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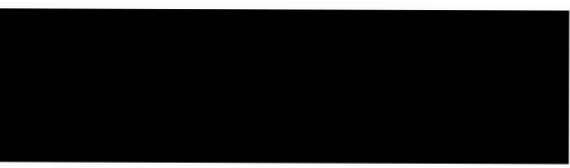
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File: SRC-04-088-51750 Office: TEXAS SERVICE CENTER Date: **OCT 04 2006**

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 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 Texas and is engaged in the trucking business. The petitioner claims that it is the affiliate of Transportes Damarjo, located in Veracruz, 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.

The director denied the petition concluding that the petitioner did not establish that the beneficiary had been and 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 director's decision was in error. In support of this assertion, the petitioner submits 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:

- (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.

As a preliminary matter, any document containing foreign language submitted to Citizenship and Immigration Services (CIS) must be accompanied by a certified translation. **8 C.F.R § 103.2(a)(3)**. Petitioner has submitted numerous documents in a foreign language and those documents will be rejected as evidentiary submissions.

The first 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 as follows:

- A. General operations
- B. Responsibility for the daily activities of the trucks, including the supervision of loading and unloading goods, the placing of trucks at the locations of customers, and supervision the flow of information for smooth operations of activities.
- C. Weekly projections for each vehicle to optimize resources and logistics to serve customers.
- D. General supervision of documentation to invoice for services rendered, to monitor income and expenses and to manage employees who handle booking and accounting functions.
- E. Negotiations on a regular basis with suppliers of goods and services of the company.
- F. Daily supervision of all employees, including problem resolution of employee disputes and setting and adjusting wages for employees.
- G. Management of expenses incurred by the company for operations.
- H. Review and approval proposals to purchase goods and services for the company.
- I. Dealing with governmental authorities and supervision of documents and reports as well as relationship with said authorities, especially in obtaining permits required to conduct business.
- J. Representation of the company before regulatory governmental agencies.

On March, 3, 2004, the director requested additional evidence. Specifically, the director requested the following responses:

- If there are other employees explain what their duties are and their education background.
- Explain how the beneficiary will not engage in the day to day operations of the business, and he will primarily be engaged in a managerial or executive duties.
- Submit copies of the Employer's State Quarterly Tax Return with all the attachments for the past two quarters. Submit proof that payments have been made to the [petitioner].
- Submit 940 EZ Employers Annual Federal Unemployment Tax Return for [petitioner].
- Submit a current lease agreement for the U.S. Company.
- Submit photos of the inside and outside of the U.S. Company.

In response, the petitioner submitted written responses and uncertified, unsigned tax documentation.

On March 26, 2004, the director denied the petition. The director determined that petitioner had not established the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the petitioner does qualify for the classification and that certain requirements are not applicable.

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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. 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 the petitioner has done just that but has not established the elements of both managerial and executive capacity. Although counsel for petitioner has made numerous conclusory assertions, 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 Obaighena*, 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).

Starting with the petitioner's description, many of the duties listed are repetitive, generic and ambiguous. As an example items G and H are both so generic as to possibly mean purchasing gas or parts for the trucks. The only receipts submitted by petitioner are purchases in the conduct of routine operation of trucks by the

operators themselves, following the trucks on their shipping routes. *See generally* receipts, attached hereto as petitioner's initial unlabeled exhibit (showing widely varied purchase locations for items such as diesel and mechanical parts). Items I and J are more or less about the status of beneficiary, as opposed to a duty that requires any significant manifestation of time or effort. Items D and E are so ambiguously worded they could be part of the same activity (choosing a garage to work on trucks, for example) and appear to be the actual performance of the asserted function as opposed to managing it. Items B and C can only be reasonably interpreted as duties of a first-line supervisor, and are so ambiguous as to possibly mean choosing the travel routes of the trucks and calculating the cost of gas. Item A includes the day-to-day activities that counsel admits beneficiary engages in. *See* Letter, petitioner's counsel, dated April 21, 2004 (stating ". . . beneficiary is engaged in day-to-day operations . . ."). While performing day-to-day activities will not automatically disqualify a beneficiary, the petitioner must establish that beneficiary will be primarily acting in a managerial or executive capacity.

In the petitioner's response to the RFE, counsel repeatedly asserts that beneficiary operates in both a managerial and executive capacity:

Other than this beneficiary and his son, there are presently only two other employees, both operators of tractor trailers. Each beneficiary has responsibility and control over their respective areas as detailed in the original letter in support of both petitions. Each beneficiary manages an essential function within the organization; each has authority to hire and fire employees within their area and each functions at a senior level within the organization; and each exercises discretion over day to day operations within their function. As the company grows and more employees are added, then their responsibilities will change as needed.

Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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); *Astyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Simply having a managerial or executive title and asserting to occupy such a position in the company is not sufficient. 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 Obaighena*, 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).

The petitioner had ample opportunity to submit evidence of its employees operating under different capacities, and could have provided more probative documentation, itemized beneficiary's time by percentage or given probative evidence of beneficiary's work product (produced in the regular, systematic conduct of business by petitioner). In this case the petitioner has never submitted the required initial evidence and did not provide probative documentary evidence to support its assertions in the Response to RFE or on appeal. An application must be filed with all required initial evidence. 8 C.F.R. § 103.2(b). If all initial evidence or evidence requested by the director is not submitted the petition may be considered abandoned. 8 C.F.R. § 103.2(13).

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 case counsel admits on appeal that beneficiary performs the general administration and reports to the son. This statement completely undermines the assertion that beneficiary receives little or no supervision, and that he primarily performs in a managerial or executive capacity.

Counsel asserts on behalf of the petitioner that the beneficiary manages the function of "administrative manager," and then, confusingly, alternatively lists the beneficiary as managing "general operations". This is a necessary function that must be performed by any company, and to define essential function so broadly would be to render the term moot. Routine tasks associated with running a business are not an essential function as contemplated by the statute and its legislative history. It is asserted that the beneficiary's son, also referred to as a "beneficiary" by counsel in the Response to RFE, manages an essential function and has day-to-day authority over that function. Finally, it is asserted that "each beneficiary" as the petitioner and beneficiary are referred to in the Response to RFE letter, directs the management of the organization and establishes the goals and policies and receives only general supervision or direction. The AAO is unable to determine what either of the two employees of petitioner are doing at any one time, under what capacity, nor can it accept that the only other employee of the company performs all of the asserted activities and yet primarily acts in a managerial or executive capacity as a functional manager.¹ The AAO finds that such an assertion is not credible and in this case not supported in the record other than by the assertions of interested parties.

In this case counsel has asserted that the beneficiary is managing the administrative function of the petitioner, and that despite the fact that his son owns a majority of the petitioner and allegedly controls petitioner (titled the "administrative manager"), the beneficiary directs the administrative manager and operates in something other than a first line supervisor capacity. In addition to finding the petitioner's factual claims not credible, if the facts were presumed as such then petitioner has not established that its duties transpose to more than a first line supervisor. The petitioner has not demonstrated that any employees are managerial or professional, and are actually performing the functions allegedly managed by beneficiary.

¹ The record indicates that beneficiary's son is also claimed as a manager or executive, which is inconsistent with the numerous other capacities in which the beneficiary's son – the only other employee – allegedly acts in order to qualify the beneficiary.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and 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, 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).

The AAO would note that in addition to the technical problems listed above, some of petitioner's evidence provides other indications of ineligibility. Pictures submitted as evidence illustrates that petitioner does not have a premises sufficient to conduct a trucking business. The pictures are of a home residence with Xerox copies of the petitioner's name taped to a window and laid on the lawn. There is no evidence of a permanent business office or premises, with actual signage, or any facilities for trucks or the storage of freight. In this case, the petitioner applied initially for a new office and would have had to submit evidence that sufficient premises had been acquired to conduct business. If such petition were approved under the facts that were contained in this record, then a gross error was committed and the petition should be revoked. In this case the petitioner does not have sufficient business premises. 8 C.F.R. § 214.2(l)(9)(iii)(A)(5).

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). In the instant matter petitioner has not met the burden of proving that the beneficiary will be employed in a managerial or executive capacity, nor has petitioner proven that a qualifying relationship with a qualifying organization exists. Subsequently, the appeal will be dismissed and the petition is hereby denied.

ORDER: The appeal is dismissed and the petition hereby denied.