



U.S. Citizenship
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Services

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File: SRC 04 032 50508 Office: TEXAS SERVICE CENTER

Date: MAY 04 2006

IN RE: Petitioner:
Beneficiary:



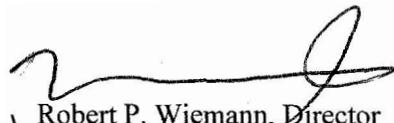
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Director
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 president/general 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 corporation organized under the laws of the State of Florida and is engaged in the retail sale of computer hardware and software. The petitioner claims that it is the subsidiary of Distribuidora Aspire Computer, C.A., located in Caracas, 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.

Upon the director's initial review of the matter, she sent the petitioner a request for additional evidence on February 6, 2004. Specifically, the director requested that the petitioner submit a list of the three employees of Aspire Distributions, Inc., including their job titles.

In response, counsel for the petitioner submitted a letter dated February 6, 2004, which listed four employees, their job titles, and a brief description of their duties. Counsel did not include the beneficiary on this list of the petitioner's current employees.

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 appeal, counsel for the petitioner asserts in its letter dated March 12, 2004 that (1) the size of the petitioner is "irrelevant" for purposes of whether a beneficiary qualifies for L-1 status as a manager or executive, (2) the beneficiary "supervises the development of activities of all the organization specifically two managers and their subordinates," and (3) delays in the issuance of the beneficiary's L-1 visa only allowed "approximately six weeks to establish a new office." In support of this assertion, the petitioner resubmits copies of the beneficiary's L-1 visa documents, passport pages, and I-94 Departure Record Card.

Upon review and for the reasons discussed herein, counsel's assertions are not persuasive and, thus, the AAO will dismiss 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 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.

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.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been employed in a 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(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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If a petitioner chooses to represent the beneficiary as being both an executive and a manager, it must then

establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In addition, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of both managerial and executive capacity. See section 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). For instance, the petitioner depicted the beneficiary as "plan[ning], develop[ing,] and establish[ing] policies and objectives," "[s]upervis[ing] and direct[ing] activities of subordinate managers and personnel," and "[e]stablish[ing] hiring and firing standards and administ[r]ation of the] same." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating (or paraphrasing) the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, these vague and nonspecific descriptions of the beneficiary's duties fail to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "plan[ning], develop[ing,] and establish[ing] policies and objectives," "[c]oordinat[ing] functions and operations between division and departments," "[d]irecting and coordinate[ing] financial and fiscal policies," and "[p]lan[ning] and develop[ing] public relations policies." The petitioner did not, however, define the petitioner's policies and objectives or provide details on what functions and operations the beneficiary will coordinate. 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). 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, while the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. For instance, as the director noted in her decision and as indicated on the Petition for a Nonimmigrant Worker (Form I-129), the record only indicates that three persons were employed by the petitioner at the time the petition was filed on November 13, 2003. As the beneficiary was physically present in the U.S. in L-1A status by that time, it appears that one of the three claimed employees was the beneficiary. Therefore, at the time the petition was filed it can be assumed that the beneficiary had at most two subordinate employees and not four as counsel for the petitioner claims. Consequently, besides the beneficiary, it is unclear from the record which two employees, if any, were employed at that time as well as what their job titles and duties were. Absent this evidence, it would appear that the beneficiary was either the sole employee or at most a first-line supervisor. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the record fails to demonstrate that the beneficiary is primarily supervising a staff of professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

Moreover, the assertions of counsel in its letters dated February 6, 2004 and March 12, 2004 are the only evidence that the petitioner employed anyone besides the beneficiary. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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). Absent documentary evidence that the petitioner employed anyone other than the beneficiary at the time the petition was filed, the AAO is left to presume that the beneficiary is actually the one responsible for taking orders, making sales calls, showing samples, and negotiating purchase prices. If this is the case, he is performing tasks necessary to provide a service or product and these duties will not be considered managerial or executive in nature. 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).

Whether the petitioner has one, three, or five employees, counsel is incorrect in asserting that the size of the petitioner is completely irrelevant. While 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, it is appropriate for CIS to consider the size of the petitioning company provided it is done 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 § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). 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, such as the exact number of employees of the petitioner, and fails to believe that the facts asserted are true. *Id.*

Overall, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Counsel indicates that the petitioner continues to expand and has already hired additional employees. However, 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 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 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 or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

Counsel for the petitioner does assert both in the record and again on appeal that the beneficiary was not provided the one-year period to establish the U.S. entity due to delays in the issuance of the beneficiary's L-1 visa. While it is recognized that the U.S. Department of State has had lengthy delays in issuing visas to certain individuals, it is understood that in most cases it rarely takes more than six weeks for an applicant to

obtain a nonimmigrant visa appointment and have his or her nonimmigrant visa application processed. The evidence presented by the petitioner, however, does not prove that the beneficiary experienced delays in the issuance of his visa; the beneficiary, for example, may simply have waited many months before making an appointment to submit his visa application to the U.S. Embassy. It is also possible that the U.S. Embassy requested additional information and documentation that the beneficiary failed to deliver to the Embassy in a timely manner. Absent evidence to the contrary, the AAO cannot consider this issue as it pertains to the petitioner's failure to meet the requirements of 8 C.F.R. § 214.2(l)(14)(ii).

Moreover, while counsel would make it appear the beneficiary was unable to enter the United States until September 29, 2003, it appears from the record that the beneficiary was actually present in the United States prior to his entry in L-1A status for business related to the creation and establishment of the U.S. entity. Specifically, the petitioner indicated on Form I-129 that the beneficiary was *last* admitted to the United States on July 3, 2002 (I-94 [REDACTED] information contrary to the included I-94 card (# [REDACTED] showing a September 29, 2003 admission date in L-1 status. In addition, the petitioner's incorporation documents show that the beneficiary was present in the United States on July 16, 2002, further evidenced by the Agent for Service of Process document signed by the beneficiary before [REDACTED] Notary Public in the State of Florida. While the beneficiary may only have been present in the United States for a short time in what is assumed was B-1 nonimmigrant status, his presence and B-1 status would still have provided him the opportunity to establish the U.S. entity and start its business operations more than one year and four months prior to the expiration of his L-1A status on November 14, 2003. Absent evidence to the contrary, it is also possible that the beneficiary remained in the United States for some time in B-1 status or even made subsequent and frequent visits to the United States in B-1 status before even applying for his L-1 visa in Venezuela. Therefore, as stated above, without evidence from the petitioner proving otherwise, the AAO cannot consider the delayed visa issuance claim as it pertains to the petitioner meeting the requirements of 8 C.F.R. § 214.2(l)(14)(ii).

Beyond the decision of the director, another evidence issue in this matter is the lack of certified translations for any of the Spanish language documents submitted. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims that the foreign, parent company is a legal entity. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Absent this evidence, the petitioner has failed to prove that "the United States and foreign entities are still qualifying organizations as defined in [8 C.F.R. § 214.2(l)(1)(ii)(G)]." 8 C.F.R. § 214.2(l)(14)(ii)(A).

Finally, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner has also failed to show that the U.S. entity has been "doing business" even for the few months the beneficiary has been present in the United States. Specifically, the copy of the lease provided by the petitioner is unsigned, which raises the issue of whether the U.S. entity ever secured the required physical premises to operate its business. In addition, the two sales invoices included were dated August 8, 2003 and September 15, 2003, covering only two months out of the year, and no sales invoices were submitted for the period of time following the beneficiary's admission to the United States in L-1 status on September 29, 2003. Moreover, while only two bank statements were submitted (July 2003 and August 2003), neither statement shows any substantial business transactions. In fact, the July 2003 statement shows a questionable transaction where the U.S. entity was wired \$98,713.50 by

its "parent company" but subsequently debited nearly the entire amount, \$98,000.00, the very next day for unknown reasons or purposes. The August 2003 statement also fails to show any transaction that might correspond to the August 8, 2003 invoice.

As indicated above, 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). There is no provision in 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 petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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.