



U.S. Citizenship
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Services

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MAR 06 2007

FILE: SRC 05 190 51495 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 appeal will be rejected as untimely filed.

The petitioner, a Florida limited liability company, claims to be an affiliate of Tracto Bil, C.A., located in Venezuela. The petitioner stated that the United States entity is engaged in the purchase and export of heavy machinery and tractors. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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 in order to continue to fill the position of manager.

On November 18, 2005, the acting director denied the petition concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a managerial or executive capacity

Under the regulations, an affected party has 30 days from the date of an adverse decision to file an appeal. *See* 8 CFR § 103.3(a)(2). If the adverse decision was served by mail, an additional three-day period is added to the prescribed period. *See* 8 CFR § 103.5a(b). In accordance with 8 C.F.R. § 103.2(a)(7)(i) an application received in a CIS office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct file. For calculating the date of filing, the appeal shall be regarded as properly filed on the date it is so stamped by the service center or district office.

The record reflects that the director's decision of November 18, 2005 was sent to the petitioner at its address of record. According to the date stamp on the Form I-290B Notice of Appeal, the appeal was received 52 days later on January 9, 2005. On December 21, 2005, the petitioner timely submitted Form I-290B to AAO and appealed the decision of the director.¹ Thus, the appeal was untimely filed.

Moreover, in reviewing the merits of the appeal, the instant petition was properly denied. On appeal, the petitioner states that the beneficiary is employed in a managerial capacity even though the beneficiary is the only employee of the U.S. company. The petitioner further states that the beneficiary is employed in a managerial or executive capacity because the beneficiary "does have authority over the day to day operations beyond the level normally vested in a first line supervisor." The petitioner further states that "a liberal definition of managerial and executive applies when the transferred is coming to set up a new U.S. office." Finally, the petitioner states that even if the beneficiary did not meet the requirements of a

¹ On December 21, 2005, the AAO rejected the Form I-290B and returned the form to the petitioner stating that the appeal must be submitted to the Service Center or Field Office that rendered the decision. The directions of the denial decision, dated November 18, 2005, state that "if an appeal is desired, the Form I-290B Notice of Appeal shall be executed and filed with this office, together with the required fee." The petitioner subsequently filed the Form I-290B Notice of Appeal and it was received as properly filed by CIS on January 9, 2006.

manager, "he would easily meet the requirement of an executive since his duties are consistent with the regulation."

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or 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).

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include: "administer the day to day operations of the business," and "exercises wide latitude in discretionary decision-making." 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 provide any detail or explanation of the beneficiary's activities in the course of her daily routine. 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).

The job description also includes several non-qualifying duties such as the beneficiary is responsible for "procuring, selecting and interviewing vendors;" "visiting supplier's plants to examine the equipment and parts;" "evaluating suppliers based on price, quality, selections and reliability;" "negotiating contracts with suppliers;" "maintaining computerized records of equipment purchased, costs, delivery, equipment performance and inventories;" "overseeing all aspects of the export/import transaction including preparation of bills of lading, obtaining import licenses, payment of applicable imposts and taxes;" and "managing the company's administrative matters such as accounts payable and accountant receivables, project case flow, etc." As the only employee of the U.S. company, it appears that the beneficiary will be primarily providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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 indicated on the Form I-129 that the company employed one employee, the beneficiary. A critical analysis of the nature of the petitioner's business undermines the petitioner's assertion that the beneficiary is employed in a managerial or executive capacity. Rather, it appears from the record that the beneficiary is the only individual performing any marketing and sales functions, finance operations and

business development activities, and all of the various operational tasks inherent in operating a business on a daily basis, such as purchasing inventory, paying bills, handling customer transactions, negotiating contracts and managing the export of the inventory. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role.

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, therefore the petitioner's assertion that the more lenient "new office" standard applies is not persuasive. 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.

The petitioner indicated in the record that the beneficiary is the only employee for the United States company, and he does not supervise any subordinate staff. 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 in managing the essential function, 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. See 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. 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)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Finally, on appeal, the petitioner asserts that the beneficiary will perform in an executive capacity. If the position offered to the beneficiary is executive in 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, 8 U.S.C. § 1101(a)(44)(B). 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 managerial 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-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.* 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). In the instant matter, the petitioner has not established evidence that the beneficiary is in an executive capacity with the U.S. entity.

Beyond the decision of the director, the petitioner failed to provide sufficient evidence to establish that a qualifying relationship exists between the foreign company and the petitioner. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer is the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). In the instant petition, the petitioner claims that the U.S. entity is 51% owned and controlled by the foreign parent company and 49% owned and controlled by [REDACTED]. The petitioner stated that the foreign entity is 100% owned by [REDACTED] and claimed that the U.S. and foreign entities are affiliates.

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.

The petitioner did not submit documentary evidence of the ownership and control of either the U.S. or foreign company. 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)).

In addition, the petitioner submitted the IRS Form 1120, U.S. Corporation Income Tax Return, for 2004 whereby the petitioner responded "no" to the question as to whether a foreign person owns directly or indirectly at least 25% of the total voting power of all classes of stock of the corporation entitled to vote or the total value of all classes of stock of the corporation. According to the IRS Form 1120, it appears that the petitioner is not owned by any foreign entity which is required in order to establish the claimed qualifying relationship between the petitioner and a foreign company. 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). The petitioner has

not resolved this conflicting information. As the appeal will be rejected as untimely filed, the AAO notes this deficiency for the record and will not further discuss the issue.

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).

Any appeal that is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

ORDER: The appeal is rejected as untimely filed.