

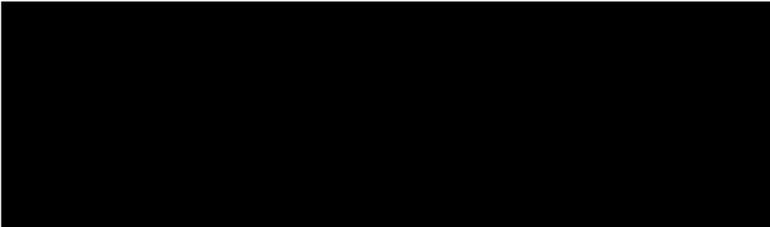


U.S. Citizenship
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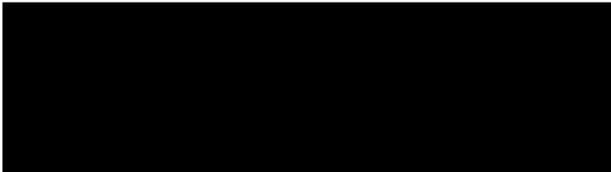


File: EAC 04 184 51761 Office: VERMONT SERVICE CENTER Date: AUG 07 2007

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)

ON 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, Vermont 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.¹

The petitioner filed this nonimmigrant petition seeking to extend employment of its U.S. subsidiary's managing director 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 Venezuelan corporation, states that it is engaged in software programming and development. It claims to be the parent company of the U.S. entity, XML Partners, Inc., a Puerto Rico corporation. 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 his stay for three additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the U.S. entity 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, new counsel for the petitioner asserts that the evidence has been poorly presented and was misconstrued by U.S. Citizenship and Immigration Services (USCIS). Counsel submits an amended petition and supporting documents in support of her assertion that the beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

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.

¹ The AAO rejected the petitioner's appeal as untimely filed, without rendering a decision on the merits of the case, on December 14, 2005, as the appeal was dated stamped as received on December 14, 2004, or 34 days after the director issued the Notice of Decision in the matter. See 8 C.F.R. §§ 103.3(a)(2)(i) and 103.5a(b) (requiring that the affected party file the complete appeal within 30 days of service of the unfavorable decision, or within 33 days if the decision was mailed). The petitioner has since provided evidence that the appeal was in fact delivered to the Vermont Service Center on December 13, 2004, 33 days after the director issued the decision. Accordingly, the appeal was timely filed and the AAO will consider the merits of the appeal herein.

- (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 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 under the extended petition.

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 petition was filed on May 3, 2004. In an attachment to the Form I-129 petition, the petitioner described the beneficiary's duties as follows:

Alien has been in charge in past year of opening new operations of [the U.S. entity]. Alien is handling the commercial and financial administration of the company in Puerto Rico, as well as the administration of its international activities. As part of his duties, Alien directs and administrates client development areas, customer support, and personnel matters. Alien will further coordinate commercial and technical support with clients in order to delineate a suitable marketing strategy for future international operations. Alien is in charge of hiring and training new personnel as the operations develop and evolves [sic].

Alien also perform the following activities:

- Build, develop, and manage sales pipeline for Puerto Rican and the Caribbean.
- Evaluate and manage the distribution of accounts and business opportunities in the region among sales account managers.
- Establish operational work-flow for all projects in the region.
- Set appropriate sales targets and productivity/quality standards for the region and for individual projects.
- Work with Vice President of International Operations and direct report supervisors to develop and review monthly sales and marketing plans.
- Identification, analysis and solution creation, including enhancements to the current systems or processes.
- Manage third party/partners relationships to penetrate new markets using indirect channels.
- Review existing procedures and make recommendations for better procedures.
- Yearly evaluations on assigned staff. Identify staff weaknesses and arrange for training.
- Interview candidates and participate in employee selection activities.
- Fully responsible for the Profit & Loss Analysis of the region.
- Reports to the Vice President of International Operations.

This description was also included in a letter from the U.S. entity, addressed to the beneficiary, dated May 28, 2004. The petition was submitted with evidence of the beneficiary's L-1A status, granted from July 31, 2003 through July 30, 2004, but no additional documentation was provided.

Accordingly, the director issued a request for additional evidence on August 6, 2004. The director advised the petitioner that the position description provided was vague and did not clearly demonstrate that the beneficiary will perform duties at the managerial or executive level under the extended petition. The director instructed the petitioner to submit a statement describing the duties performed by the beneficiary for the previous year and the duties he will perform if an extension is granted. The director noted that the petitioner should not use vague terms, but instead must explain the actual tasks the beneficiary performs.

The director also requested a list of employees working for the U.S. entity, including each employee's name, position title and complete position description. The director requested a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis, including one for the beneficiary. Finally, the director requested copies of IRS Forms 941, W-2, W-3 and 1099 as evidence of payments to employees and contractors.

In a letter dated September 13, 2004, former counsel for the petitioner provided the following description of the beneficiary's duties over the past year and proposed duties under the extended petition:

[The beneficiary] had to negotiate contracts with potential clients; open bank accounts; establish relationships with contractors; find and negotiate lease agreements for office space and equipment; provide solution proposals and identifying business opportunities, based on customers needs; and assume the business' budget planning and tracking activities.

[The beneficiary's] duties and responsibilities for the previous year and for the extension period will also include build, develop and manage sales structures for Puerto Rico and the Caribbean in order to increase the business volume and earnings. Such efforts included identifying potential countries to expand the business, such as, the Dominican Republic, Aruba, Trinidad and Tobago, and Curacao. [The beneficiary] will also evaluate and manage the distribution of accounts and business opportunities in Puerto Rico among sales account managers; set appropriate sales targets and productivity/quality standards; review and prepare monthly sales and marketing plans; review existing administrative and business procedures; make yearly evaluations on assigned staff; identify staff weaknesses and arrange for training and interview candidates and participate in employee selection activities.

[The beneficiary] and other executives of [the petitioner] and its affiliates and subsidiaries meet twice a year in [the petitioner's] headquarters in Caracas, Venezuela, to evaluate the general performance of [the petitioner] and its affiliates and subsidiaries. In such meetings the executive level individuals of [the petitioner] and its affiliates and subsidiaries establish the general policies and expected goals for the upcoming semester.

[The beneficiary], as stated and explained above, is a senior executive of the company and currently supervises personnel contracted to third party companies (such as CPAs, attorneys, system analyst and programmers) and [the U.S. entity's] full time employees. [The beneficiary's] job title is Managing Director and Treasurer.

Counsel stated that the U.S. entity has subcontracted three employees through Axium Software Integration Services, Inc., including a senior analyst, a web architect and a Microsoft .NET programmer, who work under the beneficiary's supervision. Counsel stated that the U.S. entity has also contracted three employees for the position of programmer/system analyst who commenced working with the company in September 2004 and will provide support to ongoing projects. Counsel noted that after a successful first semester of 2004, the U.S. entity is in a position to hire support personnel and is interviewing candidates to serve in the positions of secretary and account manager.

In response to the director's request for evidence of its staffing levels and wages paid to employees, the petitioner submitted: (1) a professional services proposal from Axium Software Integration Services to provide contracted employees to serve in the roles of senior analyst, web architect and MS.Net programmer, signed in March 2004; (2) copies of offer letters to three individuals for the position of Systems Information Analyst, with employment to commence on September 1, 2004; (3) copies of three canceled checks issued by the U.S. entity to its attorney, to Axium Software, and to the company's accountant; and (4) the U.S. company's financial statement for the first six months of 2004, which shows that the company paid \$12,774 in payroll expenses, \$59,890 in contracted services, and \$8,618 in legal and accounting fees.

The director denied the petition on November 10, 2004, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that employees hired or contracted after the date of filing would not be considered in her analysis of the beneficiary's employment capacity. The director acknowledged that the beneficiary was responsible for three contracted employees at the time of filing, but noted that the petitioner had not identified any employees who would be responsible for selling the company's products and services or performing administrative duties. The director concluded that the beneficiary would reasonably be the only employee available to perform these daily non-managerial functions, and that such tasks would preclude him from performing primarily managerial or executive duties.

On appeal, new counsel for the petitioner asserts that the beneficiary is employed in a managerial capacity by virtue of his management of the Puerto Rican office and its daily operations, his authority to hire and fire employees and supervise personnel, his power to negotiate contracts, his responsibility for establishing policies and strategies, and his authority to plan and enforce such policies. Counsel asserts that the fact that the beneficiary entered into a contract on behalf of the U.S. company to hire employees who would work under his supervision clearly establishes that his position is in a managerial capacity.

Counsel further contends that the beneficiary is employed in an executive capacity as he "is entirely responsible for the operational and policy management" of the U.S. company and has discretion to implement policy, make decisions, and report to the board of directors.

Counsel asserts that "the case at bar has been poorly presented" and states that the evidence previously provided was misconstrued by the director. Counsel has not clearly indicated what evidence was "poorly presented" by the previous counsel, how that evidence was "misconstrued" by the director, or otherwise specifically object to any particular findings made by the director.

Instead, counsel submits an amended Form I-129 petition, a new supporting letter from the petitioner and documentary evidence required by the regulation at 8 C.F.R. § 214.2(l)(14)(ii). The evidence includes a more detailed description of the beneficiary's duties and an organizational chart for the U.S. entity. Counsel requests that the amended application be reconsidered by the director, or, in the alternative, by the AAO.

Upon review, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

As a preliminary matter, it must be noted that counsel's request to amend the petition on appeal is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(l)(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.

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.*

Furthermore, the definitions of executive and managerial capacity have two specific requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove 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 related to operational or policy management, not to the supervision of lower-level employees or the performance of non-managerial and non-executive tasks.

Here, the petitioner has established that the beneficiary likely exercises the appropriate level of authority and exercises discretion over the day-to-day activities of the Puerto Rican office. However, the record does not establish that the beneficiary's daily tasks would encompass primarily managerial or executive duties as of the date the petition was filed.

The petitioner's initial description of the beneficiary's duties was vague and non-specific and did not convey any understanding as to what the beneficiary would do on a day-to-day basis as managing director of the U.S. company. As noted by the director, statements such as the beneficiary "directs and administrates client development areas," and "will direct and coordinate commercial and technical support with clients" do not meet the petitioner's burden to provide a clear description of the duties performed by the beneficiary. Similarly, the petitioner's statements that the beneficiary is responsible for "identification, analysis and solution creation, including enhancements to the current system," and "reviewing existing procedures and

making recommendations for better procedures" are ambiguous, absent an explanation as to what "solution," "system," or "procedures" the petitioner is referring. 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).

Accordingly, the director advised the petitioner that the initial job description was inadequate to establish the beneficiary's eligibility, and requested a detailed description of the beneficiary's actual duties, the percentage of time he spends on each duty, and a clear description of the duties performed by any subordinate employees. The position description submitted in response to the director's request was essentially the same as the job description submitted with the initial petition and already found to be deficient. The petitioner offered no further clarification regarding the beneficiary's actual duties, nor did it indicate how the beneficiary would divide his time among his various responsibilities. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

On appeal, the petitioner has offered two additional descriptions of the beneficiary's duties in support of its "amended petition." Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Furthermore, a review of the organizational chart and more detailed description submitted on appeal suggests that the petitioner is attempting to elevate the scope of the beneficiary's role in order to conform with the requirements of this visa classification. When the petitioner responded to the request for evidence, it indicated that the beneficiary was the sole payroll employee of the U.S. company, and the evidence indicated that he supervised three contracted employees at the time of filing. The petitioner made no reference to the beneficiary's authority to supervise personnel employed by the U.S. entity's parent company or other related entities. Nevertheless the new organizational chart shows that the beneficiary supervises a staff of fourteen people, including employees of the parent company and the petitioner's affiliate companies. As noted above, 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. at 176.

Absent a detailed description of the beneficiary's duties, the director reasonably considered the U.S. entity's staffing levels and the nature of the business to determine whether the totality of the record corroborated the vaguely outlined managerial and executive responsibilities. 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 CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

The petitioner was established in 2003 and claims to be engaged in the marketing, sale, distribution and support of Enterprise Software Solutions, as well as provision of professional services and support. It achieved sales of \$626,980 during the first six months of 2004. At the time of filing, the U.S. company employed the beneficiary as managing director, contracted two to three employees to provide technical services for a client project, and utilized the services of a law firm and an accounting firm. Although the petitioner has provided evidence of contracted employees in the areas of accounting, legal and technical services, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

The petitioner indicated that as of September 2004, it was interviewing candidates to serve in the roles of secretary and account manager, noting that the account manager would "be in charge of the sale and promotions of the products and services." The petitioner has not established that the U.S. entity employed any personnel to perform the actual day-to-day, non-managerial operations of the company related to sales, marketing, financial, and administrative functions. Thus it is evident that the beneficiary, in addition to "managing" these aspects of the business, would reasonably be required to perform essentially all aspects of the company's day-to-day operations, including non-qualifying duties such as marketing and selling the company's products and services. The actual duties themselves 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). 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).

Although the director specifically addressed the lack of staff to perform the administrative and sales operations of the company at the time of filing, neither counsel nor the petitioner has addressed this deficiency on appeal. Based on a review of the totality of the record, it cannot be concluded that the

petitioner had a reasonable need for the beneficiary's services in a primarily managerial or executive capacity at the end of the first year of operations.

The petitioner also indicates that additional staff have been hired subsequent to the filing of the petition, and additional staff will be hired by the U.S. company in the near future. However, 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).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. 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.