its prior decision, but uphold the previous decision of the director.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its vice president and managing director as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida that is engaged in the manufacture and distribution of solar energy equipment.¹ The petitioner claims that it is the subsidiary of [REDACTED], located in Madrid, Spain. 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 for an additional three years.

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 subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On June 18, 2004, the appeal in this matter was summarily dismissed for failure to submit a brief in support of the Form I-290B. On motion, the petitioner, through counsel, submitted sufficient documentation to show that the brief in support of the appeal was in fact timely filed. Consequently, the AAO will grant the motion to reconsider the matter, withdraw its prior decision, and adjudicate the appeal now properly before the AAO for consideration.

On appeal, counsel for the petitioner also asserts that the director erred by finding that the beneficiary was not a qualified executive, particularly since he functions at the highest level in the petitioner's organizational hierarchy. In support of this assertion, counsel submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

¹ It should be noted that, according to the Florida Department of State, Division of Corporations, the petitioner has been administratively dissolved due to its failure to satisfy the state's annual report requirements. Therefore, regardless of whether the petitioner's annual report issues in Florida can be easily remedied or not, it raises the issue of the company's continued existence as a legal entity in the United States.

- (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 the present 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 of support submitted with the initial petition, counsel for the petitioner states that by establishing solid market connections for the petitioner, the beneficiary has successfully established the U.S. subsidiary. Based largely on her extensive role in expansion of the parent company into the Latin American market, counsel contends that the beneficiary is the logical choice to handle the further expansion of the petitioner in the United States. Counsel advises that the beneficiary would continue to promote and market the petitioner's product during her stay in the United States and indicates that her duties would include reviewing financial statements, attaining corporate objectives, and assessing market conditions.

On June 7, 2003, the director requested additional evidence. Specifically, the director requested that the petitioner submit more detailed information regarding the beneficiary's duties and the manner in which they were managerial and/or executive in nature. Specifically, a complete description of duties was requested, including a list of all subordinate staff members and their positions and duties within the organization.

In response, counsel for the petitioner submitted a detailed list of the beneficiary's duties with a percentage breakdown of the time devoted to each duty. In addition, counsel advised that the beneficiary was assisted by a clerical assistant until that person was dismissed in March 2003 and that she is currently assisted by a new clerical assistant who was hired on June 30, 2003. Counsel further explained that the beneficiary is the only employee of the petitioner with managerial and/or executive duties, and generally restated the duties discussed in the initial letter of support. With regard to the breakdown of duties, counsel indicated that the beneficiary's duties were broken down in the following manner:

- Administration: 30%
- Coordination with Spain: 30%
- Sales and Client Support: 30%
- Traveling: 10%

The petitioner further clarified that the wages and salaries figure of \$31,919 on Line 13 of the petitioner's 2002 U.S. Corporation Income Tax Return reflected wages paid solely to the beneficiary in the amount of her salary (\$30,000) plus a bonus (\$1,919).

On July 30, 2003, the director denied the petition. The director determined that the beneficiary was not employed in a primarily managerial or executive capacity, and that since the evidence suggested she was the petitioner's sole employee, it was indisputable that she was required to perform firsthand the essential tasks necessary for the continued operation of the business.

On appeal, counsel contends in a brief statement that the beneficiary is a function manager, and therefore qualifies as a manager or executive under the regulations. Counsel provides evidence of the petitioner's quarterly tax returns for the quarters ending March 31, 2003 and June 30, 2003, each showing that one of the two clerical assistants was employed by the petitioner during that period. No further documentation or evidence is submitted.

Upon review, the AAO concurs with the director's decisions in this matter. 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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

On appeal, counsel resubmits an overview of the beneficiary's duties and concludes that she is a function manager and thus qualifies for the extension of the petition. 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, 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. 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.

Here, the petitioner claims that the beneficiary's duties are exclusively managerial and/or executive, yet the identified duties of the beneficiary in the record include numerous non-qualifying tasks. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial.

In this case, the petitioner states that the beneficiary has and will continue to evaluate the market conditions for the petitioner and review financial statements and that 30% of her time is devoted to administration. Such duties are not included in the definition of either managerial or executive capacity, which counsel so strongly urges the AAO to consider. The record contains no additional evidence or explanation with regard to the duties of the beneficiary. Merely claiming that the beneficiary is an executive or manager is insufficient to establish eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In addition, in the response to the request for evidence, counsel indicates that the beneficiary previously oversaw a clerical assistant who worked approximately 40 hours per week from October 2001 to March 2003, and this person had since been replaced by another clerical assistant who began work in June 2003. There are two problems with these claims. First, the petitioner seems to claim that a clerical assistant was employed full time during the beneficiary's tenure with the petition, which would include the tax year 2002. The petitioner, however, clarified in the response to the request for evidence that the wages and salaries paid that year, in the amount of \$31,919, were solely paid to the beneficiary. If the clerical employee worked a full time position during this period, this evidence is contradictory and not supported, and raises issues with regard to credibility. 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).

Second, the new clerical assistant allegedly began her employment with the petitioner in June 2003, the month after the beneficiary's period of stay expired and the month after the extension request was filed. The

petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. Whether this employee does in fact relieve the beneficiary from performing non-qualifying duties is irrelevant, since she was not under the beneficiary's supervision at the time of filing. Consequently, this evidence is not persuasive in establishing the beneficiary's qualifications, since the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). While the petitioner continually alleges that the business is getting to a stage where other employees can relieve the beneficiary from performing non-qualifying duties, the relevant stage of the petitioner was that of the time of filing.

Returning to the petitioner's claim that the beneficiary qualifies for the extension on the basis that she is a function manager, the AAO notes that there is no definitive, uncontradicted evidence that the beneficiary had a subordinate staff to relieve her from performing non-qualifying duties during the previous year. While a function manager may not necessarily have any direct subordinate employees, the record must still establish that the petitioner has sufficient staff to relieve the beneficiary from primarily performing the function she claims to manage. Since it appears, absent evidence to the contrary, that the beneficiary was the only employee during the petitioner's first year of operation and that she performed an abundance of non-qualifying duties, the petitioner has failed to establish the beneficiary's eligibility as a function manager. It is undisputed that the beneficiary is engaged in client-related services and marketing. As previously 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. 593, 604 (Comm. 1988).

The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitutes significant components of the duties performed on a day-to-day basis.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation *one year* within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Finally, upon further review of the director's decision, the AAO notes that included in the director's analysis was the following incorrect statement: "Evidence in the record is not persuasive that as of the filing date of the petition, the U.S. petitioner had grown to a point where it could remunerate the beneficiary." While this statement was merely included in the longer and more detailed review of the beneficiary's managerial and/or executive capacity, and was not a separate basis for the denial, the AAO notes that the director's reliance on this factor is erroneous. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(2) requires that a new office petition

include evidence of the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States. There is no requirement under the regulations pertaining to the extension of a new office that the petitioner submit evidence that it has the financial ability to remunerate the beneficiary. The director's statement with regard to this issue is hereby withdrawn.

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 decision of the director is affirmed. The appeal is dismissed.