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U.S. Citizenship
and Immigration
Services

87



File: EAC 06 223 51971 Office: VERMONT SERVICE CENTER Date: DEC 04 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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

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.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president 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 limited liability company, states that it is engaged in printing services. The petitioner claims that it is an affiliate of Internet Center 2023, C.A., located in Caracas, Venezuela. The beneficiary was granted one year 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 two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will be employed "in a managerial capacity of supervisor," and will direct the activities of "numerous independent contractors." Counsel asserts that the director erred in failing to consider the services provided by independent contractors. Counsel submits additional evidence in support of the appeal, but has not provided a brief.

Upon review, and for the reasons discussed herein, counsel's assertions are not persuasive. 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 beneficiary would 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 July 26, 2006. The petitioner indicated on Form I-129 that the beneficiary would continue to serve as president of the U.S. company, which claimed to have two employees as of the date of filing.

In a letter dated July 17, 2006, the petitioner described the beneficiary's duties in this position as follows:

In this position, [the beneficiary] has been responsible for determining and formulating policies and business strategies and has provided the overall direction of the company. He has also planned, directed and coordinated operational activities at the highest level of management with the help of subordinate managers. Furthermore, he has directed, planned, and implemented policies and objectives of the company in accordance with the company charter and board of directors. He has also directed the activities of the business in order to update procedures, establish responsibilities, and coordinate functions among departments and sites. As President, [the beneficiary] analyzed the business operations to evaluate the performance of the company and employees, as well as determined areas of cost reduction and program improvement. Due to the technical nature of [the petitioner] and PrintingMania [the petitioner's claimed subsidiary], [the beneficiary] has also be [sic] responsible for overseeing the product and equipment development and ensuring that the company stays abreast of the latest technological advances in printing. Additionally, [the beneficiary] has been responsible for overseeing the inventory levels of the company and to ensure that the logistical procedures in force are cost-efficient and sufficient for meeting consumer demand. As President, [the beneficiary] has conferred [sic] with the executive staff, as well as listened and considered employee feedback, in order to establish policies and formulate plans. He has been responsible for reviewing financial statements and sales and activities reports to assess

the business health of the company and to ensure that company's objectives are achieved. [The beneficiary] has also been responsible for overseeing the training of new staff members, and has made sure the correct procedures and protocols are being followed by both executives and employees.

With respect to the nature of the petitioner's business, the petitioner stated that the U.S. company had purchased a 50% interest in "PrintingMania" which is described as "a full service offset printing company with an extensive array of digital and traditional printing equipment" and a "team of graphic artists." The petitioner submitted a copy of stock certificate number 5 issuing 500 shares of "Mania Productions Corp." to the U.S. company, but no further evidence regarding this claimed subsidiary has been provided. The petitioner also submitted evidence that it has registered a fictitious name and does business as "Xprint." According to the petitioner's lease agreement, the company shares and operates a 300 square foot office with its lessor, New Print, Inc., which appears to do business as "Palmetto Printing."

The director issued a request for additional evidence on December 7, 2006. In part, the director requested: (1) a comprehensive description of the beneficiary's duties; (2) a list of the U.S. company's employees, including names, position titles and detailed position descriptions; (3) an organizational chart for the U.S. company; (4) payroll records for the month of July 2006; and (5) a copy of IRS Form 941, Employer's Quarterly Federal Tax Return, for the third quarter of 2006.

In a response received on March 2, 2007, the petitioner provided the following description of the beneficiary's duties as "sales director":

In his Managerial position [the beneficiary] is being responsible for providing leadership, vision and strategic direction while building new business for US division.

He is responsible for new business development, planning capture of proposals, setting strategic direction in an evolving market, ensuring successful program execution and high level of operations for each project to maintain excellent customer relationships for both US division and overseas, providing first level senior management responsibility for customer satisfaction.

As manager, he ensures maximum overcome prioritizing, initiating, and monitoring the capture process on proposals assuring prescribed financial controls.

Performance of his duties requires exercise judgment and interaction with all levels of support staff, and customers, making managerial decisions in a collaborative manner while identifying joint marketing opportunities where applicable, assisting in all operation performance goals creating and maintaining an environment conducive to the professional growth and development of staff.

[The beneficiary] manages all aspects of Sales Administration as relates to alignment, analysis, compensation, and any process for both US and foreign divisions.

He identifies and implements strategic and tactical planning to enhance growth.

He performs market assessments, competitor analyses, pricing strategies. Draw conclusions from market assessment data on the competitive environment and the company's strengths, weaknesses, opportunities and targets.

The petitioner indicated that the beneficiary supervises an executive administrative assistant who works twenty hours per week. The petitioner stated that her duties include answering or directing inquiries from business partners, preparing invoices, organizing correspondence and records, preparing correspondence, researching "information requests," preparing special reports, internal accounting, and scheduling appointments and meetings.

The petitioner provided photographs of the petitioner's "main office" located at 7088 SW 158 Path in Miami, Florida, which appears to be a small office and some copying and printing equipment set up in a residence. This address was identified as the beneficiary's residential address on Form I-129. The petitioner also provided photographs of its sales office located at 16115 SW 117 Ave., #A-23 in Miami, Florida, the address identified as the beneficiary's work site on Form I-129. The photograph of the exterior of these premises identifies the business as "Palmetto Printing."

The director denied the petition on May 7, 2007, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that the petitioner's description of the beneficiary's position identified general managerial functions and was insufficient to establish what duties he would perform within the context of the petitioner's current staffing arrangement. The director emphasized that the record shows that the company employs only the beneficiary and a part-time executive assistant and thus does not appear to employ full-time employees to provide the sales and services of the company. The director determined that it is reasonable to conclude, based on the evidence submitted, that the beneficiary would be primarily engaged in the performance of non-qualifying duties. The director further found that the petitioner had failed to establish that the beneficiary would supervise a subordinate staff of professional, managerial or supervisory employees, manage an essential function, or function at a senior level within an organizational hierarchy.

On appeal, counsel for the petitioner provides the following statement on Form I-129:

The beneficiary has worked in a managerial capacity of supervisor and directing the activities of numerous independent contractors employed by the petitioner organization. The Service (USCIS) erred as a matter of law in failing to consider the independent contractor employed by the petitioner.

In support of the appeal, the petitioner submits:

- A Website Marketing Service Agreement between the petitioner and [REDACTED]. The document is not signed or dated.

- A letter from the president of C [REDACTED] who states that his company has "rendered established and continuous services" to the petitioner in the areas of graphic design, consulting and printing.
- A letter from [REDACTED] stating that the petitioner utilizes their services for payroll forms and income tax preparation.
- A letter from [REDACTED] that the petitioner has utilized its services "in the administrative area, accounting consultation and collecting payments."
- A letter from [REDACTED] indicating that it has provided services to the petitioner "in the area of bookkeeping and filing services."
- A letter from a customer of the U.S. company, [REDACTED], praising the petitioner's "dedication in the areas of graphic design, consulting and printing."
- A letter from [REDACTED], stating that the company has provided graphic design, consulting and printing services to the petitioner since January 2006.

The petitioner provides copies of invoices issued to the petitioning company for services rendered by by [REDACTED]. The petitioner has also provided a copy of the U.S. company's 2006 IRS Form 1065, Return of Partnership Income, but the return does not provide any clear evidence of payments to independent contractors. Furthermore, according to the tax return, the petitioner did not pay any rent in 2006.¹

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would 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(1)(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 initial position description provided by the petitioner was overly general and failed to identify the specific managerial or executive duties to be performed by the beneficiary under the extended petition. For example, the petitioner indicated that the beneficiary is responsible for such vaguely-defined responsibilities as "overall direction of the company," "formulating policies," directing "the activities of the business," "coordinating functions among departments and sites," conferring with "executive staff," and working with "subordinate managers." 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). Furthermore, the

¹ The petitioner has also submitted on appeal voluminous medical records for the beneficiary. Neither counsel nor the petitioner has explained how this evidence is relevant to the issue of whether the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

petitioner does not employ subordinate managers or executives nor has it been shown to be operating through different "departments and sites," thus raising questions regarding the credibility of the listed duties.

Moreover, the petitioner implied that the beneficiary was responsible for managing both the petitioning company and [REDACTED] a partially-owned subsidiary claimed to be a "full-service offset printing company." Other than submitting a stock certificate for the claimed subsidiary, the petitioner offered no documentary evidence related to the business activities or employees of PrintingMania. 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)). Accordingly, the beneficiary's claimed responsibilities for overseeing the activities of this separate company will not be considered in the instant analysis.

In response to the director's request for a comprehensive description of the beneficiary's duties, the petitioner changed the beneficiary's job title from "president" to "sales director" and submitted a completely different list of duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

When responding to a request for evidence, 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 its 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. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the evidence in the record.

The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. The petitioner's statements that the beneficiary provides "leadership, vision and strategic direction," "identifies and implements strategic and tactical planning," and "manages all aspects of sales administration," do not assist USCIS in determining what the beneficiary actually does on a day-to-day basis. Although the petitioner assigned the beneficiary the position title of "sales director," the lack of a subordinate sales or marketing staff, considered in light of the beneficiary's duties for "new business development," "customer relationships," and performing market assessments and competitor analyses, suggests that he is in fact the sole employee responsible for sales and marketing duties within the petitioning company. 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).

The definitions of executive and managerial capacity have two separate 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). 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, although requested by the director, 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 some of the beneficiary's tasks 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. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Although the director specifically addressed the deficient position descriptions provided by the petitioner in his notice of denial, neither counsel nor the petitioner has attempted to clarify the beneficiary's actual job duties on appeal. Rather, counsel simply states that the beneficiary works in "a managerial capacity of supervisor," and directs the activities of "numerous independent contractors." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Contrary to the counsel's assertions, the director did not "fail to consider the independent contractor employed by the petitioner, as the petitioner did not previously claim to employ such contractors or submit evidence of their employment.

The evidence submitted on appeal is insufficient to overcome the director's finding that the beneficiary would not be employed in a primarily managerial or executive capacity. At most, it appears that the petitioner has utilized the services of graphic design and printing companies for certain jobs; however, it is not explained why the petitioner, which has been described as a full-service printing company with its own equipment, would need to assign such tasks to outside companies. Nor has it been established that the beneficiary actually supervises the activities of employees in these unrelated companies. There is no evidence in the record of payments to the majority of the claimed contractors who provided letters in support of the appeal. Again, 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. at 165. The petitioner has not established that the beneficiary regularly supervises any employees other than the part-time executive assistant.

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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The petitioner is described as a "printing services" business. Thus, it is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive tasks such as performing the graphic design and printing services, marketing, sales and customer service duties, purchasing supplies, delivering finished products to customers, and performing routine banking, bookkeeping and administrative tasks. The petitioner employs the beneficiary as president and a part-time assistant who performs some administrative duties. Although the petitioner claims on appeal to use other companies to provide graphic design and printing services, the AAO finds it implausible that a "printing company" that claims to be fully-equipped does not actually perform any printing services in-house. The petitioner appears to have printing equipment in both of its claimed locations. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of a president who performs primarily managerial or executive duties and part-time assistant. It is therefore reasonable to assume, and has not been shown otherwise, that the beneficiary himself must spend a significant amount of time performing the tasks necessary to provide the petitioner's services. 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)

In sum, although the beneficiary evidently exercises discretion over the day-to-day operation of the business as its president and sole full-time employee, the beneficiary has not been shown to primarily perform duties associated with the high-level responsibilities identified in the statutory definitions of managerial or executive capacity. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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 record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). For this reason, 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.