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U.S. Citizenship
and Immigration
Services



D7

File: SRC 05 219 51120 Office: TEXAS SERVICE CENTER Date: JUN 05 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)

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, Texas 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 vice president of sales 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 a branch of Communication Spares (IK) Limited, located in Essex, United Kingdom. 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 months. 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 had been employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the director failed to consider and failed to give proper weight to all evidence provided for the record. Specifically, counsel for the petitioner contends that the director erroneously focused on the size of the petitioning entity and the lack of subordinate staff members as a basis for concluding that the beneficiary was not acting in a primarily managerial or executive capacity. On appeal, counsel submits a brief where he contends that the beneficiary is qualified by virtue of his management of an essential function of the petitioner.

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 issue in the present matter is whether the beneficiary has been and 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.

With the initial petition, a letter from the U.S. petitioner dated August 3, 2005 outlined the beneficiary's position and duties while employed in the United States. The petitioner also explained that although the initial period of stay was effective as of June 1, 2004, the beneficiary did not enter the United States until August 5, 2004 due to complications with the British Embassy. Consequently, the initial new office petition was extended for an additional two months. Despite this, the petitioner indicated hurricanes and a weak dollar, in comparison to the Euro and British Pound, increased the costs of importing goods into the United States and thus hindered the anticipated expansion of the U.S. company. With regard to the beneficiary's position and duties, the petitioner stated:

[The petitioner] continues to require the services of a Vice President, Sales to oversee start-up operations and management of the company. The responsibilities of the Vice President, Sales will include overseeing all business and financial operations during start-up; implementing [the petitioner's] marketing strategy; negotiating agreements with product manufacturers and distributors; establishing distribution networks; and directing the expansion of sales efforts in the U.S. Our Vice President, Sales, will also be responsible for preparing and delivering product presentations; analyzing market trends; and monitoring expenditures and budgets for marketing plans and projects. In short, our Vice President, Sales, will be managing an essential function of our branch operations. Our Vice President, Sales, will report to and coordinate business, financial and marketing activities between our U.K. and U.S. operations. Within the next two years, the Vice President, Sales, will hire an Engineer to maintain and repair equipment and additional sales and marketing personnel.

On August 15, 2005, the director requested additional evidence pertaining to the nature of the beneficiary's position. Specifically, the director requested "convincing" evidence that the beneficiary was employed in a

managerial or executive capacity. The director also requested an organizational chart for the U.S. entity showing the current staffing of the petitioner in addition to a description of the duties of all employees. In a response dated November 7, 2005, counsel for the petitioner confirmed that the beneficiary was the petitioner's sole employee and, therefore, no organizational chart was available. With regard to the beneficiary's employment in a qualifying capacity, counsel claimed that the beneficiary clearly met the criteria for a function manager "by: (1) managing the U.S. branch office of the foreign entity; (2) managing an essential function of the organization; (3) functioning at a senior level within the organizational hierarchy; and (4) exercising discretion over the day-to-day operations of the function for which he has authority."

Counsel presented examples of the manner in which the beneficiary met these four criteria. For example, counsel claimed that the beneficiary's negotiation of a commercial lease and distribution agreements for product distribution were examples of his management of the office. Regarding the beneficiary's essential function, counsel claimed that the beneficiary managed the sales and marketing of the petitioner which was crucial to the petitioner's development. Since the beneficiary was the petitioner's sole employee, counsel claimed, the beneficiary was consequently functioning at a senior level within the organization. Finally, counsel stated that the beneficiary had full responsibility for all operational decisions of the petitioner and therefore exercised broad day-to-day discretion over all of the petitioner's business and financial operations.

On November 18, 2005, the director denied the petition. The director found that the beneficiary's stated duties had not satisfied the regulatory requirements for managerial or executive capacity. The director noted that the nature and structure of the business as it currently functioned did not appear to support the position of a *bonafide manager or executive*, particularly since the petitioner had not established that the beneficiary would exercise authority over subordinate employees or manage an essential function or component of the organization.

On appeal, counsel reasserts the contention that the beneficiary is a function manager by virtue of his oversight of marketing and sales for the petitioner. Counsel claims that the director's reliance on the size of the petitioner and the lack of subordinate staff members was an erroneous basis for the denial and claims that the director's disproportionate reliance on the absence of this component contributed to a flawed conclusion.

Upon review, counsel's assertions that the beneficiary manages an essential function of the petitioner are not persuasive. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function.

In this case, despite counsel's articulate description of the beneficiary's duties and repeated claims that he manages the sales and marketing of the petitioner, the fact remains that based on the evidence provided, the

beneficiary will be *performing* these functions directly. Counsel claims, in response to the request for evidence and again on appeal, that the beneficiary negotiates distribution agreements, initiates marketing, and remains responsible for the expansion of the petitioner's sales and marketing efforts. Furthermore, counsel claims that although the petitioner plans to hire additional employees in the future, they are not necessary at this stage in the petitioner's development since the beneficiary alone is planning, implementing, and directing the company's sales and marketing. Based on this claim, it is clear that the beneficiary is actively executing, as opposed to passively managing, this function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

In the present matter, it is clear that the beneficiary is not primarily performing managerial or executive duties since the petitioner and counsel repeatedly contend that he is actively performing all marketing and sales tasks. By the petitioner's own admission, there is no subordinate staff to relieve him from performing these non-qualifying duties, and the petitioner further claims that there is currently no need for other staff members. It stands to reason, therefore, that as the petitioner's sole employee, the beneficiary is responsible for the crucial but non-qualifying tasks of sales and marketing for the petitioner. These do not fall directly under traditional managerial duties as defined in the statute; therefore, the petitioner has not provided evidence that the beneficiary primarily manages rather than performs an essential function.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in granting a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate 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.*

In the present matter, 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.

The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. Instead, it appears that the beneficiary is actively engaged in establishing and implementing the sales and marketing services of the petitioner as opposed to merely overseeing such functions. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has failed to establish that a qualifying relationship exists between the foreign entity and the U.S. entity. The petitioner repeatedly contends that it is a branch office of the foreign entity. The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer. In this matter, the petitioner submits its Articles of Incorporation, showing that it incorporated in the State of Florida in 2004. As a result, therefore, the petitioner is not a branch of the foreign entity. The AAO must now examine the petitioner's ownership to determine whether a qualifying relationship exists with the beneficiary's foreign employer.

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.

In this matter, the petitioner submitted a copy of its Articles of Incorporation, which authorize 7,500 shares to be issued at \$1.00 per share. The petitioner also submits a copy of share certificate number one, indicating that 1,000 shares were issued to the foreign employer. As general evidence of a petitioner's claimed

qualifying relationship, however, 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.*

In this matter, there is no documentation to definitively establish that only 1,000 of the 7,500 authorized shares of the petitioner have been issued. Although the petitioner claims that the foreign employer is the sole shareholder, this claim alone is insufficient to establish a qualifying relationship in this matter. 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)). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. Therefore, a qualifying relationship between the two entities cannot be reasonably established. For this additional reason, the petition may not 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).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.