



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

07

File: SRC 06 041 50433 Office: TEXAS SERVICE CENTER Date: **AUG 03 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)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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) in the position of technical project manager. The petitioner is a corporation organized in the State of Florida that claims to be engaged in distribution, sales and services for digital printing presses. It claims that it is the subsidiary of M.G.I. SA, located in Ivry sur Seine, Cedex, France. 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 of the director's denial. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner seeks to clarify the nature of the beneficiary's proposed position and asserts that the beneficiary is in fact qualified for the benefit sought. In support of the appeal, the petitioner submits a brief and 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 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 support of the petition, the petitioner submitted an undated letter which provided an overview of the petitioner and the beneficiary's proposed role therein. Specifically, the petitioner stated that the beneficiary worked abroad as an engineer. It explained that it currently had an engineer, formerly employed by the foreign entity, on staff in the United States, but that due to his need for retraining on the company's most recent products at the plant in France, he would no longer be able to provide the daily support required by the petitioner. As a result, the petitioner intended to replace this employee with the beneficiary.

A letter from the foreign entity dated November 3, 2005 described the beneficiary's duties as follows:

[The beneficiary's] mission will be to assist our US staff by training on the new products and protocols we are implementing, in coordination with [REDACTED] and our [t]echnical [t]eam in France; implement technical procedures and train US [t]echnical [s]taff on mechanical & electronics components, on operator's training, trouble shooting, lab & fields repairs & service calls, create, translate & update manuals & operating guides, data recording & factory feed back, procedures & processes as per our requirements.

On December 30, 2005, the director requested additional evidence. Specifically, the director requested more information with regard to the staffing levels of the petitioner, including the position titles, qualifications, and duties of all employees. In response, the petitioner submitted a letter dated February 2, 2006 from the foreign entity. The foreign entity stated that the beneficiary's position required a person who possessed a "diploma of Master in Engineering." Additionally, the petitioner submitted a list of employees demonstrating the organizational hierarchy of the petitioner. The chart listed nine employees: five were listed under "Management & Administration," one under "Sales," two under "Technical Team," and the last employee, the person the beneficiary was intended to replace, was categorized as "Factory Support." No additional description of the beneficiary's proposed duties in the United States was provided by the petitioner.¹

On February 27, 2006, the director denied the petition. The director determined that the beneficiary will not act in a primarily managerial or executive capacity. Specifically, the director noted that in addition to providing a vague description of the beneficiary's duties, the evidence of record suggested that the beneficiary would actually be performing key tasks and providing the services of the petitioner rather than managing a subordinate staff or a designated function.

On appeal, the petitioner asserts that the beneficiary has been tasked to restructure the petitioner's technical service, and thus he would in fact be functioning in a managerial or executive capacity. Included in the appeal is an updated organizational chart which shows that the beneficiary's position in the organizational hierarchy would include in its responsibilities the supervision of subordinate staff members.

¹ The regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." Although the director did not specifically request additional details regarding the beneficiary's proposed position with the petitioner, the director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

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.*

In this matter, the petitioner failed to provide an adequate description of the beneficiary's proposed duties. Instead, it merely provided a brief, generalized synopsis in the initial letter of support submitted with the petition. Although the petitioner provided brief and generalized overviews describing the general nature of the beneficiary's role in the petitioner's enterprise, and provided a list of U.S. employees, the petitioner failed to articulate the manner in which the beneficiary would interact with these persons. The only details in the record pertaining to the proposed position of the beneficiary suggest that he will be providing technical training and support. The record, however, does not explain how the training will satisfy the regulatory definitions of managerial or executive capacity, since there is no further information with regard to how the beneficiary interacts with others. As such, the record contains little information regarding the exact nature of the beneficiary's duties.

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What will the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In this matter, the petitioner's failure to provide a detailed description of the beneficiary's proposed managerial and/or executive duties has rendered it impossible to conclude that the beneficiary will function in a primarily managerial or executive capacity.

The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner claimed in response to the request for evidence that the beneficiary would be one of nine employees at the U.S. office. However, the position that he is intended to fill by replacing the current engineer on staff is identified on the organizational chart as "factory support." Although there are five other employees who are listed under the "management and administration" department, no reference is made to the beneficiary with regard to those positions. Furthermore, by the petitioner's own admission, an engineering degree is required in order to perform the duties of the position, thereby suggesting that much of the position requires hands-on services by the beneficiary as opposed to merely supervising or overseeing a subordinate staff as contemplated by the regulations. Furthermore, the organizational chart depicting the foreign entity's organizational structure was provided in response to the director's request for evidence; however, this chart merely lists the U.S. operation as being overseen by the foreign entity's senior vice president. There is no specific claim in the record, therefore, that the beneficiary will be overseeing a subordinate staff of professional, supervisory, or managerial employees.

The nature of the organizational hierarchy of the petitioner suggests that the beneficiary is akin to a skilled worker who will be providing specialized training in the field of engineering to future U.S. staff. 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).

When staffing levels are used as a determining factor in denying a visa to a multinational manager or executive, the reasonable needs of the organization in relation to its overall purpose and stage of development must be considered and addressed. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, there is no indication in this matter that the reasonable needs of the organization were not considered by the director. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support the beneficiary in a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act. Specifically, although the beneficiary's level of expertise and role in the continued success of the petitioner is certainly important, it has not been demonstrated that the beneficiary will assume a managerial or executive role in the company. Instead, the record indicates that the beneficiary will assume a position referred to as "factory support," and although it is undisputed that he will offer technical training to staff members and protocol updates throughout the entity, he is not overseeing a staff of managers, supervisors, or professionals. In fact, it appears that he is at the lowest level of the petitioner's organizational hierarchy.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

On appeal, the petitioner submits an updated organizational chart for the U.S. entity. The newly-submitted chart indicates that the beneficiary will supervise a Warehouse Coordinator and two Senior Field Service Engineers, who in turn would oversee three Technicians. The petitioner, however, 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.

Furthermore, the proposed position of the beneficiary as outlined by the petitioner on appeal is materially different to the position initially described at the time of filing. Specifically, the description of duties provided in the petitioner's November 3, 2005 letter indicates that the beneficiary would be responsible for training the U.S. staff in the company's new products and protocols. Furthermore, the record indicates that he would be replacing [REDACTED], who was currently employed as a senior engineer and identified as "factory support." On appeal, the petitioner claims that in addition to training, the beneficiary "will be entrusted with full managerial power over the entire Service." His new, additional duties will include hiring and firing staff, decision making, and overseeing customer service decisions. Furthermore, the petitioner

claims that he will oversee four managerial employees, and will eventually manage up to eight managerial employees.

These contentions, however, are not persuasive. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

In the instant matter, the petitioner fails to establish that it will employ the beneficiary in a predominantly managerial or executive position as required by 8 C.F.R. § 214.2(1)(3). For this reason, the petition may not be approved.

Furthermore, the petitioner on appeal alternatively requests consideration of the petition for L-1B classification. This request to amend the petition on appeal, however, is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(1)(7)(i)(C) state:

The petitioner shall file an amended petition, with fee, at the service center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The request to reconsider the original petition on appeal as a petition for L-1B classification is, therefore, rejected.

Beyond the decision of the director, it does not appear that the beneficiary was employed abroad in a primarily managerial or executive capacity. The petitioner indicates that the beneficiary is an engineer and performs engineering and technical services for the petitioner. In the foreign entity's organizational chart, it appears that the beneficiary's position is in the research and development area, and in turn, he and two members of the production area supervise an assembly and purchasing team. There is no indication that these subordinate employees are managerial, supervisory, or professional in nature, such that the beneficiary could be deemed a manager. Additionally, there are four executives and managers who in turn oversee the beneficiary within this organizational hierarchy. Finally, as with the proposed duties in the United States, the exact nature of his day-to-day duties abroad is uncertain. The record, therefore, is not persuasive in demonstrating that the beneficiary was employed abroad in a primarily managerial or executive capacity. For this additional reason, the petition may not be approved.

Additionally, the petition also may not be approved because there is insufficient evidence of a qualifying relationship between the petitioner and the foreign entity. The petitioner claims that it is a wholly-owned subsidiary of the foreign entity. The petitioner, however, has submitted insufficient documentation to establish that the foreign entity in fact owns the petitioner. For example, the record contains the petitioner's

Articles of Incorporation, but does not contain stock certificates or meeting minutes demonstrating the nature of ownership of the petitioner's outstanding shares. Although the director specifically requested evidence to this effect in the request for evidence, the petitioner failed and/or refused to submit such evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In addition, the claims of the petitioner, without documentary evidence to support them, are insufficient for purposes of establishing that a qualifying relationship exists in this matter. 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)).

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.