



U.S. Citizenship
and Immigration
Services

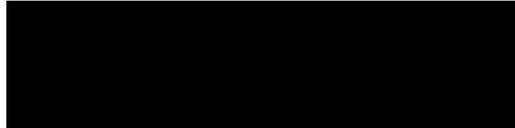
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File: SRC 04 199 51677 Office: TEXAS SERVICE CENTER Date: JUN 02 2006

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:



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 seeks to employ the beneficiary temporarily in the United States 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 U.S. petitioner, a corporation organized in the State of Florida that is engaged in international cargo transport, seeks to employ the beneficiary as its general manager. The petitioner claims that it is the subsidiary of [REDACTED] located in Cali, Colombia.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary had at least one continuous year of employment with a qualifying foreign entity out of the preceding three; or (2) the beneficiary would be employed in a primarily managerial or executive position in the United States.

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 appeal, counsel for the petitioner asserts that the petitioner had in fact satisfied all regulatory requirements, since the beneficiary had taken a temporary leave of absence from the foreign entity and had consequently not interrupted her continuous employment with the foreign entity. In addition, counsel reasserted the managerial qualities of the beneficiary's proposed position in the United States and concludes that she has therefore satisfied the criteria for manager and/or executive.

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:

- (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.

- (v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:
 - (A) Sufficient physical premises to house the new office have been secured;
 - (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
 - (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (I)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue in this matter is whether the beneficiary 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. *See* 8 C.F.R. § 214.2(l)(3)(iii).

The petition in this matter was filed on July 14, 2004. According to the regulations, therefore, the beneficiary is required to have at least one year of continuous and uninterrupted employment with the foreign entity during the period beginning July 14, 2001 to July 14, 2004. On the L Supplement to the Form I-129, the petitioner indicated that the foreign parent employed the beneficiary without interruption from August 31, 2000 to October 15, 2001.

In response to the director's request for evidence dated July 22, 2004, clarification on this issue was requested. Specifically, the director noted that the beneficiary had entered the United States on November 8, 2001 on an H-4 visa. In a response dated August 18, 2004, the petitioner responded by explaining that, due to the beneficiary's husband's employment in the United States, she requested and was granted an unpaid leave

of absence from the foreign entity so that she could accompany her husband while he worked in the United States. The petitioner admitted that although the beneficiary's exact position, duty or work area may not be available to her if she were to return, the foreign entity would make every effort to accommodate her if she did return.

The director found this evidence insufficient to establish compliance with the regulatory requirements, and denied the petition on September 1, 2004. On appeal, counsel for the petitioner submits copies of the petitioner's request for a leave of absence as evidence that this was the situation under which she remained affiliated with the foreign entity after October of 2001.

Upon review, the AAO is not persuaded that the beneficiary satisfied the regulatory requirements.

The regulations clearly state that an alien must have one year of *continuous* employment out of the three years preceding the filing of the petition. *See* 8 C.F.R. § 214.2(l)(3)(iii). As discussed above, since this petition was filed on July 14, 2004, the period in which this one continuous year of employment had to take place was from July 14, 2001 through July 14, 2004. Based on the beneficiary's employment history with the foreign entity, the AAO must examine her eligibility from July 14, 2001 through July 14, 2002, since the employment prior to this date falls outside the requisite three-year period.

The record clearly indicates that the beneficiary resigned her position with the foreign entity in October of 2001 and left to join her husband in the United States on November 8, 2001. In her request for a leave of absence dated October 18, 2001, the beneficiary even admits that she may never return to the petitioner. Specifically, she states: "I appreciate your offer of leaving the door open *in case I return*, in a prudent time to rejoin my actual job." (Emphasis added). The beneficiary's own admissions in this letter clearly show that even she did not know whether she would ever return to this position.

Generally, time spent employed abroad or on similar, detailed assignments for the same foreign entity will generally not be considered disruptive of the continuous year of employment when sufficient evidence is submitted to show that a beneficiary is still continuing to perform his or her duties for the foreign employer. In this case, however, the beneficiary left the employment of the foreign entity to join her husband in the United States. There is no evidence that her travel to the United States was to perform job related duties for the foreign parent. In fact, all evidence in the record directly contradicts this possibility, as the beneficiary clearly indicates that she chose to leave the employment of the foreign entity in order to evaluate the possibility of staying in the United States.

The record, therefore, indicates that in the three years prior to the filing of the petition, the beneficiary had, at best, three full months of continuous, uninterrupted employment with the foreign entity. As the regulations clearly require one full year of continuous employment with a qualifying organization abroad, the beneficiary has not met this requirement. For this reason, the petition may not be approved.

The second basis for the director's denial in this matter was based upon the finding that the beneficiary would not be employed in a primarily managerial or executive capacity in the United States.

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 provided the following overview of the beneficiary's proposed duties in the United States. Specifically, the petitioner stated:

As General Manager, [the beneficiary] will use [her] independent discretion and authority in identifying and cultivating new information sources, and developing strong and mutually beneficial relationships with [the petitioner's] officials at Miami and New Jersey offices. In identifying, developing and maintaining these sources, [the beneficiary] will ensure that [the petitioner] is provide[d] immediate, first hand information on breaking developments and changes. This is particularly critical to our business which has built its reputation on

providing accurate and up to the minute services on changes and developments in international cargo and courier worldwide. In managing these developments [the beneficiary] will ensure that [the petitioner] receives priority treatment in receiving details on the availability, terms and conditions, and special features of cargo and courier services. When details are received, [the beneficiary] will direct [the petitioner's office in] Orlando. In addition, [the beneficiary] will execute the following duties: - Establish and maintain appropriate systems for measuring necessary aspects or organizational performance.

- Monitor, measure and report on organizational development plans and achievements within agreed formats and timescales.
- Manage and develop direct reporting staff . [sic]
- Manage and control departmental expenditure within agreed budgets.
- Liaise with other functional/departmental managers so as to understand all necessary aspects of organizational development, and to ensure they are fully informed of organisational development objectives, purposes and achievements.
- Maintain awareness and knowledge of contemporary organisational development theory and methods and provide suitable interpretation to directors, managers and staff within the organization.
- Ensure activities meet with and integrate with organisational requirements for quality management, health and safety, legal stipulations, environmental policies and general duty of care.

The petitioner continued by stating that the beneficiary would devote approximately 70% of her time performing these functions, and an additional 20% of her time would be devoted to overseeing the establishment of training programs and materials for the petitioner's personnel and clients. The remainder of her time would be devoted to developing overall financial plans and accounting practices for the petitioner.

On July 22, 2004, the director requested additional evidence with regard to the beneficiary's duties as well as those of her fellow employees, including their position titles, duties, and educational backgrounds. The director further requested an organizational chart showing the hierarchical structure of the petitioner's business in order to ascertain the beneficiary's level of responsibility within the organization. Finally, copies of quarterly state and federal tax returns were requested in order to determine the actual number of employees currently retained by the petitioner as active employees.

In response, the petitioner submitted a letter from [REDACTED], the Director of the petitioner's Miami office, which clarified the beneficiary's proposed duties. Specifically, the letter stated that the beneficiary "will have to carry out the sales job and insertion of the company's name in the market." He further stated that she would be responsible for organizing the logistics of package pick-up and that she would address "citations" dealing with dissatisfaction of the logistics process.

Furthermore, in addition to the educational degrees and position titles of the petitioner's four employers, the petitioner submitted an overview of the petitioner's entire global organization as well as an organizational

chart for the foreign entity. The petitioner failed, however, to submit an organizational chart for the U.S. entity.

On September 1, 2004 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States.

On appeal, counsel provides no new evidence and merely reasserts that, based on her experience abroad and the proposed managerial position in the United States, the beneficiary will soon oversee the Miami and Orlando offices and therefore qualifies as a manager for purposes of this evaluation.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties, the petitioner has failed to establish that it will be able to support the beneficiary in a capacity that is primarily managerial or executive at the end of the first year of operations. In addition, the AAO notes that the description of duties was too vague to ascertain whether the beneficiary will be acting in a primarily managerial or executive capacity.

In this case, the initial description of the beneficiary's duties and her role within the petitioner's hierarchy was vague and lacked detail with regard to the petitioner's planned objectives for her as general manager. In response to the request for evidence, more information regarding other employees of the petitioner was provided and, simultaneously, the petitioner claimed that the beneficiary would be responsible for the sales and marketing functions of the company. 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). In this case, the letter from the Miami office's director clearly confirms that she will be responsible for the sales and marketing of the U.S. company. For the reason discussed above, these duties suggest that the beneficiary's duties will not be primarily managerial or executive in nature.

A further problem, however, is the lack of an organizational chart or a discussion of the organizational structure of the petitioner. While the petitioner did in fact provide educational backgrounds and position titles for the petitioner's current employees, the petition omitted to state where the beneficiary would fall among these employees. For example, the AAO cannot determine from the record whether the beneficiary will oversee a staff of subordinates, or whether she will be the least senior employee upon her employment in the United States. 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Furthermore, the vague discussion of her proposed duties makes it extremely difficult to ascertain the exact nature of her proposed position. 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. at 1108, *aff'd*, 905 F.2d 41.

Prior to adjudication and again on appeal, counsel asserts that the beneficiary is a qualified manager. The record, however, is devoid of any concrete evidence to support these assertions. While the beneficiary may in fact have gained valuable knowledge and experience from her previous position with this employer, the fact remains that there is no credible evidence in the record to corroborate the claims of counsel that the beneficiary is qualified for the benefit sought. 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)). 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).

For this additional reason, the petition may not be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

ORDER: The appeal is dismissed.