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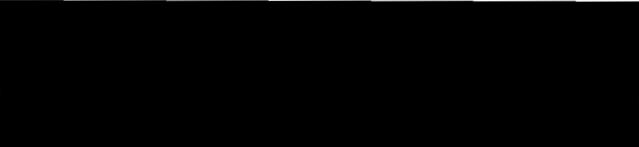
File: WAC 05 209 50532 Office: CALIFORNIA SERVICE CENTER Date: JUN 04 2007

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:



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, California 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 visa 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 is a corporation organized under the laws of the State of California and is allegedly engaged in the business of providing architectural room analyses, material testing, and decontamination services. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

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 petitioner had been "doing business" during the year preceding the filing of the petition.

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 to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager. Counsel did not address the director's determination that it has not been "doing business." While counsel indicated in the Form I-290B that he would file a brief and/or evidence with the AAO within 30 days of the filing of the appeal, no brief or evidence has ever been received. On December 19, 2006, counsel confirmed by facsimile that he did not file a brief or evidence in support of the appeal contrary to that indicated on the Form I-290B.

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 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

In response, counsel to the petitioner submitted a letter dated October 28, 2005 in which he explained that payroll summaries and wage reports are unavailable for the petitioner "pending the employment of required staff of the corporation." Counsel also described the beneficiary as having consulted with architectural departments; overseen the transfer of corporate offices from Los Angeles to Lancaster, California; and prepared monthly reports and action plans for the parent company in Switzerland. Counsel also submitted an organizational chart which places the beneficiary at the top of the organization. However, as counsel admitted that the petitioner has no employees, the subordinate employee positions identified in the chart are apparently unfilled.

On December 1, 2005, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the beneficiary's duties are primarily those of an executive or manager.

Upon review, counsel's assertions are not persuasive.

Title 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 Citizenship and Immigration Services (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 United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary develops business plans; formulates policies, goals, and procedures; and prepares monthly reports. The petitioner did not, however, specifically define what plans will be developed; what policies, goals, and procedures will be formulated; or what reports are being and will be prepared. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes lofty duties does not establish that the beneficiary will actually perform managerial duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a

matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As indicated in counsel's letter dated October 28, 2005, the petitioner does not have any employees. Given the absence of a subordinate staff which could relieve the beneficiary of the need to perform the non-qualifying operational or administrative tasks inherent in the operation of any business, or of the need to provide services to the petitioner's customers, it must be concluded that the beneficiary is performing these tasks and providing these services himself. 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). Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary will act 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. 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 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, the beneficiary appears to be primarily providing services to customers and/or performing non-qualifying administrative or operational tasks. Therefore, the petitioner has not established that the beneficiary is employed primarily in an executive capacity.

It is appropriate for 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). As indicated above, the record indicates that the petitioner has no employees. Apparently, the petitioner does not even employ the beneficiary. Thus, the AAO is left to question whether the beneficiary is even rendering services to the petitioner and, therefore, whether the beneficiary can be considered to be an intracompany transferee as defined in 8 C.F.R. § 214.2(l)(1)(ii)(A). Moreover, as further explained below, the record is

devoid of any evidence that the petitioner is engaged in any business activity. While the record indicates that the beneficiary and his spouse have been involved in one or more real estate transactions, both the business records and the beneficiary's individual tax return fail to establish that the beneficiary, or the petitioner, has been providing any of the services described in the initial petition.

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

The second issue in the present matter is whether the petitioner has been "doing business" as defined by 8 C.F.R. § 214.2(l)(1)(ii)(H) during the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). "Doing business" is defined in pertinent part as "the regular, systematic, and continuous provision of goods and/or services."

The record is devoid of any evidence of any business activity by the petitioner. The only evidence of any business activity pertains to the beneficiary and his spouse and not to the petitioner.

On August 9, 2005, the director requested copies of bank statements and the petitioner's federal income tax returns for 2003 and 2004. In response, the petitioner provided a single bank statement showing a balance of \$215.56 and the beneficiary's individual tax return. The petitioner did not provide a copy of the petitioner's IRS Forms 1120 for 2003 and 2004 and did not give any explanation for its inability to provide these documents.

On December 1, 2005, the director denied the petition. The director concluded that the petitioner failed to establish that it had been doing business for one year prior to the filing of the instant petition.

On appeal, counsel does not address this determination by the director.

Upon review, the AAO concurs with the decision of the director and will dismiss the appeal.

The petitioner has offered no evidence that it has been "doing business" in a regular, continuous, and systematic manner. The record is devoid of any evidence of any business activity by the petitioner. The petitioner failed to provide any invoices or other documents which could establish business activity other than a single bank statement showing a balance of \$215.56. While it appears as if the beneficiary and his spouse may have been involved in one or more real estate transactions, this activity does not appear to pertain to the petitioner. Moreover, the director specifically requested copies of the petitioner's corporate tax returns for 2003 and 2004, and the petitioner chose not to provide copies of these documents. 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).

Accordingly, the petitioner has not established that it has been "doing business" as defined by 8 C.F.R. § 214.2(l)(1)(ii)(H) during the previous year, and the petition may not be approved for that reason.

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ.*, 99 Fed. Appx. 556,

