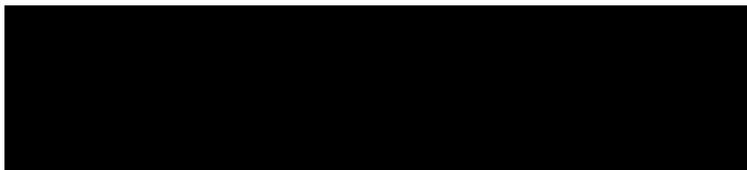


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File: SRC 05 026 50322 Office: TEXAS SERVICE CENTER Date: FEB 01 2007

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its marketing 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 in the State of Florida that claims to be engaged in the auto rental business. It claims that it is the subsidiary of Frio Market de Venezuela, S.A., located in Caracas, Venezuela. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, which was subsequently extended for an additional two years. The petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) the beneficiary had been employed abroad in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal of the director's denial. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner seeks to clarify errors it believes the director made in rendering the decision in this matter. In support of the appeal, the petitioner submits a brief and additional evidence.

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

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

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

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

In support of the petition, the petitioner submitted a letter from former counsel dated November 3, 2004. In this letter, counsel indicated that the beneficiary was "in charge of managing the company marketing and sales activities." On the L Supplement to the Form I-129, the petitioner described the beneficiary's duties as follows:

- 1-She manages marketing and sales activities of establishment and [controls] marketing and sales program
- 2-She train[s] employees in marketing and sales employees working under her
- 3-She review[s] market analyses to determine customer needs, volume potential, price schedules, and discount rates
- 4-She research[es] the tourism industry to establish effective marketing and sales techniques for the business within the local market
- 5-She develop[s] campaigns and advertising techniques for other employees to follow
- 6-She represents the company at trade association meeting
- 7-She analyzes marketing statistics to formulate policy
- 8-She directs research and recommends or approves budget, expenditures and appropriations for development work

On January 5, 2005, the director requested additional evidence. Specifically, the director requested more specific information with regard to the duties of the beneficiary in the United States, and particularly focused on all other employees, their titles and duties, and their position in the organizational hierarchy. Finally, payroll summaries and quarterly wage reports were requested to corroborate the employment of any persons identified.

In response, the petitioner submitted a letter dated April 11, 2005. The petitioner provided the following description of the beneficiary's position:

In the U.S. company [the beneficiary] is in charge [of]: (a) Manag[ing] the marketing and sales area[,] (b) Train[ing] employees in marketing and sales, (c) Review[ing] market analyses to determine customer needs, (d) research[ing] the tourism industry to establish effective marketing and sales techniques, (e) responsible for overall U.S. sales and marketing operations, managing the planning and implementation of the overall sales strategies, overseeing the marketing and promotional activities. [The beneficiary] has the managerial authority over the market and sales activities.

The petitioner further indicated that the beneficiary possessed a bachelor's degree in Industrial Relations, and also submitted four Forms 1099, evidencing wages paid to independent contractors on an "as-needed" basis. The petitioner explained that these employees were temporary workers who assisted the petitioner at busy times based on the "tourism flow."

On May 5, 2005, the director denied the petition. The director determined that the beneficiary was not acting in a primarily managerial or executive capacity. Specifically, the director noted that in addition to providing a vague description of the beneficiary's duties, the petitioner had also failed to provide evidence to corroborate its claim that it employed a sufficient staff to relieve her from performing non-qualifying duties.

On appeal, the petitioner asserts that the beneficiary was employed in a qualifying capacity and cites tumultuous weather in the region of its office, which is a region largely dependent on tourism, as a factor for downturns in its business.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In this matter, the petitioner failed to provide an adequate description of the beneficiary's proposed duties with the extension request. Instead, it merely provided a brief, generalized synopsis on the L Supplement to the Form I-129. As the initial submission was insufficient to warrant approval, the director requested more information, including a more specific description of the beneficiary's duties, in the request for evidence dated April 11, 2005. Although the petitioner responded to this request, it merely provided brief, one-sentence overviews describing the general nature of the beneficiary's role in the petitioner's enterprise, and essentially repeated the initial description previously deemed insufficient by the director. The petitioner failed to provide sufficient details with regard to the beneficiary's position. As such, the record contains little information regarding to the exact nature of the beneficiary's duties.

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

The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner claims that it employs several contractors on an "as-needed" basis. However, the fact that these contractors are not steadily employed by the petitioner, and apparently are only retained when spurts in tourism mandate their assistance, it appears that the beneficiary is the sole employee of the business and is required to perform all the required tasks essential to the continued operation of the business.

Despite the director's request for evidence of payroll summaries and quarterly wage reports, the petitioner failed to submit any documentation which would establish that the petitioner employed a workforce aside

from the beneficiary and temporary contract workers whose positions and tenure were both unspecified and sporadic. To establish that the petitioner has sufficient staff to relieve the beneficiary from performing non-qualifying duties, the petitioner must submit a description of staffing, including the number of employees and the types of positions, as well as evidence of the wages paid to the employees. Despite the submission of Forms 1099 for the contract workers, there is no evidence that the petitioner maintains a permanent staff of employees to relieve the beneficiary from performing tasks essential to the operation of the business. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

With regard to the petitioner's employees, counsel correctly observes that, when staffing levels are used as a determining factor in denying a visa to a multinational manager or executive, the reasonable needs of the organization in relation to its overall purpose and stage of development must be considered and addressed. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, there is no indication in this matter that the reasonable needs of the organization were not considered by the director. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act.

In addition, it is important for Citizenship and Immigration Services (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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

In the instant matter, the petitioner is not employing the beneficiary in a predominantly managerial or executive position as required by 8 C.F.R. § 214.2(l)(3). For this reason, the petition may not be approved.

The second issue in the present matter is whether the beneficiary was employed abroad in a primarily managerial or executive capacity.

The initial petition provided no discussion of the beneficiary's duties while employed abroad, other than that she had served as the sales manager for the foreign entity from 1997 to 2000. Consequently, in the request for evidence issued on January 15, 2005, the director requested details regarding her duties abroad.

In the response dated April 11, 2005, the petitioner described her employment abroad as follows:

- She managed sales and marketing activities of establishment and directed sales marketing program.
- She had ultimate authority with respect to negotiations with suppliers and clients.
- She coordinated sales distribution by establishing sales quotas and goals and advised sales and marketing personnel concerning sales and advertising techniques.
- She reviewed market analyses to determine customer needs, volume potential, price schedules, and discount rates and directed personnel accordingly.
- She represented the company at trade association meetings to promote our services.
- She directed and delegated tasks to subordinate managers and specialized personnel in accordance with her findings.

On May 5, 2005, the director denied the petition. Similar to the findings with regard to the U.S. position, the director found that the evidence submitted by the petitioner was insufficient to establish that her position abroad had been in a managerial or executive capacity. The AAO agrees.

As stated above, 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) and (iv). The petitioner's description of the job duties must clearly describe the duties performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

With regard to this issue, the petitioner once again failed to provide an adequate description of the beneficiary's duties abroad. The duties provided in response to the request for evidence are extremely similar to the vague description of duties associated with the U.S. positions. In that matter, however, there is no discussion of subordinate staff members or the organizational structure within which she worked, thereby making it difficult to determine the exact nature of her position abroad.

Once again, the petitioner merely recited the beneficiary's vague job responsibilities. It remains unclear what the beneficiary actually did on a daily basis. However, the description of duties emphasized her prominent role in the sales functions of the company, which traditionally are not managerial or executive duties. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the event that the beneficiary was performing the majority of the foreign entity's sales functions, it cannot be determined that she was employed abroad in a qualifying capacity. Specifically, as previously discussed, An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In this matter, despite the director's request for detailed information, the petitioner failed to provide enough information to make a substantial determination. 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). In this matter, the petitioner's failure to thoroughly address the director's specific requests has rendered it impossible to conclude that the beneficiary is functioning in a primarily managerial or executive capacity.

Additionally, the petitioner claims that the beneficiary oversaw subordinate managers and delegated tasks to them, but provides no documentation of the existence of these managers or the overall hierarchical structure of the foreign entity. 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)). Merely claiming that the beneficiary oversaw subordinate managers abroad is insufficient to establish that the beneficiary was employed in a primarily managerial capacity.

The record is not persuasive in demonstrating that the beneficiary was employed abroad in a primarily managerial or executive capacity. For this additional reason, the petition may not be approved.

It should be noted that Citizenship and Immigration Services (CIS) approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Beyond the decision of the director, the petition also may not be approved because there is insufficient evidence of a qualifying relationship between the petitioner and the foreign entity. The petitioner claims that it is a wholly-owned subsidiary of the foreign entity. The petitioner submitted a copy of Notice of Acceptance as an S-Corporation, valid as of January 30, 2001. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See Internal Revenue Code*, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683

(9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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

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

ORDER: The appeal is dismissed.