

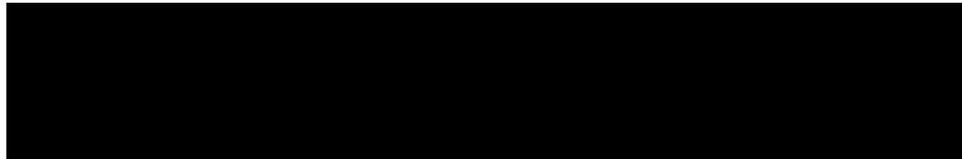


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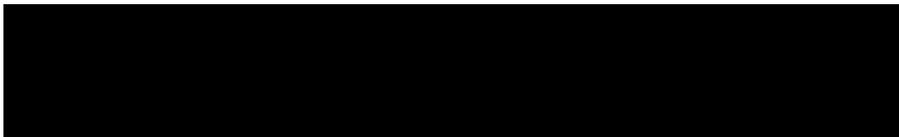
File: SRC 06 120 51906 Office: TEXAS SERVICE CENTER Date: APR 05 2007

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)

ON BEHALF OF THE 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, a Florida corporation, states that it is engaged in the import and export of computer and office supplies. The petitioner claims to be a subsidiary of Professional Stationery Suppliers, located in Trinidad. The beneficiary was initially granted a one-year period in L-1A classification in order to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for three additional years.

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, the petitioner disputes the director's decision and asserts that the petitioner established that the beneficiary will be employed in an executive capacity. Counsel submits a brief and additional documentary evidence in support of 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 sole issue addressed by the director is whether the petitioner established that 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.

The nonimmigrant visa petition was filed on March 7, 2006. The petitioner stated on Form I-129 that the beneficiary would continue to serve as general manager of the two-person company. In a supporting letter dated February 21, 2006, the foreign entity described the beneficiary's position as follows:

During [the beneficiary's] first year in L-1A status, he has exercised more than a mere supervisory control over the U.S. subsidiary's sales office for imported/exported products. He has determined the policies, staffing, marketing, directional company goals, and established corporate good will and maximum profitability. Over the past year as the General Manager of [the petitioner], [the beneficiary] has been responsible for expanding our operations through planning, directing and coordinating all aspects of our U.S. company. His duties have included formulating company policies for marketing, sales, personnel and finances. Moreover, [the beneficiary] has been managing the daily operations of [the petitioner].

[The beneficiary] has started the process of exporting office supplies to the West Indies, including, but not limited to Trinidad, successfully exporting office supply products with a value of \$50,254.35US to date. He has also created a network of suppliers. [The beneficiary] has also been advertising and networking to create a clientele to buy the company's products in the United States. Included in this effort has been the distribution of samples to many potential buyers, and the use of marketing tools such as pens, calendars and diaries.

The petitioner submitted its most recent IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2005, which confirmed the employment of the beneficiary and his spouse.

The director issued a request for evidence on April 20, 2006, in part, instructing the petitioner to submit the following additional documentation: (1) evidence of the petitioner's current staffing level, including position titles and duties for all employees, and educational background for any professionals; (2) the organizational chart for the U.S. company, including all employee names and job titles; (3) copies of the U.S. company's

Florida Forms UCT-6, Employer's Quarterly Report, for all quarters of 2005; and (4) evidence that the beneficiary will not engage in the day-to-day operations of the business, along with evidence that the beneficiary is managing other managers or professionals.

In a response dated May 22, 2006, counsel for the petitioner further described the petitioner's staffing levels and the beneficiary's duties as follows:

[The petitioner] currently has two full time employees, [the beneficiary] and [REDACTED]. [The beneficiary], the General Manager of the U.S. entity, manages the day to day operations of the company and dedicates a majority of his time developing the marketing and sales strategy of [the petitioner]. [REDACTED], the assistant to [the beneficiary], responsibilities include running the day to day operations of [the petitioner]. As the U.S. entity continues to grow, additional employees will be hired to assist [REDACTED] in running the day to day operations of [the petitioner].

Counsel for the petitioner noted that the petitioner did not begin its operations until the third quarter of 2005, and noted that as a result of Hurricane Wilma in October 2005, the petitioner was shut down for nearly three weeks due to lack of power and telephone service.

The director denied the petition on June 14, 2006, concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity under the extended petition. The director observed that, based on the petitioner's staffing levels, the beneficiary would be engaged in the day-to-day operations of the business rather than performing primarily managerial or executive duties. The director noted that the beneficiary would not be responsible for supervising any managerial, supervisory or professional employees. The director acknowledged the petitioner's claim that a hurricane temporarily shut down its operations, but noted that it was evident that the company's lack of supporting staff as of the date of filing was not directly attributable to this three-week setback in operations in 2005.

On appeal, counsel for the petitioner asserts that the beneficiary "has complied with all four requirements" for executive capacity as defined at section 101(a)(44)(B) of the Act, in that he:

- a) Was primarily responsible for managing the U.S. operations of [the petitioner] by managing all aspects of its Florida operations;
- b) Was solely responsible for establishing the goals and policies of [the petitioner];
- c) Exercised complete control in discretionary decision-making with regards to the operations of [the petitioner]; and
- d) Received only general supervision from within the U.S. as well as foreign operations.

Counsel emphasizes that the petitioning company has developed major customers in the United States and abroad, and achieved \$50,000 in sales during the last five months of 2005 alone, despite being shut down during the fall of 2005 due to hurricanes in South Florida. The petitioner provides copies of previously submitted documents in support of the appeal.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. 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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are primarily related to operational or policy management, not to the performance of non-managerial or non-executive duties or involvement in the operational activities of the company.

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the petitioning company as its owner and general manager, the petitioner's description of the beneficiary's job duties fails to establish that he would perform primarily managerial or executive duties under the extended petition. The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to establish what tasks the beneficiary performs on a day-to-day basis. For example, the petitioner stated that the beneficiary has "determined the policies, staffing, marketing, directional company goals," "established corporate good will," held responsibility for "planning, directing and coordinating all aspects" of the company, and formulated "company policies for marketing, sales, personnel, and finance." The petitioner did not further describe the goals and policies developed and implemented by the beneficiary, nor did it indicate who would perform the routine tasks associated with the company's marketing, sales, finance and other functions that are claimed to be managed by the beneficiary. 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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 response to the director's request that the petitioner clarify how the beneficiary is able to devote the majority of his time to managerial or executive duties, the petitioner simply stated that the beneficiary "manages the day to day operations of the company and dedicates a majority of his time to developing the marketing and sales strategy," while his assistant "runs the day to day operations" of the company. Again, the petitioner's blanket claim that the beneficiary "manages the day to day operations of the company" will not satisfy the petitioner's obligation to describe the beneficiary's actual duties. Similarly, on appeal, counsel

paraphrases the statutory definition of executive capacity in an attempt to establish that the beneficiary is qualified for the requested extension of status. 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. at 108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Furthermore, 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). The petitioner has not described the actual duties to be performed by the beneficiary, such that they could be classified as managerial or executive in nature. A beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to his position merely on the basis of broadly-cast job responsibilities.

Although the petitioner indicates that the beneficiary devotes the majority of his time to "developing the marketing and sales strategy" of the petitioning company, the petitioner does not employ a sales or marketing staff to implement the beneficiary's "strategy" or to perform the routine tasks associated with selling and marketing the petitioner's products. When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. According to the beneficiary's resume, he is responsible for "sales and collections," and "purchasing of stocks and distribution of goods to clients," duties which do not fall under the statutory definitions of managerial or executive capacity. The petitioner also noted the beneficiary's responsibility for "advertising and networking," and various marketing activities. In addition, the AAO notes that the majority of the submitted sales invoices identify the beneficiary as the individual who prepared the invoice. Overall, the evidence suggests that the beneficiary himself is responsible for carrying out the company's day-to-day sales, marketing, purchasing and advertising activities, rather than merely "developing strategies" for these functions as claimed by the petitioner. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his 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 many of the beneficiary's duties, as discussed above, 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 manager or executive. *See e.g., IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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, USCIS 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 USCIS 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 USCIS 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.

At the time of filing, the petitioner was a one-year-old company engaged in selling computer and office supplies to U.S. and international customers. The petitioner's 2005 corporate tax return indicates that the company is engaged in the retail sale of office products, although it is not clear from the record whether the petitioner actually operates a retail store. The petitioner employs the beneficiary as general manager and one other employee as his assistant. Although the director requested a description of the duties of all employees, the petitioner simply indicated that the assistant "runs the day-to-day operations" of the company. Due to the petitioner's failure to specify the actual duties performed by its other employee, the AAO cannot determine to what extent this employee relieves the beneficiary from performing non-managerial and non-executive tasks. 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)).

The petitioner reasonably requires employees to market and sell the products, advertise the petitioner's business, respond to customer inquiries and perform other customer service functions, arrange for domestic and international delivery of orders, maintain the company's day-to-day finances, purchase products from suppliers, and perform routine clerical and administrative tasks associated with operating a small import/export business. Although the petitioner states that the beneficiary "manages" the day-to-day operations and his assistant "runs" the day-to-day operations, the record does not clearly demonstrate that a single subordinate employee performs most or all of the non-managerial and non-executive tasks associated with operating the petitioner's business.

Upon review, it is clear that the director considered the reasonable needs of the company and concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act. Contrary to the petitioner's assertions, the record does not establish that the beneficiary was relieved from primarily performing non-managerial duties associated with the company's sales, marketing, advertising, customer service, financial, distribution and administrative functions.

Collectively, the lack of a subordinate staff brings into question how much of the beneficiary's time can actually be devoted to the claimed managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. See sections 101(a)(44)(A) and (B) of

the Act. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner asserts on appeal that the beneficiary functions primarily in an executive capacity, and the fact that there are few employees does not detract from the fact that his duties are primarily executive in nature. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* In this case, while the beneficiary evidently exercises discretion over the business as the owner of the business and the senior employee in its two-person organization, the petitioner has not established that his primary duties are the high-level duties contemplated by the statutory definition.

Nor does the record establish that the beneficiary will primarily manage a subordinate staff of managerial, supervisory or professional employees, or an essential function of the organization, such that he would be employed in a primarily managerial capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A).

Although the petitioner indicates that it intends to hire additional staff in the near future, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The AAO is sympathetic to the petitioner's claim that its business was hampered by a succession of hurricanes that impacted the State of Florida in 2005. However, notwithstanding any difficulties, the petitioner appears to have been doing business continually since the beneficiary's arrival in the United States and will not be excused from the regulatory requirement that the company support the beneficiary in a managerial or executive capacity within one year of commencing U.S. operations.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

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.