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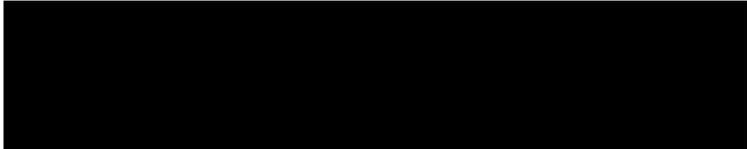
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File: EAC 07 008 50487 Office: VERMONT SERVICE CENTER Date: NOV 01 2007

IN RE: Petitioner:
Beneficiary:

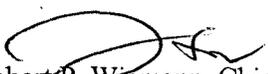


Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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, Vermont Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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 that will engage in scheduled freight forwarding, money transfers, and related services, seeks to employ the beneficiary as its president and general managers.¹ The petitioner claims to be the subsidiary of Call Box Comunicaciones, located in Bogota, Colombia. The petitioner seeks to employ the beneficiary in the United States to open a new office.

The director denied the petition, concluding that the petitioner did not establish that (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity within one year of operation; or (2) sufficient physical premises had been secured to house the new office.

The petitioner filed an appeal in response to the denial. On appeal, the petitioner submits a statement in which it reasserts the beneficiary's qualifications, and contends that it supplied extensive documentation which clearly established that the beneficiary would be operating in a primarily managerial or executive capacity. It further asserts that since the initial filing, the petitioner acquired new offices in which to house the U.S. business, and submits photographs and further documentation in support of this contention.

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.

¹ It should be noted that, according to the Florida Department of State, Division of Corporations, the petitioner has been administratively dissolved due to its failure to satisfy the state's annual report requirements. Therefore, regardless of whether the petitioner's annual report issues in Florida can be easily remedied or not, it raises the issue of the company's continued existence as a legal entity in the United States. See § 607.1421, Fla. Stat. (2006).

- (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.
- (v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:
 - (A) Sufficient physical premises to house the new office have been secured;
 - (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
 - (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first 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.

With the initial petition, the petitioner submitted a letter dated October 4, 2006 in which it discussed the beneficiary's qualifications for the U.S. position. Specifically, the petitioner stated that the beneficiary had been employed by the foreign parent company since September of 2004 as a commercial director. The petitioner stated that the parent company specifically selected the beneficiary to open a new office in the United States based on her qualifications and experience. The petitioner submitted a general overview of the beneficiary's proposed duties, and submitted the following list outlining her position in further detail:

Directs the management of the organization.

Establishes the goals and policies of the organization.

Supervises and controls the work of other professional managerial employees.

Exercises discretion over the day-to-day operations of the organization.

Establish[es] and implement[s] departmental policies, goals, objectives, and procedures, conferring with board members, organization officials, and staff members as necessary.

Assigns or delegates responsibilities to managers and staff as required.

Review[s] financial statements, activity reports, and other performance data to measure productivity and goal achievement.

Plans, organizes, directs, and controls [the petitioner's] major functions and works through other employees to achieve the organization's goals.

Exercises wide latitude in discretionary decision-making.

Receives only general supervision from the board of directors of [the foreign entity].

May perform other duties or tasks assigned.

The petitioner further stated that 80% of the beneficiary's time will be spent on the above-listed functions, whereas the remaining 20% would be spent coordinating and communicating with the foreign entity through reports.

The petitioner also submitted a proposed organizational chart, which demonstrated that as president, the beneficiary would oversee three managers: an administrative manager, an operations manager, and a sales/purchase manager. The chart further demonstrated that these three managers would oversee their own departments, with the administrative manager supervising the administrative department, the operations manager overseeing an operations assistant, a store manager, and an unspecified number of sales representatives, and the sales/purchase manager overseeing an unspecified number of account executives and assistants. The petitioner claimed that by the end of the first year of operations, the beneficiary would oversee six professional individuals.

The director issued a request for additional evidence on October 23, 2006. The request asked the petitioner to submit additional evidence to establish that the petitioner will require the services of a bona-fide manager, and specifically requested information regarding the manner in which the beneficiary would be relieved from performing non-managerial, day-to-day tasks. The director further noted that based on the nature and scope of the proposed business, the organizational structure of the petitioner was not plausible, and gave the petitioner an opportunity to respond to this observation.

In a response dated November 6, 2006, the petitioner responded to the director's request. The petitioner restated that the petitioner intended to hire six employees within the first year of operations, and claimed that the three managers (administrative, operations, and sales and purchase) would report directly to the beneficiary. With regard to how the beneficiary would be relieved from performing non-qualifying duties, the petitioner stated that it expected to have a gross income of \$323,000 within its first year of operations. It further stated that the beneficiary's duties would be limited to an upper-management level, and that she would

be responsible for hiring the employees who would engage in the day-to-day operations of the company. The petitioner also provided an overview of the duties of the proposed managers.

On November 22, 2006, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity within one year of operation. Specifically, the director also concluded that based on the position descriptions provided and the nature of the proposed business, the evidence did not support a finding that the beneficiary would supervise and control the work of other supervisory, professional, or managerial employees who would relieve her from primarily performing non-qualifying duties. Noting that the proposed business did not seem to warrant a bona-fide manager/executive in addition to subordinate managers, the director also found that the petitioner had not demonstrated that the beneficiary would alternatively manage a function of the petitioner.

On appeal, the petitioner restates the beneficiary's proposed duties, and claims that in addition to supervising other managerial and/or professional employees, she will also manage an essential function of the organization. The petitioner further stated that while the organizational chart submitted was merely a proposed organizational chart, it was indicative of the petitioner's plan to first hire clerical workers and then expand to include additional managerial and/or professional personnel. Finally, the petitioner claims that within one year, it planned "to have the people, the resources, and the technology to get our job done across the designated area of operations," and thus would require the services of a bona-fide manager.

Upon review, the petitioner's assertions are not persuasive. Whether the beneficiary will be a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties will be "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is a qualified manager or executive by virtue of her position title, experience abroad, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed managerial or executive duties. 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The description of the beneficiary's proposed duties, provided in the initial letter of support dated October 4, 2006, is vague and merely paraphrases the regulatory definitions. Specifically, the petitioner lists "directs the management of the organization," "establishes the goals and policies of the organization," and "exercises wide latitude in discretionary decision-making" among the beneficiary's duties, which are direct quotes from the statutory definition of executive capacity. Furthermore, the duties identified as "supervises and controls the work of other professional managerial employees," and "exercises discretion over the day-to-day operations of the organization" quote verbatim the statutory definition of managerial capacity. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.* at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). 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. at 1108.

In addition to its failure to provide a detailed overview of the beneficiary's actual duties, the petitioner has submitted no information to establish the percentage of time the beneficiary will perform the claimed managerial or executive duties. It has been noted in the record that the petitioner intended to hire six people in the next year, four of which possess managerial titles. Other than on appeal, where the petitioner claims that it will first hire clerical staff and then hire managers, there is no mention in the record of any proposed secretarial or administrative staff positions. Aside from the operations assistant, whose position is not clearly discernable, the organizational chart identifies no proposed staff positions dedicated to the day-to-day operational tasks of the petitioning enterprise. Collectively, as noted by the director, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive within one year of the petition's approval.

In the absence of a clearly-stated hiring plan involving staff members devoted to handling the non-managerial tasks of the business, the director examined in the alternative whether the beneficiary would be managing an essential function of the organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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)). Despite the petitioner's claim on appeal that the beneficiary does in fact manage an essential function, the petitioner has provided no such evidence.

In this matter, the proposed position of the beneficiary is president and general manager of a newly-incorporated entity in the United States that currently employs no staff. The petitioner has not demonstrated that the beneficiary, as president and general manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. While the organizational chart indicates that the titles of the beneficiary's proposed subordinates are in fact professional and/or managerial, the absence of proposed clerical or administrative positions suggests that while these employees may possess managerial titles, they will nonetheless be performing non-qualifying duties. As a result of this discrepancy, the petitioner has also failed to establish that it will employ a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial or executive duties. Further, regardless of the beneficiary's position title, the record is

not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. Based on the limited documentation furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity within one year of the petition's approval. For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner secured sufficient physical premises to house the new entity as required by 8 C.F.R. § 214.2(l)(3)(v)(A). With the initial petition, the petitioner submitted a copy of its commercial lease agreement dated September 18, 2006. The lease did not specify the size of the space the petitioner had rented, and merely stated that the petitioner leased "a portion" of the premises. Noting that the petitioner had failed to submit photographs of the interior and exterior of the building, the director requested this evidence in the request for evidence dated October 23, 2006.

In a response dated November 6, 2006, the petitioner submitted the requested evidence. Specifically, the petitioner submitted four photographs: two photos of the interior and two photos of the exterior of the leased premises.

On November 22, 2007, the director denied the petition. Specifically, the director noted that the photographs did not depict the nature of the petitioner's business, and failed to demonstrate that the petitioner was actually conducting business. The director noted that no business signs were visible for the petitioner or any other entities housed in the vicinity, and thus it was unclear what type of businesses and/or services were available or actually being conducted. The director concluded that this lack of evidence, coupled with the petitioner's lease, which failed to state the amount of square footage included in the leased premises, was insufficient to demonstrate that sufficient physical premises had been secured.

On appeal, the petitioner indicated that the photos and lease submitted with the initial petition represented the premises the petitioner had originally intended to use. It claimed, however, that since the initial petition was filed, it had moved to another location where its U.S. office was currently located. In support of this contention, the petitioner submits on appeal a lease agreement dated November 1, 2006 along with pictures of the newly-acquired premises.

Upon review, the AAO cannot conclude that sufficient physical premises had been acquired as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The premises located at 1500 N.W. 128 Drive, which had been leased by the petitioner as of September 18, 2006, were deemed unacceptable by the director by virtue of the lack of evidence showing adequate space, machinery, and facilities for the claimed and proposed business operations of the petitioner. Upon review of the photographs submitted in response to the request for evidence, the AAO concurs with the director's finding. The fact that the lease fails to specify the amount of square footage leased by the petitioner especially renders the petitioner's claim unacceptable.

Although the petitioner submits new evidence on appeal of a newly-acquired premises and photographs supporting the claim that business is being conducted at this location, the petitioner fails to overcome the basis for the denial. The petition in this matter was filed on October 10, 2006. The newly-leased premises were not secured until November 1, 2006, approximately three weeks after the filing of the petition. 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 (Reg. Comm. 1978).

The regulations clearly require the petitioner to have secured sufficient physical premises at the time of the petition's filing. In this matter, the petitioner had not satisfied this requirement. For this additional reason, the petition may not be approved.

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.