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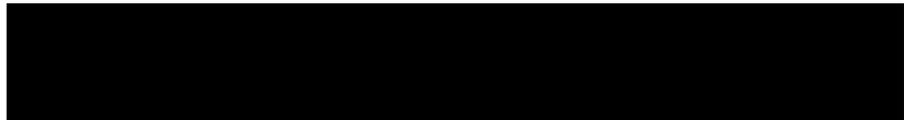


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JUN 20 2007

FILE: SRC 06 107 50959 Office: TEXAS SERVICE CENTER Date:

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 AAO will dismiss the appeal.

The petitioner claims that it is engaged in the marketing and distribution of retail agricultural and livestock products. It seeks to extend the employment of its general manager the beneficiary temporarily in the United States as its president, pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The beneficiary was initially granted L-1A classification for a one-year period in order to open a new office and the petitioner now seeks to extend her stay. The director denied the petition based on the finding that the petitioner had not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner contends that the denial was erroneous, and claims that the director erroneously relied on the size of the petitioner when rendering the denial. In support of the appeal, the petitioner submits a letter 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 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 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 the initial petition, the petitioner indicated that it employed only one person, the beneficiary. Additionally, it claimed that due to unforeseen delays, the beneficiary had been in the United States for less than one year, thereby delaying the start-up phase of the U.S. entity. The petitioner, on Form I-129, briefly described the beneficiary's job duties as general manager as follows: "[d]ay to day discretionary authority in coordinating and directing marketing, distribution, and sales department, target new business."

The petitioner also submitted a document entitled "Business Plan Narratives, Period 2006-2007." This document outlined the objectives of the U.S. entity, and explained that due to delays in obtaining licenses and permits, as well as delays due to hurricane season, the business was slow to start. The document further indicated the petitioner reached agreements with two Chilean companies. One agreement consisted of providing supplies to a vending machine company, and the other required the petitioner to market the company's products in Chile and eventually other South American companies. The business plan finally stated that although the beneficiary was currently the sole employee of the U.S. entity, she would be responsible, in the near future, for contracting one additional person, as well as personnel in the areas of accounting, legal advice, warehousing, and shipping, and part-time assistance when required.

On May 9, 2006, the director requested additional evidence. Specifically, the director requested convincing evidence that the beneficiary was employed in a primarily managerial or executive capacity, as well as evidence of wages paid to the petitioner's employees. In a response dated May 26, 2006, the petitioner provided the following overview of the beneficiary's position in an attempt to show she was primarily employed in a managerial or executive capacity:

[In the role of president and general manager, the beneficiary] has been empowered by the owners abroad, with total authority to represent the company in every aspect of the business and matters associated to such legal representation and directs the company at her own discretion. In such capacity, she is the only authorized signature, manages the organization and its resources, owner, responsible and accountable for all the functions associated to high management in the organization (although small), among other, executes the following acts: can contract employees, contractors, supervise and control them, open and operate bank current accounts under her single signature, can perform all the associated bank transactions (checks, loans, letters of credit, transfers, loans, import and export documents, etc.) providers,

consultants, customs brokers other suppliers, accounting services, represents the company and sign before the authorities such as Social Security, Federal and State, Taxes returns and other presentations,, Municipalities, permits and licenses, contracts of any type, rents, leases and subleases, distribution, etc. etc[.]

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In addition, she gives direction about marketing of products, selection of products, prices approval, business plan and its execution, guidelines to Chile's organization in regards to marketing processes, credit policies, etc.[]

The petitioner also submitted its most recent quarterly tax return for the first three months of 2006, and an organizational chart that appears to apply to the foreign entity.

On June 26, 2006, the director denied the petition. The director determined that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity, and noted that the evidence of record indicated that she is the sole employee of the U.S. entity. The director concluded that the petitioner had failed to establish that it is able to support the beneficiary in a qualifying position within one year of the approval of the initial new office petition.

On appeal, the petitioner submits evidence of other companies in the Florida area that function with only one person in charge of operations, and argues that as a result, the beneficiary is clearly employed in a qualifying capacity. The AAO disagrees.

The petitioner's assertions are not persuasive. 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. 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 position description of the beneficiary provides a general synopsis and does little to clarify what she does on an average workday. 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). 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. *See id.*

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, Citizenship and

Immigration Services (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 present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. The petitioner has failed to sufficiently explain how the beneficiary, as the sole employee, can act primarily as a manager or executive without any subordinate staff members to relieve her from performing non-qualifying duties. 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 or her 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. Without a subordinate staff, the beneficiary must therefore engage in all aspects of the business, including sales, marketing, administrative, and clerical duties.

Although the petitioner submitted an organizational chart listing numerous other staff members, it appears that these persons are employed by the foreign entity, not the U.S. entity. Furthermore, despite the director's request for payroll information, no documentation showing that the petitioner employs additional persons has been submitted. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Furthermore, the petitioner clearly stated that, in the business plan at the time of filing as well as on the Form I-129, the beneficiary was the only employee. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, the petitioner claims that a large portion of the beneficiary's duties involve contracting, hiring and supervising personnel. As discussed above, however, the record contains no evidence that the petitioner employs anyone other than the beneficiary. In fact, in the business plan submitted with the initial petition, the petitioner clearly states that the beneficiary will be responsible for hiring personnel "as soon as business demands." The petitioner, however, must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or

beneficiary becomes eligible under a new set of facts. *Id.* As stated above, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States 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 is not sufficiently operational after one year, 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.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has failed to submit evidence that a qualifying relationship exists between the petitioner and the foreign entity as required by C.F.R. § 214.2(l)(3)(i). 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, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must 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 petitioner merely submits a copy of its Articles of Incorporation. No documentation evidencing the claimed subsidiary relationship with the foreign entity has been submitted. 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. at 165. For this additional reason, the petition may not be approved.

Additionally, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. Although the petitioner claims that it experienced unforeseeable and uncontrollable delays during the first year of operations, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous

provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii)(H). There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. 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).

Finally, the AAO notes a discrepancy in the record regarding the filing of the petition. The claimed representative for the petitioner, [REDACTED] filed both Form I-129 and Form I-290B in this matter, and signs correspondence written on the U.S. entity's letterhead as a "director" of the petitioner. Upon review of the record, [REDACTED] is the husband of the beneficiary. Despite claims in the record that [REDACTED] is a director of the petitioner, the Articles of Incorporation dated December 7, 2004 show that only one director, the beneficiary, was initially appointed. A review of the Florida State corporate records further shows that as of the date of this decision, no change in the number of directors has been made. Furthermore, as discussed above, the petitioner has submitted no evidence to support a finding that [REDACTED] is employed by the U.S. entity.

It is noted that [REDACTED] is the beneficiary of a Form I-539 application seeking to extend his L-2 visa classification as the spouse of the beneficiary of the instant petition. Although the record implies that [REDACTED] is employed by the petitioner, no documentation, such as payroll or tax records, has been submitted to substantiate this contention. Furthermore, his I-539 application claims that he has been working for a different company, Robert Half Management Resources, as a consultant in finance and accounting. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

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 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.