



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

D7



FILE: SRC 05 171 51763 Office: TEXAS SERVICE CENTER Date: MAY 02 2007

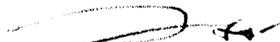
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

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, and denied a subsequent motion to reopen. 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 corporation organized in the State of Florida, claims to be the subsidiary of [REDACTED], located in Cali, Colombia. The petitioner identifies itself as a language institute. 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 the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed a motion to reopen in response to the denial. Upon review, the director denied the motion based on the petitioner's failure to submit new facts and evidence to overcome the basis for the denial. On appeal, the petitioner contends that the beneficiary does in fact qualify as a manager or executive, and submits a brief and additional evidence in support thereof.

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 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 May 18, 2005, the petitioner stated that the petitioner had grown within the past year and now has two locations within Florida. The petitioner further stated that it had three divisions within its language

institute; namely, an ESOL Division, which teaches English as a second language to foreign language speakers; a Foreign Language Division, dedicated to the teaching of foreign languages including Spanish, French, German, and Italian; and a Translation and Interpretation Division, which performs translation and interpretation of foreign language documents.

The petitioner explained that within the U.S. entity, the petitioner acted as president and oversaw seven employees. Specifically, by way of its organizational chart, the petitioner indicated that the beneficiary directly supervised [REDACTED] the Language Center Director, who in turn supervised [REDACTED], a sales representative, three department heads: [REDACTED] Head of ESOL Department; [REDACTED] Head of Translation Department; and [REDACTED] Head of Foreign Language Division. Each department head in turn oversaw one teacher/translator, namely [REDACTED] (ESOL), [REDACTED] (Translation), and [REDACTED] (Foreign Language).

The petitioner indicated that the beneficiary's proposed duties in the United States included the following:

EXAMPLES OF IMPORTANT AND ESSENTIAL DUTIES (55% of his [sic] time dedicated to these duties)

1. Oversee all aspects of the operation.
2. Develop and maintain the vision of the Company; oversee marketing, product development, manufacturing, finance, and customer service; approve all financial obligations; seek business opportunities and strategic alliances with other organizations;
3. Has authority to enter and negotiate contracts on behalf of the Company.
4. Planning, developing, and establishing long-range goals and objectives of business organization in accordance with board directives and corporation charter.
5. Conferring with advisors to plan business objectives, to develop organizational policies to coordinate functions and operations, and to establish responsibilities and procedures for attaining objectives, and also in then implementing goals through subordinate administrative personnel and sub-contractors.
6. Plan, develop, and establish policies and objectives of business organization in accordance with board directives and company charter; direct and coordinate financial programs to provide funding for new or continuing operations in order to maximize return on investments and increase productivity.
7. Liaison activities with the accountants and lawyers who contract with the Company.
8. Hiring staff and other personnel actions, including promotions, transfers, discharges, or disciplinary measures.

FINANCIAL ADMINISTRATIVE AND BUDGETING DUTIES (45% of his [sic] time dedicated to these duties):

1. All aspects of the Company's finance (budget and accounts receivable)[sic], administration)[.]

2. Reviewing activity reports and financial statements to determine progress and status in attaining objectives and revising objectives and planning in accordance with current conditions.
3. Directing and coordinating formulation of financial program to prove funding for new or continuing operations to maximize returns on investments, and to increase productivity.
4. Develop, administer, monitor, and coordinate department budget; forecast funding needs for staffing, materials, and supplies; capital equipment and facility maintenance; monitor and approve expenditures; make recommendations as necessary.
5. Confers with management personnel to establish production and quality control standards, develop budget and cost controls, and to obtain data regarding types, quantities, specifications, and delivery dates of products ordered and serviced.
6. Administrative control and conformance with legal requirements of the firm.

Finally, the petitioner submitted copies of its quarterly tax return for the first quarter of 2005, which demonstrated that at the end of March 2005, the petitioner employed only three persons; namely, the beneficiary [REDACTED] (Director), and [REDACTED] (Head of Translation Department). The documentation submitted for 2004 indicated that [REDACTED], Head of the Foreign Language Division, provided contractual services for the petitioner but was not a salaried or hourly employee.

On July 14, 2005, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request asked the petitioner to submit a more detailed description of the day-to-day duties of the sales representative, as well as documentation establishing the number of employees currently retained by the petitioner. Specifically, payroll records, quarterly tax returns, and Forms 1098 and 1099 were requested to establish the number of employees and contractors. Finally, evidence establishing the date of hire for all employees was requested.

The petitioner submitted a response dated August 15, 2005. The petitioner indicated that it currently employed five independent contractors, five full-time employees, and one freelance employee. In support of these contentions, the petitioner submitted copies of its most recent quarterly tax return, copies of Forms W-4 and W-9, and copies of cancelled paychecks to various contractors.

On October 5, 2005, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a 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, specifically due to the conflicting evidence regarding the subordinates of the beneficiary and their duties and job titles. The director noted that the evidence submitted failed to definitely establish the organizational hierarchy of the petitioner and the exact role of the beneficiary within that structure.

On motion, the petitioner submitted statements attesting to the current structure of the U.S. entity as of October 2005. The petitioner asserted that the director's assertions were erroneous and urged reconsideration

of the denial. The director found that the arguments presented did not constitute new evidence and, therefore, the motion was denied. On appeal, the petitioner contends that the director has not taken into consideration the contractual obligations of the teachers and translators currently working for the petitioner. Specifically, the petitioner asserts that the beneficiary never involved herself in day-to-day activities of the enterprise, nor did she act as a first-line supervisor. Additional evidence was submitted in support of these contentions.

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 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).

In the letter dated May 18, 2005, the petitioner indicated that 55% of the beneficiary's time was devoted to "important and essential duties," such as "oversee[ing] all aspects of the operation" and "develop[ing] and maintain[ing] the vision of the Company." The remaining 45% of her time, according to the petitioner, was devoted to "financial, administrative, and budgeting duties," defined as "all aspects of the Company's finance (budget and accounts receivable) administration." While on the surface, these duties appear to be high level tasks, the exact nature of the beneficiary's day-to-day role in the company remains unclear. For example, while the petitioner contends by way of the description provided that the beneficiary is responsible for all essential duties pertaining to the company, including financial management, it is unclear exactly what the beneficiary does on an average work day. 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).

While high-level duties are identified in the description of duties, the actual duties performed by the beneficiary on an average day are uncertain. Since no definitive information is provided in the record other than the broad list of duties submitted in the petitioner's May 18, 2005 letter, the AAO cannot conclude that the beneficiary is primarily engaged in high-level tasks. As stated above, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, although the petitioner states that 55% of the beneficiary's duties revolve around "important and essential duties" and the other 45% are devoted to financial duties, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. Specifically, within the list of duties, the petitioner includes both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's tasks, such as "entering into and negotiating contracts," "overseeing customer service," and "forecasting funding needs for staffing, materials and supplies" do not fall directly under traditional managerial duties as defined in the statute. As the petitioner fails to document what portion of the beneficiary's duties would be managerial functions and what would be non-managerial, the

AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Furthermore, there are numerous discrepancies in the record with regard to the organizational structure and staffing of the U.S. entity. With the initial petition, the petitioner submitted its quarterly tax return for the quarter ending March 31, 2005. The document indicated that as of March 31, 2005, the petitioner employed the beneficiary, the center director, and the head of the translation department. However, the organizational chart submitted indicated that the petitioner employed a total of eight employees under the petitioner, namely, three department heads, a sales representative, and three teachers/translators. When asked for additional documentation to support its claims, the petition submitted documentation including Forms W-9 for various contractors, a selection of checks, and its most recent quarterly tax return. The quarterly return for the quarter ending June 30, 2005 indicated that the petitioner employed five persons during that quarter, namely, the beneficiary, the center director, the head of the translation department, and two teachers not listed on the organizational chart submitted with the initial petition.¹ 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 petitioner correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying 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 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 this matter, confusion arose as to whether the petitioner employed a subordinate staff to relieve the beneficiary from performing non-qualifying duties. Specifically, the petitioner claims to be a language institute offering instruction and translation services. While the response to the request for evidence indicated that a number of contractors had filled out tax paperwork, the payroll and quarterly tax information did not support the petitioner's claim that it employed a staff of eleven employees and contractors.

¹ The AAO notes that the director incorrectly states in the denial that the petitioner employed only two persons for the second quarter of 2005. It appears that the director viewed only the first page of the quarterly return, since it is clearly indicated on page 2 that three additional employees were on the petitioner's payroll at that time.

For example, two of the alleged department heads, namely, [REDACTED] and [REDACTED] are not listed as employees and did not receive wages from the petitioner in 2005. Although the petitioner submits copies of checks made out to [REDACTED] for a total of \$300 in the month of February 2005, this is not sufficient to show that he is a full-time contractor heading up a department. For example, the petitioner's documentation of the work schedule for this person indicates that he is employed from 9:00 a.m. to 7:00 p.m. from Monday thru Friday, with a two-hour break between 3:00 p.m. and 7:00 p.m. However, the only evidence of compensation paid to [REDACTED] is two checks for \$150 each in the month of February 2005. No other documentation evidencing compensation paid to him was submitted. Similarly, [REDACTED] is also identified as a department head with a full-time work schedule identical to [REDACTED]. He, too, is omitted from the petitioner's quarterly tax return, and no checks evidencing compensation to him are included in the record.

The petitioner contends that the submission of Forms W-4 and W-9 for these and other persons it claims to be contractors prove that the petitioner has a fully-staffed operation with multiple full-time employees. The AAO disagrees. Any such forms presented by a petitioner must be accompanied by other evidence to show that these employees have commenced work activities. These forms verify, at best, that the business has made an effort to complete relevant tax withholding documentation; they do not verify that those individuals have actually begun working or that they have been providing services to the petitioner. *See Matter of Ho*, 22 I&N Dec. 206, 212 (Assoc. Comm. 1998). In the absence of such evidence as pay stubs, payroll records, or paychecks, the petitioner has not established that the petitioner employs a subordinate staff that would relieve the beneficiary from performing non-qualifying duties.

The petitioner asserts on appeal that the staffing of the organization has since grown, and that the beneficiary is now supported by a large subordinate staff to relieve her from performing the tasks necessary to generate the services of the petitioner. To establish that the petitioner has staffed the new operation, however, the petitioner must submit a description of staffing, including the number of employees and the types of positions, as well as evidence of the wages paid to the employees. 8 C.F.R. § 214.2(l)(14)(ii)(D). The record indicates that at the time of filing, the only employees who were on its payroll were the beneficiary, the center director, and the head of the translation department. The organizational chart submitted with the initial petition, which listed [REDACTED] and [REDACTED] as full-time department heads and [REDACTED], and [REDACTED] as part-time teachers/translators is not supported by the petitioner's quarterly returns. While the petitioner did submit copies of checks to [REDACTED] (two checks for \$1,400 in January 2005) and to [REDACTED] (one check for \$250 in February 2005, there is no evidence, independent from the petitioner's own assertions, that these persons were receiving compensation from the petitioner at the time of the petition's filing in June 2005. 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)).

This post-June 2005 evidence, however, is not acceptable to establish eligibility in this matter. 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. In this matter, the petitioner has submitted numerous invoices evidencing the provision of language instruction and/or translation services; however, it has failed to show that it employed a sufficient staff to relieve the beneficiary from providing such services herself. 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

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, it is clear by the lack of payroll records that, at the time of filing, the beneficiary was not supported by a sufficient staff to relieve her from primarily performing language instruction, translation services, or other non-qualifying duties. Based on the evidence presented, therefore, 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.

In addition, the petitioner indicates that the beneficiary is the sole owner of both companies. Specifically, the petitioner claims that the beneficiary owns 100% of the foreign entity, which in turn claims to own 100% of the U.S. 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 she will be transferred to an assignment abroad upon completion of her 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).

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.