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File: SRC 04 070 51627 Office: TEXAS SERVICE CENTER Date: JUN 02 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: SELF-REPRESENTED

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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its general administrator 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 describes its business as an import-export retail store.¹ The petitioner claims that it is the subsidiary of Business, C.A., located in San Cristobal, Venezuela. 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 subsequently filed an appeal.² The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that contrary to the director's findings, the beneficiary's position is at an executive level and submits additional evidence in support of the contention that the director's conclusions were erroneous.

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.

² It is noted that the petition and the appeal were prepared by a representative of Bosilevac, Zambrano and Associates, Inc., located in Miami, Florida. The petition, however, is not accompanied by a Form G-28, Notice of Entry of Appearance by an Attorney or Representative, and furthermore, the representative has not established that it is a licensed attorney or an accredited representative authorized to undertake representations on the petitioner's behalf. See 8 C.F.R. § 292.1. Accordingly, the assertions of the representative will not be considered in this proceeding.

- (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 primary 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 the initial petition, the petitioner described the beneficiary's job duties in a letter dated January 8, 2004 as follows:

[The beneficiary] has been employed by [the petitioner] in the capacity of Administrative Manager and is responsible for the general administration, process and management of our company. She coordinates the work so as to run the business in an efficient and profitable manner. She has been a key to the success [of] the operation of [the] business, because [of her] expertise, knowledge, and outstanding achievements.

[The beneficiary] is responsible for the control, administration and management of the company. Further, [s]he is responsible for the hiring and training of personnel of the entity in the United States that is under her control. Her years of management and executive level experience (foreign and US [c]ompany), has given her the latitude to make these decisions without having to consult with any other person or entity. Her position will continue at [an]

executive level since she formulates policy and has the ultimate discretionary authority to make necessary changes in the structure of the business. Her functions with [sic] the organization are properly [sic] as executive since she performs only those executive functions and leaves the daily tasks to the company employees.

The petitioner provided the following additional list of duties, noting that the beneficiary's position involves the management of the business operations:

- The control of the employees and future employees employed with the company;
- Training of employees (hiring and firing of employees);
- Managing the Finances;
- Planning, developing, and implementing company strategy;
- Planning the future expansion of the business and the possibility of franchising the said business;
- Developing and implementing policies and procedures for company operations;
- Developing mark-up percentages necessary to insure profit, based on estimated budget, profit goals and average rate of client acquisition;
- Developing policies and procedures for procurement of services;
- Oversee the negotiating of contracts with clients;
- Authorizing purchase of contract services based on estimates;
- Formulating pricing policies for sale of services;
- Review statements, invoices, bills of lading and insurance certificates;
- Coordinate the purchase of services, supervising the contact with the different vendors to attain the desired services;
- Plan business objectives, develop organizations polices [sic] and establish responsibilities and procedures for attaining objectives with the business operations of the internet services business;
- Review activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions;
- Direct and coordinate formulation of financial programs to provide funding of new or continuing operations to maximize returns on investments and increase productivity.

In addition to the statement of duties, the petitioner submitted a copy of the organizational chart for the U.S. entity, which stated that the beneficiary was on the same level as a Law Advisor and Accountant Advisor, both of which did not designate a certain individual to perform such duties. Under her supervision, according to the chart, was [REDACTED] in the position of Administrative Assistant and [REDACTED] in the position of Executive Secretary.

Finally, the petitioner also submitted its quarterly tax returns for the quarters ending March 31, 2003, June 30, 2003, and September 30, 2003. For the first two quarters, the only employee listed was [REDACTED], the Administrative Assistant, who earned \$420 and \$1,260, respectively. For the quarter ending September 30, 2003, Ms. [REDACTED] earned \$1,260 and Mr. [REDACTED], the Executive Secretary, earned \$840.

On March 5, 2004, the director issued a Notice of Intent to Deny the petition. In the notice, the director stated that it appeared that the beneficiary was merely a first-line supervisor in charge of overseeing non-professional employees. The director also noted that a beneficiary who performs the tasks necessary for a petitioner to generate goods and services is not functioning in a qualifying capacity. The petitioner was given thirty days to respond.

In an undated response, the petitioner resubmitted the list of duties set forth above, and stressed that she answered only to stockholders. The petitioner further stated that it was extremely important to have the beneficiary in the United States in order to handle day-to-day operations.

On October 7, 2004, the director denied the petition. The director determined that the beneficiary was acting as a first line supervisor at a gas station/retail operation, and that the sole employees of the petitioning entity, according to the quarterly reports, were the beneficiary and the administrative assistant. Based on the composition of the petitioner as indicated by the evidence in the record, the director concluded that the beneficiary was merely a first-line supervisor and that she was not managing a staff of subordinate professionals to relieve her from performing non-qualifying tasks.

On appeal, the petitioner asserts that director made numerous errors in the denial. First, the petitioner contends that it is not a gas station and reasserts that it is engaged in the import and export business. The petitioner further contends that it is currently investing in other ventures including clothing, beauty salons, and footwear boutiques, and that its current business is the export of industrial and heavy material. The petitioner further advised that it is currently renting a new location and will be remodeling another location, thus contributing to an estimated growth rate of 300% in the coming years.

Upon review, counsel's assertions are not persuasive. 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.*

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "managing the finances" and "developing mark-up percentages" do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

More importantly, perhaps, is the vague recitation of duties in conjunction with the vague explanation of the petitioner's business. The petitioner claims that it is an import and export company, and that it currently is specializing in the export of industrial and heavy materials. This primary function does not coincide with the beneficiary's stated duties, many of which suggest that the petitioner is interested in engaging in retail sales. Furthermore, the petitioner's certificate of use indicates that the purpose of the business is the retail sale of clothing. However, no evidence with regard to the beneficiary's role in this aspect of the industry is submitted. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to 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).

In this matter, it is extremely unclear as to the exact nature of the beneficiary's role in the petitioner's business, since the record fails to demonstrate with certainty what in fact is the exact nature of the petitioner's business. In response to the denial, the petitioner indicates that it plans to acquire additional boutiques for clothing and footwear in addition to beauty salons, and that it anticipates a growth of over 300% in the coming years. While this is certainly commendable, the reliance of the petitioner on future endeavors does not automatically entitle the petitioner to extend the beneficiary's status. 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). Furthermore, 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. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

In the instant matter, the petition's business dealings are unclear. The record indicates that as of September 2003, an administrative assistant who earns approximately \$420 per month is on staff, in addition to the beneficiary and executive secretary [REDACTED] who, according to the quarterly tax returns, began working for the petitioner during the third quarter of 2003. The duties of these alleged subordinate employees of the beneficiary are likewise unclear, thereby precluding the AAO from finding that the beneficiary is relieved of performing non-qualifying duties by other subordinate employees such that she could focus exclusively on managerial or executive duties. 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.

Based on the evidence contained in the record, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the petition may not be approved.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted a number of "various invoices, none of which consistently establish a pattern of sales or acquisitions by the petitioner consistent with its stated purpose to function as a retail clothing store. For example, one invoice is for the purchase of a 1998 Toyota Camry, and yet another is for the purchase of an item described as "TXR, System 10. X-Ray Room. New" for \$15,000. As discussed above, the actual nature of the petitioner's proposed business is likewise unclear. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner has been doing business since the approval of the initial new office petition in January of 2003. For this additional reason the petition may not be approved.

Additionally, the petitioner has failed to submit evidence that a qualifying relationship exists between the foreign entity and the petitioner. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the petitioner claims that the foreign parent owns 51% of the petitioner. No evidence to corroborate this claim has been submitted. In fact, Schedule K of the petitioner's 2002 U.S. Corporation Income Tax Return indicates that no entity owns more than a 50% interest in the voting shares of the company. Though the petitioner has submitted its Articles of Incorporation, other evidence, such as stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings, must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. The petitioner has failed to submit acceptable documentation of its claimed subsidiary relationship with the foreign entity. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

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.