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File: EAC 07 020 50631 Office: VERMONT SERVICE CENTER

Date: DEC 21 2007

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF 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 nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant nonimmigrant petition seeking to extend the employment of its general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida corporation, states that it is engaged in the import, export, commercialization and service of office supplies and computers. It claims to have a qualifying relationship with the "Insumos Group," located in Peru. The beneficiary was initially approved for L-1A classification for a one-year period commencing in January 2005, and was subsequently granted an extension of stay until October 1, 2006, due to a delay in the start-up of the petitioner's new office in the United States. The petitioner now seeks to extend the beneficiary's L-1A status for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity.

The petitioner subsequently filed the instant appeal. The director declined counsel's request to treat the appeal as a motion to reopen and forwarded the matter to the AAO for review. On appeal, counsel asserts that the petition was denied because the beneficiary "poorly documented his petition due to an unprofessional legal advice from a non US Immigration Attorney." Counsel states "the employer left out necessary documents that have since been located." Counsel submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The nonimmigrant petition was filed on October 27, 2006. The petitioner stated on Form I-129 that the beneficiary would continue to serve as the general manager of the U.S. company, which indicated that it had four employees as of the date of filing. In a letter dated September 20, 2006, the petitioner indicated that the beneficiary "has been continually analyzing and evaluating both the market demand and our groups capabilities." No other description of the beneficiary's duties was provided. The petitioner stated that the company's employees include the beneficiary as general manager, a sales manager and "two support personnel" hired on a freelance basis.

On December 7, 2006, the director requested additional evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director requested: a comprehensive description of the beneficiary's duties; a list of all U.S. employees by name and job title; detailed position descriptions for all employees in the U.S., to include a breakdown of the number of hours devoted to each of the employees' duties on a weekly basis; the petitioner's payroll records for September and October 2006; and copies of IRS Forms 941 and 1099.

In a response received on March 1, 2007, the petitioner provided the following description of the beneficiary's duties:

- He is the person responsible to manage the US company and at the same time work with the other international executives as part of an international commercial group.
- [The beneficiary] has finished the "start up" of the company, we now have all the required permits and licenses and office equipment, we have trained some personnel, others shall be hired in the near future as the company's needs increase, and we have leased both an office, and a warehouse.

- Currently and in the future, [the beneficiary] must oversee the work of the supervisory personnel, (Sales Manager and Technical service department).
- He shall also oversee the purchase of foreign products along with the Group's requirements in order to consolidate purchases and keep prices and costs as low as possible.
- He must research and locate new products and business opportunities for the US company and the entire group's benefit.
- Structure export sales plans for foreign countries. In this area it is important to note that [the beneficiary] was able to sign a contract with Corpo Trading, based in Miami, for them to sell our products in Guatemala and gave them the exclusive distribution for all Central America.
- Although it is a small part of the company's business, he oversees the technical services provided as well as reinstallation of data rooms.
- He makes the financial decisions and has direct contact with financial institutions. . . .
- He must also oversee the coordinations with the clients, transporters and agents, to assure the provision of our products is uniform and properly scheduled, both to comply with the demands of the new clients obtained by [the petitioner] in the United States as well as in other international markets.
- It is [the beneficiary's] main duty to manage the entire operation by setting monthly goals, overseeing the performance of the employees in order to appoint or reappoint managerial/supervisory positions, mainly in the sales and technical departments.
- He shall approve marketing policies, supervise its progress and coordinate regularly with the other Directors of the company (Board of Directors) and the management of the foreign affiliates, to develop the group's overall international development plan.

The petitioner indicated that its first year of operations was "relatively slow" until October 2006, when its corporate group decided to effectuate all purchases through the U.S. company.

With respect to the beneficiary's subordinate employees, the petitioner stated that the beneficiary supervises a sales manager who evaluates market tendencies and makes recommendations, visits prospective wholesale and retail clients, plans participation in and attends trade fairs, and sets sales goals and strategies. The petitioner also identified an "independent technician supervisor" who coordinates and oversees the performance of technical services provided by the company and trains other technicians and support personnel.

The petitioner submitted a copy of its Florida Form UCT-6, Employer's Quarterly Report, for the fourth quarter of 2006, which confirmed the employment of the beneficiary and the sales manager. Based on the wages paid to the sales manager, \$1,650 for the three-month period, he was employed on a part-time basis. The petitioner did not submit a Form 1099 for its independent technician supervisor or other evidence of payments to independent contractors.

The director denied the petition on May 7, 2007, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

The director noted that the petitioner had not established that it employs anyone other than the beneficiary and the sales manager, and further found that the sales manager did not receive a salary commensurate with a full-time position. The director observed that the position description submitted for the beneficiary merely identified "general managerial functions," without identifying the specific duties to be performed by him within the context of the petitioner's staffing arrangement. The director also noted the apparent lack of full-time salespersons or other lower-level employees who would provide the sales and services of the business to customers. The director concluded that the beneficiary would reasonably be required to perform or help to perform these non-qualifying functions.

On appeal, counsel for the petitioner asserts that the beneficiary "had poorly documented his petition due to an unprofessional legal advice from a non US Immigration Attorney," and states that the petition was denied "because the US employer left out necessary documents that have since then been located." Counsel asserts that the beneficiary is acting as "a bona fide multinational executive." Counsel concedes that the petitioner did not accomplish its "salary goal" in 2006, and clarifies that the U.S. company hired its technical supervisor in January 2007.

In support of the appeal, the petitioner submits, in relevant part, an organizational chart for the U.S. company, the company's initial business plan prepared in 2004, and a brief statement from a director of the foreign entity regarding the beneficiary's U.S. job duties.

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 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 show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

As noted by the director, the petitioner's description of the beneficiary's duties was overly general and included a number of duties which cannot be clearly categorized as managerial or executive in nature. For example, the petitioner indicated that the beneficiary researches and locates new products and "oversees the purchase" of products, but the petitioner does not claim to employ any lower-level employees engaged in product research, sourcing and purchasing functions. Similarly, the petitioner stated that the beneficiary oversees "coordination with clients, transporters and agents," but did not identify who the beneficiary "oversees" in carrying out this responsibility. Finally, the petitioner did not establish that the company actually employed any technical staff as of October 2006 when the petition was filed, which raises questions regarding the beneficiary's stated responsibility for overseeing the provision of technical services. Therefore,

a review of the beneficiary's listed duties in the context of the petitioner's current staffing levels raises questions regarding whether the beneficiary is "overseeing" the petitioner's functions, or directly performing the day-to-day duties associated with purchasing and exporting products and providing technical services to U.S. clients. 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 AAO does not doubt that the beneficiary exercises authority over the U.S. company as its general manager and sole full-time employee. However, based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). The fact that the beneficiary manages a business, regardless of its size, 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).

Although the director specifically emphasized the deficiencies of the submitted job description and the petitioner's failure to document the existence of its four claimed employees, neither counsel nor the petitioner has addressed these issues on appeal. Rather than clarifying the beneficiary's job duties, the petitioner has submitted a new description on appeal that merely paraphrases the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

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 CIS 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.

The petitioner claims to be engaged in the provision of technical services to U.S. customers and performing all purchasing functions for its international group. It employs the beneficiary as general manager and a part-time sales manager. As noted above, the petitioner has not provided evidence that it employs the claimed

technical staff, nor does it claim to have an employee or employees who perform the purchasing duties "overseen" by the beneficiary. The company does not have staff dedicated to administrative or routine financial operations. The absence of a subordinate staff sufficient to perform the non-qualifying duties of the petitioner's business is a proper consideration in the analysis of the beneficiary's employment capacity. *See Q Data Consulting, Inc. v. INS*, 293 F. Supp. 25, 29 (D.D.C. 2003). Given the absence of employees who would perform many of the non-managerial or non-executive operations of the company, it is reasonable to conclude, and has not been shown otherwise, that the beneficiary would need to spend a significant portion of his time directly performing non-qualifying duties associated with the company's day-to-day operations. Again, 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. at 604.

In this matter, the petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. As of the date of filing, the beneficiary supervised a single part-time employee who had no subordinates and whose duties have not been demonstrated to be professional in nature. Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties associated with the petitioner's day-to-day functions so that the beneficiary may primarily engage in managerial duties. The record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy or manage an essential function of the company. Based on the evidence furnished, it cannot be found that the beneficiary will be employed in a qualifying managerial capacity as defined at section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). Even though the petitioner indicates that it is still in its preliminary stages of development, the petitioner is not relieved from meeting the statutory requirements.

Nor has the petitioner substantiated its claim that the beneficiary would be employed 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, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* As discussed above, the petitioner has not demonstrated that the beneficiary is relieved from being primarily focused on the day-to-day operations of the U.S. company.

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

Beyond the decision of the director, the AAO notes for the record that the evidence submitted does not establish that the petitioner was doing business for the year preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The petitioner stated in response to the director's request for evidence that it had "really begun its operations" in October 2006, the month in which the petition was filed. There is no evidence in the record of any business conducted by the petitioner prior to June 2006. For this additional reason, the petition cannot be approved.

Further, the AAO notes that the record as presently constituted does not contain evidence of a qualifying relationship between the U.S. company and its claimed foreign affiliates, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The petitioner has not submitted evidence of the ownership and control for the U.S. company or for the foreign companies that previously employed the beneficiary. Although the petitioner noted that such evidence was submitted with a previous L-1A petition, it must be emphasized that each petition filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). The regulations governing the extension of a petition involving a new office specifically require evidence that the petitioner maintains a qualifying relationship with the foreign organization. 8 C.F.R. § 214.2(l)(14)(ii)(A). Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). For this additional reason, the petition cannot be approved.

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 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.