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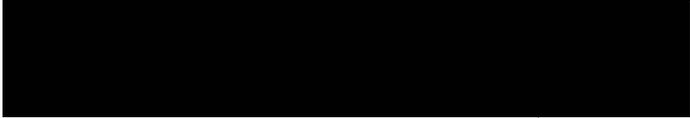
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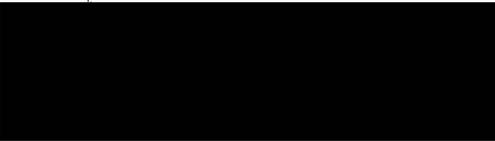
File: SRC 04 102 50255 Office: TEXAS SERVICE CENTER Date: MAY 04 2006

IN RE: Petitioner:  
Beneficiary:



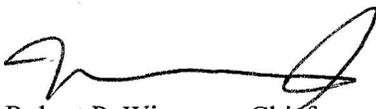
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 president 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 Texas and is engaged in the purchase and distribution of chemical and petrochemical products. The petitioner claims that it is the affiliate of Astro Chemical S.A. de C.V., located in Mexico City, Mexico. 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 initial review of the matter, the director sent the petitioner a request for additional evidence on March 8, 2004. Specifically, the director requested the following: (1) evidence that the foreign entity is currently doing business, including current financial records, tax records, employment records, corporate annual reports, invoices, bills of sale, and product brochures; (2) evidence that the U.S. entity has been doing business for one year, including bank statements, payroll records, invoices, sales records, shipping receipts, and invoices for goods and services ordered; (3) the past four quarters of the Employer's State Quarterly Tax Returns, including proof that the petitioner has made its payments to the Internal Revenue Service; (4) evidence of the ownership and control of the U.S. and foreign entities, including stock certificates, corporate stock registers, or annual reports that list the affiliates and subsidiaries and ownership percentage of each; (5) the petitioner's Texas Fictitious Business Name / Doing Business As Certificate; (6) the petitioner's 2003 payroll records; (7) a current organizational chart for the U.S. entity; (8) the foreign entity's organizational chart; (9) a "definitive" description of the beneficiary's employment with both the U.S. and foreign entities; (10) the beneficiary's direct subordinates, including their job titles, job duties, educational backgrounds; (11) the essential function that the beneficiary manages in the event the beneficiary does not supervise any employees; and (12) a current, unexpired lease agreement for the U.S. entity.

In response, the petitioner submitted the following: (1) un-translated documents in Spanish that appear to include a statement from the foreign entity, Mexican tax and bank documents, invoices, an information letter addressed to the Mexican Department of Defense, and product analysis documents; (2) the petitioner's 2003 bank records; (3) various invoices of the petitioner from 2003; (4) the petitioner's 2003 balance accounting sheets; (5) the petitioner's last three State Quarterly Tax Returns, which shows the beneficiary was the only employee during this time; (6) evidence of the payment of Federal taxes in 2003; (7) an incomplete or "brief English summary" of the foreign entity's articles of incorporation; (8) corporate minutes for the U.S. entity, all dated March 1, 2004; (9) corporate bylaws of the U.S. entity; (10) the petitioner's 2003 tax return; (11) the petitioner's 2003 payroll records; (12) an organizational chart for the U.S. entity, indicating that the beneficiary is its sole employee; (13) an organization chart for the foreign entity; (14) a letter from the beneficiary on the foreign entity's letterhead, which provides some additional details on the job duties of the beneficiary; (15) a new lease agreement for the petitioner, which extends the prior lease by one year while expanding the leased premises to include one additional suite.

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 that the position is executive, not managerial, and that "the beneficiary meets each of the four parts of the definition of 'Executive Capacity.'" The petitioner does not submit any additional evidence in support of this assertion.

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 (I)(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 or will be employed in a primarily 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. In this case, while counsel for the petitioner clearly states on appeal that the beneficiary's position is executive, in its initial documents and in its response to the director's request for evidence, the petitioner makes no such claim and, in fact, appears to indicate that the position will be managerial once an administrative manager and a logistic manager have been hired. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In addition, in its attempt to meet the definition of manager or executive under the Act, the petitioner has provided vague and nonspecific descriptions of the beneficiary's duties that fail to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include being "responsible for the overall operations of the company," "planning, developing and establishing policies and objectives," and "setting responsibilities and procedures for attaining these objectives." The petitioner did not, however, define these policies, procedures, or objectives or provide evidence regarding who, besides the beneficiary, actually performs the operational and administrative functions of the company. 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).

On appeal, counsel for the petitioner asserts in its brief, dated April 22, 2004, that "the functions of the beneficiary are not managerial but executive." Specifically, counsel claims that the beneficiary's job duties also include the following:

The evidence presented shows that as the owner and sole employee of a \$3 plus million dollars [sic] business the beneficiary [d]irects the management of the organization; is solely responsible for management of the organization; is solely responsible for establishing the

goals and policies of his company; exercises wide latitude in discretionary decision making; and as controlling owner receives no supervision or direction from higher level executives of the company.

However, rather than providing a more specific description of the beneficiary's duties, counsel has simply paraphrased the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). As indicated above, the petitioner depicted the beneficiary as "direct[ing] the management of the organization," "responsible for establishing the goals and policies of his company," "exercis[ing] wide latitude in discretionary decision making," and "receiv[ing] no supervision or direction from higher level executives of the company." These conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating 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.).

In addition, in its letter dated March 12, 2004 the petitioner describes the beneficiary as overseeing "the maintenance of financial record systems and financial reporting" and "for ensuring that all of [the petitioner's] shipments comply with all federal and state mandates." Furthermore, as indicated previously, the petitioner states that it expects to hire an administrative manager and a logistic manager. The administrative manager "will be responsible for all administrative matte[r]s, such as invoicing, purchase orders and record keeping[, while the] logistic manager will be responsible for the reception and timely delivery of [the petitioner's] products to [its] clients." Based on this statement, the petitioner's payroll records, the organizational chart for the petitioner, and the submitted tax documents, it is clear that the petitioner only employs one person, the beneficiary. As the petitioner's only employee, it must be concluded that the beneficiary actually prepares the invoices, purchase orders, financial records, and product shipments. Therefore, the beneficiary 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).

By counsel's own admission, the beneficiary will not serve in a managerial capacity. In addition, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily executive capacity. The petitioner indicates that it plans to hire two additional managerial employees in the future. 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, 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.

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).

Beyond the decision of the director, it should be noted that in her request for evidence, the director asked the petitioner to submit evidence that the foreign entity is currently doing business. Although the petitioner submitted documents in response to this request, none were translated. Due to the petitioner's failure to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *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. This evidence is critical, as it may have established that the foreign entity meets an essential element of the qualifying relationship test. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested, translated evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). For this additional reason, the petition will not be approved.

In addition, it should also be noted that the petitioner did not adequately respond to the director's request for evidence regarding the ownership of the U.S. and foreign entities. 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 order to establish proof of ownership, the director in this case requested that the petitioner submit such evidence as the companies' stock certificates, corporate stock registers, or annual reports that list the affiliates and subsidiaries and ownership percentage of each. However, the petitioner did not submit any stock certificates and only submitted the foreign entity's corporate articles and the U.S. entity's bylaws and corporate minutes. First, the foreign entity's articles of incorporation were not fully translated; only a half-page "Brief English Summary" was submitted as the translation of a twenty-five page plus document. As indicated above, non-certified and incomplete translations of documents are not probative and will not be accorded any weight in this proceeding. Second, the U.S. entity's bylaws did not provide any relevant information regarding the ownership of the company, such as the number of shares permitted and/or issued, and the March 1, 2004 corporate minutes, while stating the ownership of the U.S. entity, are insufficient by themselves to prove ownership of the U.S. entity.

As general evidence of a petitioner's claimed qualifying relationship, corporate minutes alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificates, stock certificate ledger, stock certificate registry, and corporate bylaws 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.

Moreover, with the March 1, 2004 corporate minutes indicating that the company's first stock issuance did not occur until less than three weeks before the filing of the current petition, the AAO is left to question both the validity of this document as well as the claimed qualifying relationship for the beneficiary's initial L-1A petition (SRC 02 230 51929). In conclusion, the AAO cannot find sufficient evidence in the record to establish that the petitioner and the foreign entity had a qualifying relationship. *See* 8 C.F.R. § 214.2(I)(1)(ii)(G). 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.