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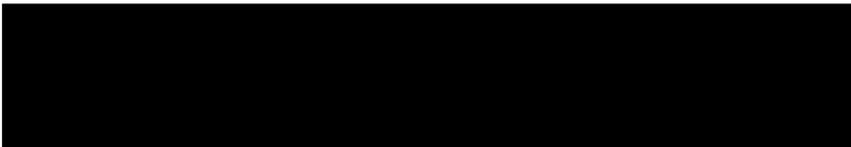


FILE: SRC 06 031 51184 Office: TEXAS SERVICE CENTER Date: MAY 03 2007

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

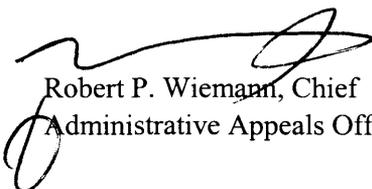
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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 dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as its vice-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 Specom, S.A.R.L., located in Beirut, Lebanon. The petitioner claims to be an automobile dealer and seeks to transfer the beneficiary to the United States for a period of three years.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary was employed abroad in a primarily managerial or executive capacity; (2) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (3) the petitioner was doing business in the United States as required by the regulations.

Counsel for the petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner seeks to clarify that the beneficiary is in fact employed abroad as a manager or executive, and will likewise be employed in the United States in the same capacity. Counsel further contends that the petitioner was engaged in significant business operations prior to the filing of the petition. In support of these contentions, counsel submits a detailed brief 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) provides 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 first issue in the present matter is whether the beneficiary is employed abroad 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 statement dated September 12, 2005 from [REDACTED] the foreign entity's chief executive officer, it was explained that the beneficiary is the company's business development manager and associate in the company and that he earns a salary of \$4,000 per month. The petitioner also submitted an organizational

chart for the foreign entity, which showed that the beneficiary was in fact the business development manager, but that he had no subordinate employees under his direction.

On November 16, 2005, the director requested additional evidence pertaining to the nature of the beneficiary's position in the foreign entity. Specifically, the director requested a more detailed description of the beneficiary's duties, as well as the number of subordinate managerial employees under his supervision. With regard to the beneficiary's subordinates, the director also requested that the petitioner provide details with regard to their position titles, their duties, and their educational credentials.

The petitioner submitted a response dated January 3, 2006. The petitioner provided an overview of the petitioner's duties and claimed that the beneficiary oversaw four persons; namely, the managing director, the head of accounting, and two marketing reservation specialists. In the description of their duties, the petitioner claimed that the managing director and the head of accounting answered directly to the beneficiary. With regard to the beneficiary's duties, the petitioner provided the following updated list:

- Obtain[s] new advertising accounts.
- Coordinates between clients and advertising development team.
- Develops financial models including forecasting, margin analysis, and pricing policy.
- Works closely with product marketing during [product] development to ensure that products and services met client needs and were executed on time and on budget.
- Manages all marketing and public relations activities for [the foreign entity].

On February 15, 2006, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary was primarily 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 or that the beneficiary had sufficient subordinate staff to relieve him from performing non-qualifying duties. Specifically, the director concluded that based on the evidence it appeared that the beneficiary was directly engaged in performing the services of the business. Finally, the director noted that there were inconsistencies in the request for evidence and the foreign entity's organizational chart that led to questions about the validity of the evidence submitted.

On appeal, counsel for the petitioner simply resubmits the previously-submitted response to the request for evidence, and claims in a letter dated March 14, 2006 that all the individuals listed on the foreign entity's organizational chart work under the authority of the beneficiary. Furthermore, he contends that the beneficiary delegates the work within the advertising and marketing department of the company. The AAO, however, disagrees with counsel's assertions.

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(1)(3)(ii). The definitions of executive and managerial capacity have two major 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).

The description of duties provided, both in the initial letter of support and in response to the request for evidence, list an abundance of non-qualifying duties. For example, duties such as "obtaining advertising accounts" and "working closely with product marketing" imply that the beneficiary is very involved in the marketing aspects of the foreign entity. Therefore, based on the nature of the statements provided, it appears that the beneficiary is engaged in the sales and marketing functions of this entity, as opposed to restricting the majority of his time to managerial or executive tasks. 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).

Additionally, as noted by the director, there are inconsistencies in the evidence submitted prior to and after the request for evidence was submitted. For example, the foreign entity's organizational chart submitted with the initial petition shows that the beneficiary, as business development manager, function in an area on his own. The rest of the organization, it appeared, was governed by the chief executive officer, who in turn directly supervised the managing director. The managing director oversaw all other subordinate staff positions, including the head of accounting, the sales representatives, the reservationists, and the administration department.

After the director requested additional information pertaining to the beneficiary's subordinate employees, however, the petitioner responded by advising that the general manager, the second-in-command of the organization, answered directly to the beneficiary, in addition to the head of accounting and the reservationists. This claim, however, directly contradicts the organizational chart initially submitted, which shows that the managing director oversaw all subordinate employees, and that the beneficiary functioned separately from the other staff.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position of the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties and authority of the position, but rather added new responsibilities. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

Furthermore, the response directly contradicted evidence initially submitted with the petition. Specifically, the organizational chart outlining the petitioner's organizational structure shows the general manager, [REDACTED] answering directly to [REDACTED], the chief executive officer. In the response to the request for evidence, the petitioner claimed that [REDACTED] reported directly to the beneficiary. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. Although the response to the request for evidence claims that the beneficiary's authority is broader than originally claimed, the record at the time of filing did not contain such evidence. In this matter, the record at the time of filing is not persuasive that the beneficiary functioned abroad in a qualifying capacity. For this reason, the petition may not be approved.

The second 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
- (v) 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 an undated statement prepared by [REDACTED] president of the petitioner, the beneficiary's duties were described as follows:

[The beneficiary] is the vice president of the company, he is responsible for the advertising and marketing of the vehicles we sell. He deals directly with local advertising companies and with the dealers overseas for exporting vehicles. He is a multilingual person that speaks three languages fluently; that is very important when dealing with overseas dealers regarding the logistics of buying and shipping the vehicles.

On November 16, 2005, the director requested additional evidence pertaining to the nature of the beneficiary's proposed position in the United States. Specifically, the director requested a more detailed description of the beneficiary's duties, as well as the number of subordinate managerial employees under his supervision. With regard to the beneficiary's subordinates, the director also requested that the petitioner provide details with regard to their position titles, their duties, and their educational credentials.

The petitioner submitted a response dated January 3, 2006. The petitioner submitted an organizational chart for the petitioner, demonstrating that the beneficiary, who will oversee three employees, namely, [REDACTED], general manager, [REDACTED], office manager/treasurer, and [REDACTED] office worker, would only be supervised by the president. With regard to his duties, the petitioner provided an identical statement to that submitted with the initial petition (quoted above).

Finally, the petitioner's quarterly tax returns for the previous year indicated that no employees were recorded on the payroll until the final quarter of 2005, when [REDACTED] was listed as earning \$3,123.55 during that period. The start date of her employment was not specified.

On February 15, 2006, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would be primarily 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 or that the beneficiary had sufficient subordinate staff to relieve him from performing non-qualifying duties. Specifically, the director concluded that based on the evidence it appeared that the beneficiary would directly engage in performing the services of the business. Furthermore, the director noted that, contrary to the claims of the petitioner, it did not appear that the petitioner had any employees on its payroll to support the claim that the beneficiary had sufficient subordinate staff to relieve him from performing non-qualifying duties. On appeal, counsel claims that the beneficiary in fact had three employees to relieve him of non-qualifying duties, as set forth on the

organizational chart. Counsel also submits the previously-submitted evidence included in the response to the request for evidence.

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). As discussed above, the definitions of executive and managerial capacity have two major 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).

The description of duties provided, both in the initial letter of support and in response to the request for evidence, was too vague to present a clear picture of the beneficiary's role in the company. The director noted that the initial submission was insufficient, and therefore issued a request for additional details in the request for evidence issued on November 16, 2005. Instead of addressing the director's request, the petitioner merely resubmitted the previously-provided description, deemed insufficient by the director. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner's failure to submit an adequate description of the beneficiary's proposed duties requires the AAO to examine the position based on the position description provided. Since this vague statement merely discusses the beneficiary's multilingual talents and claims that he is responsible for advertising and marketing, it is clear that based on the record, the beneficiary will not be employed in a primarily managerial or executive capacity. Marketing and advertising are not typically services performed by a manager or executive as defined by the Act. In fact, the claim that the beneficiary performs these services is sufficient evidence that he is not a managerial or executive employee. 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. at 604.

However, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. For example, if the petitioner was able to show that the beneficiary performed marketing and advertising functions a small percentage of the time and devoted the remainder of his time to managerial or executive tasks, the burden of proof could be met. However, indirect evidence of the petitioner's lack of employees diminishes this possibility, as the record does not show that the petitioner employs marketing and advertising personnel to relieve the beneficiary from primarily performing these non-qualifying duties. For example, the only employee of record as of December 31, 2005 is the office worker. In addition, the record does not indicate her date of hire, but previously filed tax returns for the first three quarters of 2005 show no employees. Therefore, there is no evidence to corroborate the organizational

structure set forth on the organizational chart, and thus there is no independent evidence to show that the beneficiary has a subordinate staff to relieve him from performing non-qualifying duties.

The petitioner's assertions that the beneficiary is a manager are not enough to satisfy the burden of proof 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)). The petitioner's failure to provide an adequate response to the director's request for evidence, coupled with the lack of employees to relieve the beneficiary from directly performing the services of the petitioner, indicates that the beneficiary would not be employed in a primarily managerial or executive capacity in the United States. For this additional reason, the petition may not be approved.

The final issue in this matter is whether the petitioner has been doing business as required by the regulations. The regulation at 8 C.F.R. §214.2(l)(1)(ii)(H) defines the term "doing business" 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."

In this matter, the petitioner claims that it is an automobile dealership, specifically engaged in the used car market. The director denied the petition, finding that the petitioner had failed to satisfy the regulatory requirements for doing business because there was no evidence in the record to show that business had been conducted for the previous year.

With the initial petition, invoices showing the purchase of used vehicles by the petitioner from auctions were submitted, as well as evidence of wire transfers from the foreign entity to fund these acquisitions. However, no evidence of the sale of any vehicles was submitted.

Consequently, in the request for evidence issued on November 16, 2003, the director requested documentation establishing that the petitioner had been doing business during the previous year as required by the regulations, and requested current documentation to establish this factor. In response, the petitioner submitted additional invoices for the purchase of parts and equipment, as well as two Buyers Orders/ Bills of Sale. However, upon review of these documents, it was determined that they were executed on December 16 and December 28, 2005, over one month after the petition was filed.

On appeal, counsel for the petitioner attaches an annual sales report for the petitioner for 2005, and argues that this satisfies the requirement for doing business. This evidence will not be considered. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The director specifically requested evidence showing that the petitioner had been doing business for the previous year in the request for evidence. The petitioner, however, failed to submit such evidence, and now submits it for the first time on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the previous year. Although counsel on appeal states that the petitioner's business is "relatively new and growing," this was not a new office petition, and the petitioner should be engaged in systematic business dealings by this stage in development. This factor has not been demonstrated. For this additional reason, therefore, the petition must be denied.

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 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.