

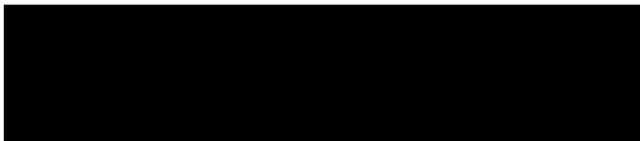
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U.S. Citizenship  
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File: SRC 05 138 51263 Office: TEXAS SERVICE CENTER Date: **AUG 06 2007**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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 appeal will be dismissed.

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its president/general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of Florida and is allegedly a retailer. 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.<sup>1</sup>

The director denied the petition concluding that the petitioner did not establish that (1) the petitioner and the foreign entity are still qualifying organizations because it was not established that the foreign entity or the petitioner is doing business; (2) the petitioner had been doing business for the previous year; or (3) 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. In support of the appeal, counsel to the petitioner submits a brief which avers that both the foreign entity and the petitioner are doing business, that the beneficiary is engaged in performing managerial duties, and that the petitioner's four employees relieve the beneficiary from performing non-managerial duties.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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.

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<sup>1</sup>According to Florida state corporate records, the petitioner's corporate status in Florida was "administratively dissolved" on September 15, 2006. Therefore, since the corporation may not carry on any business except that necessary to wind up and liquidate its affairs, the company can no longer be considered a legal entity in the United States. See Fla. Stat. 607.1405 (2006). Therefore, if this appeal were not being dismissed for the reasons discussed herein, this would call into question the petitioner's eligibility for the benefit sought.

- (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 first two issues in this matter are whether the petitioner has established that it and the foreign entity are both "doing business," and are thus qualifying organizations, and whether the petitioner has been "doing business" for the previous year.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

Evidence that the United States and the foreign entity are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section[.]

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." "Doing Business" is defined in part as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization." 8 C.F.R. § 214.2(l)(1)(ii)(H). Moreover, as this petitioner concerns the extension

of a "new office" petition, the petitioner is also required by 8 C.F.R. § 214.2(l)(14)(ii)(B) to establish that the petitioner has been "doing business" for the previous year.

In this matter, the petitioner submitted a copy of its 2004 Form 1120 indicating that the petitioner had sales of \$107,926.00 in 2004 and bank statements from January 2004 through March 2005. The most recent bank statement reported an ending balance of \$22,374.06 and reflected almost daily account activity. Much of this activity appears related to deposits and vendor fees connected to credit card transactions. The petitioner's payment of rent for its shopping mall location also appears in the statements. However, the petitioner did not provide any evidence that it purchased and sold goods as part of its alleged retail activities. Likewise, the petitioner failed to provide any evidence that the foreign entity is currently "doing business." All of the business records provided for the foreign entity concern activities in 2004 or earlier. The current petition was filed on April 18, 2005.

On May 14, 2005, the director requested additional evidence. The director requested, *inter alia*, evidence that both the petitioner has been doing business for the past year and evidence that the foreign entity is currently doing business.

In response, the petitioner provided a variety of invoices from 2004 and 2005 indicating that the petitioner purchased goods during its first year in operation. The petitioner did not provide any evidence that it sold any of these goods purchased other than the bank statements submitted with the initial petition. Also, while the petitioner did provide additional business documentation pertaining to the foreign entity, none of this documentation is dated after September 2004.

On January 3, 2006, the director denied the petition. The director concluded that the petitioner did not establish that (1) the petitioner and the foreign entity are still qualifying organizations because it was not established that the foreign entity or the petitioner is doing business; (2) the petitioner has been doing business for the previous year.

On appeal, counsel asserts that both the foreign entity and the petitioner are doing business.

Upon review, the AAO agrees with counsel that the petitioner has established that it has been doing business for the previous year pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(B) and was doing business at the time the instant petition was filed, and the director's decision to deny the petition on these grounds will be withdrawn. However, the AAO will dismiss the appeal because the petitioner failed to establish that the foreign entity was "doing business" at the time the petition was filed. Therefore, the petitioner and the foreign entity have not been established to be qualifying organizations.

The petitioner has established that it is an active business entity which engaged in the regular, systematic, and continuous provision of goods and/or services during its first year in operation. The petitioner filed taxes indicating that, for the first eight months of operation, the petitioner had \$107,926.00 in sales. The petitioner also established that it maintained a bank account during this time and that this account had almost daily activity. Furthermore, this activity appears directly related to the regular, systematic, and continuous operation of a retail establishment in a shopping mall. Finally, the petitioner established that it purchased and sold merchandise

during the immediate prior year. Therefore, the petitioner has established that it was doing business during the previous year, and the director's decision to deny the petition on these grounds will be withdrawn.

Nevertheless, the petition must be denied because the petitioner failed to establish that the foreign entity was doing business at the time the petition was filed. As indicated above, the most recent evidence of any business activity by the foreign entity submitted by the petitioner dates from September 2004. The current petition was filed on April 18, 2005. As the definition of a qualifying organization requires the petitioner to establish that the foreign entity is currently "doing business," the petitioner has failed to establish that it has a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). For this reason, the petition must be denied.

The third 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.

The petitioner does not clarify in the initial petition whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Counsel asserts on appeal that the beneficiary's duties are managerial while the petitioner asserts in the petition that the beneficiary will be employed in an executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing 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. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary will be employed either as a manager *or* an executive and will consider both classifications.

In response to the Request for Evidence, the petitioner described the beneficiary's job duties and the roles of his subordinate employees in a letter dated August 5, 2005 as follows:

The [petitioner] has five employees, including [the beneficiary]<sup>2</sup>. [The beneficiary] will continue being responsible for the management and business development activities for the U.S. entity, including sales and marketing strategies and product positioning. [The beneficiary] is still performing duties as an executive. He supervises [a store supervisor] (manager). The store manager supervises two [sales persons].

The petitioner also provided an organizational chart and wage reports confirming its employment of four individuals including the beneficiary. The organizational chart shows the beneficiary at the top of the organization supervising the three individuals identified in the August 5, 2005 letter. While one of the employees is described as a "supervisor," the petitioner did not provide a job description for this employee.

On January 3, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties are primarily those of a manager.

Upon review, the petitioner's assertions are not persuasive.

Title 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 Citizenship and Immigration Services (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

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<sup>2</sup>It is noted that, even though the petitioner avers that it employs five persons, both the list of employees in the August 5, 2005 letter immediately subsequent to this averment and the wage reports confirm that the petitioner employs four persons including the beneficiary. While the petitioner does not explain this inconsistency, it appears merely to be typographical error.

operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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. As explained above, 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.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary is "responsible for the management and business development activities." The petitioner did not, however, specifically explain what these responsibilities entail. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description as the sole managerial employee does not establish that the beneficiary will actually perform managerial duties. 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). 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).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart, wage reports, and titles for the subordinate employees, the beneficiary appears to manage a staff of three employees who are engaged in operating the petitioner's business, i.e., a retail operation. While the petitioner has given one subordinate employee a lofty "supervisory" title, the petitioner has not established that this employee is primarily engaged in performing supervisory or managerial duties. To the contrary, the subordinate employee appears to be engaged in performing tasks related to providing a service or producing a product, i.e., working at the retail operation. Inflated job titles and artificial tiers of subordinate employees are not probative and will not establish that an organization is sufficiently complex to support a managerial position. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals.

101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the educational and skill levels of the subordinate employees have not been disclosed, the petitioner has not established that the beneficiary will manage professional employees.<sup>3</sup> Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>4</sup>

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. 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. 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 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

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<sup>3</sup>In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

<sup>4</sup>While the petitioner has not specifically argued that the beneficiary manages an essential function of the organization, the record nevertheless would not support this position even if taken. 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. 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 in managing the essential function, 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. *See* 8 C.F.R. § 214.2(1)(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. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary is primarily a first-line manager of non-professional employees. 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, 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).

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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, the beneficiary appears to be primarily employed as a first-line supervisor. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

It is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ.*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

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. The petitioner has not met this burden.

**ORDER:** The appeal is dismissed.