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FILE: SRC 06 128 50356 Office: CALIFORNIA SERVICE CENTER Date: JUL 12 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: 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 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 corporation, claims to be the subsidiary of [REDACTED], located in Cali, Colombia. *The petitioner claims to be engaged in the manufacture and installation of all metallic and wire mesh.* The beneficiary was initially granted L-1A classification for a one-year period to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for an additional two years.

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

The petitioner filed an appeal in response to the denial. On appeal, the petitioner alleges that the director's decision was erroneous and that, contrary to the director's findings, the petitioner is qualified for the benefit sought. In support of this contention, 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)(14)(ii) 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 primary issue in this 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 a letter dated March 13, 2006, the petitioner explained that due to the aftermath of Hurricanes Katrina and Wilma, the beneficiary faced serious operative and economic difficulties. It claimed that the beneficiary had only been working in the United States for five months, during which period he increased sales and achieved

a net profit of \$8,000. The petitioner further stated that it currently employed three persons in addition to independent contractors.

On the L Supplement to Form I-129, the petitioner provided the following overview of the beneficiary's duties in the United States:

Direct, plan and implement policies and procedures, establish internal controls, direct the activities in USA, assign or delegates responsibilities, review financial statements and sales and promotional activity reports to ensure reach [sic] the company objectives. In summary, [d]irect the management of the company with wide latitude in discretionary decision-making.

The petitioner submitted an organizational chart identifying two administration employees and five manufacturing and installation employees in addition to the beneficiary. On April 18, 2006, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit information on the actual employees of the organization, in addition to details of their position titles, duties, and educational backgrounds, and evidence of wages paid to employees. The director also requested this information for the petitioner's independent contractors.

In a response dated June 30, 2006, the petitioner addressed the director's requests. Regarding the beneficiary, the petitioner stated that he was "fulfilling the administrative tasks day to day for the Corporation in order to guarantee the continuity, the growing and the success of the business." In addition, the petitioner stated that the beneficiary was presenting the petitioner to the community, preparing quotations, and actively pursuing new clients. The beneficiary was further claimed to be involved in the hiring process of new employees. The petitioner further explained that the beneficiary was involved in the acquisition of raw materials, rather than finished products, which would be developed under his supervision.

Regarding the organizational structure of the petitioner, it claimed that a vice president [REDACTED] was also employed in the United States. [REDACTED] who held a degree in accounting, was charged with directing the company when the beneficiary was absent, in addition to being in charge of the remaining administrative tasks on which he collaborated with the beneficiary. In addition, the person in charge of the operations department was identified as [REDACTED] who was charged with managing all contracts and providing client support. Finally, two contractors, [REDACTED] and [REDACTED] were identified for the record, and the petitioner indicated that it was considering hiring them on a permanent basis.

The petitioner also submitted its Forms 1120, U.S. Corporation Income Tax returns for 2004 and 2005, in addition to IRS Forms W-2 and 1099 for its employees and contractors.

On July 19, 2005, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary would function at a senior level within the organization or that the beneficiary had sufficient subordinate staff to relieve him from performing non-qualifying duties. Moreover, the director noted that it

appeared that the beneficiary was largely responsible for the performance of the petitioner's administrative tasks.

On appeal, the petitioner resubmits the same information it provided prior to adjudication and urges a reassessment of the evidence.

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 description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a vague overview of the nature of his duties; namely, that he would function as president of the petitioner, and oversee virtually all aspects of the business. Consequently, the director requested more specific information, including an overview of the petitioner's organizational structure in order to better comprehend the work environment of the beneficiary. The petitioner responded to this request, yet did not expand on the beneficiary's day-to-day duties. Instead, the petitioner provided an equally vague description of duties that did little to clarify the beneficiary's actual day-to-day tasks. 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). Additionally, the specific duties the petitioner focused on were administrative tasks, client acquisition, and preparation of quotations.

Based on the evidence of record, the AAO is not convinced that the description of the duties of the beneficiary is an accurate portrayal of a typical workday. In sum, the description in the record claims that the beneficiary has the general responsibility of running and overseeing the entire operation of the petitioner. Additionally, the petitioner claims that the beneficiary is primarily responsible for administrative functions. It appears, therefore, upon review of the limited position description in the record, that the beneficiary is directly responsible for all aspects of running the business, including all administrative tasks, personnel supervision and hiring, and customer service.

The fact that the petitioner claims that the beneficiary is primarily engaged in administrative tasks clearly shows that he is not employed in a primarily managerial or executive position. These duties do not fall directly under traditional managerial or executive duties as defined in the statute. While some of his stated duties, such as overseeing the entire operation of the petitioner, would generally be recognized as the responsibilities of a manager or executive, the vague descriptions provided and the lack of sufficient subordinate staff at the time of filing suggest that the beneficiary directly handles most aspects of the business himself, instead of managing these operations. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be primarily employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the

enumerated managerial or executive duties; *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner must prove that the beneficiary *primarily* performs the responsibilities specified by the statutory definitions and does not spend a majority of 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). In this case, the petitioner has failed to do so.

Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial or executive duties. Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. The beneficiary was granted a one year period of stay from April 1, 2005 to March 31, 2006. The petitioner did not enter the United States until August 14, 2005, more than four months after the initial petition was granted, and three months after the U.S. Embassy in Bogota issued the beneficiary's L visa. There is no explanation with regard to the delay in this matter.

Despite the petitioner's claim that the beneficiary has achieved a profit and will continue expansion of the U.S. entity, this assertion is not persuasive. At the time of filing, the petitioner was a one and one-half year-old company that claimed to have a gross annual income of \$12,871 according to its 2005 income tax return. The firm employed the beneficiary as president and, according to its quarterly wage reports, had recently hired a vice-president and an operations manager. The AAO notes that all of the employees have managerial or executive titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Although it provided evidence that two independent contractors provided services on an as-needed basis, no definitive description of their duties and/or the extent of their role in the company was submitted. 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 the beneficiary as president and two managerial employees.

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, CIS 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 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

Beyond the decision of the director, the question of whether a qualifying relationship exists between the petitioner and the foreign entity must be addressed. The record indicates that the foreign entity owns 90% of

the petitioner. However, a document submitted by the petitioner in the form of a flow chart indicates that although the foreign entity is the major owner of the petitioner, it does not appear to control the petitioner. Specifically, this chart claims that the petitioner is controlled by three persons, namely, the beneficiary, with 34%; [REDACTED] with 33%; and [REDACTED] with 33%. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In this matter, the record suggests that the foreign entity has no control over the U.S. petitioner. 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). Since this issue has not been clarified, the AAO cannot determine the crucial factor of control in this matter. For this additional reason, the petition may not be approved.

Moreover, the petitioner indicates that the beneficiary is the sole owner of the foreign entity, which in turn owns 90% of the petitioner. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

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 he or 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.