

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

87



File: EAC 06 024 52635 Office: VERMONT SERVICE CENTER Date: NOV 05 2007

IN RE: Petitioner:
Beneficiary:



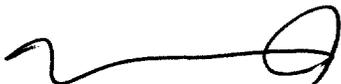
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

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 New York corporation, is engaged in the international trade of electronic products, and states that it is the subsidiary of Skala Internasional Elektromekanik Sanayi Insaat ve Ticaret Ltd. Sirketi, located in Turkey. The beneficiary was granted a one-year period in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend his status for two additional years.

The director denied the petition concluding that the petitioner had not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner disputes the director's decision and asserts that the beneficiary will continue to serve in a managerial and executive capacity as the petitioner's president. Counsel emphasizes that the petitioner achieved nearly one million dollars in sales during its first ten months of operations and hired sufficient employees and contractors to relieve the beneficiary from performing primarily managerial or executive tasks. Counsel submits a brief and additional evidence in support of the appeal.

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(1)(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 (1)(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 sole issue addressed by the director is whether the petitioner has established that the beneficiary will be employed in the United States 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.

The nonimmigrant petition was filed on November 1, 2005. The petitioner indicated on Form I-129 that the beneficiary will continue to be employed in the position of president and provided an eleven-page letter, dated October 31, 2005, which included a detailed description of the beneficiary's duties. The position description is part of the record and will not be incorporated here. Briefly, the petitioner indicated that the beneficiary would allocate his time among the following responsibilities: business planning and strategic implementation (20%); operations management (20%); finance control and analysis (20%); supplier development/marketing/public relations (15%); staff oversight, coaching and directing professional consultants (5%); and affiliation negotiations and partnership development (15%). The petitioner elaborated upon the duties to be performed by the beneficiary within each area of responsibility.

In response to a request for evidence issued on November 7, 2005, the petitioner further elaborated upon the beneficiary's responsibilities, and those performed by the beneficiary's subordinate employees, which, as of the fourth quarter of 2005, included a vice president for technical and IT services, a vice president for planning and finance, a vice president for sales and marketing, a technical sales coordinator, and outsourced service providers including an accountant, an attorney, a payroll and tax preparer, an office management services provider, a freight forwarding and warehousing services provider, and a customs broker and insurer. The petitioner provided evidence of educational qualifications possessed by the beneficiary's subordinates, as well as a professional position evaluation/analysis for the beneficiary's position from [REDACTED] of Pace University, who opined that the position of president with the petitioning company is "executive/managerial in nature."

The petitioner also provided an organizational chart for the petitioning company, evidence of wages paid to employees and contractors, and other supporting evidence to establish the business activities undertaken by the company during its first year of operation. In addition, the record includes the petitioner's original business plan prepared in 2004, which demonstrates that the company has in fact surpassed expectations in terms of first year sales objectives and has followed its initial hiring plan on schedule.

The director denied the petition on February 10, 2006, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director acknowledged that the beneficiary would supervise three vice presidents who possess at least a bachelor's degree, but determined that the petitioner had not established that these employees are bona fide managers or professionals. The director determined that the number of employees hired during the first year of operations would be insufficient to support the beneficiary in a primarily managerial or executive capacity and concluded that the beneficiary is not relieved "from performing any of the duties of the day-to-day operation of the United States office." Finally, the director determined that the beneficiary is not managing a function because it is evident, based on the petitioner's staff size, that there would not be "separate functions of the company that an individual would be able to manage."

The petitioner filed the instant appeal on March 13, 2006. On appeal, counsel for the petitioner asserts that the beneficiary is employed in a managerial and executive capacity, and contends that the U.S. company has grown sufficiently within the previous year to support his position, in that he is relieved from performing non-managerial, day-to-day operations and duties. Counsel asserts that the beneficiary's position is managerial in nature as he oversees all functional aspects of the company through subordinate employees, and has authority to direct the development of strategic partnership with other companies, and supervises and controls the work of three vice presidents who both possess and require baccalaureate degrees in order to perform their professional duties. Counsel submits further evidence in support of the petitioner's contention that the beneficiary's direct subordinates are professionals, including job postings for similar positions from other companies in the petitioner's field, and occupational information and requirements from U.S. Department of Labor Resources. Counsel further asserts that the beneficiary has the authority to hire and fire staff and retains complete authority over all employees and contractors. Finally, counsel asserts that the beneficiary exercises discretion over the day-to-day operations of the activity or function and provides additional explanation in support of this claim.

In addition, counsel asserts that the beneficiary also satisfies the requirements for "executive capacity" set forth at 8 C.F.R. § 214.2(l)(1)(ii)(C). Counsel contends that the director was dismissive of the petitioner's arguments that the beneficiary would be employed as an executive, noting only that "the proffered position could not be considered executive because the beneficiary will not be directing the management of the organization." Counsel asserts that the detailed information submitted with regard to the beneficiary's position clearly establishes that he directs the management of the organization, establishes its goals and policies, has wide latitude to exercise discretionary decision-making authority, and works under the guidance of the board of directors of the parent company. Counsel provides examples for the record in support of her claim that the petitioner established the beneficiary's employment in an executive capacity.

Finally, counsel objects to the director's conclusion that the company has not grown sufficiently to support a managerial or executive position, or hired employees to relieve the beneficiary from performing non-qualifying duties. Counsel emphasizes that the U.S. company achieved revenues of nearly \$1 million in its first ten months of operation and hired four employees and a number of contractors to perform the day-to-day operations of the company. Counsel asserts that the beneficiary has delegated all responsibility for day-to-day functions to his subordinates and is not directly involved in sales and marketing, financial analysis, shipping or customer service.

Upon review, counsel's assertions are persuasive. The director's decision dated February 10, 2006 will be withdrawn and the petition will be approved.

The petitioner has established that the beneficiary will be employed in a primarily managerial capacity. The petitioner has provided thorough explanations and extensive documentary evidence to demonstrate that the beneficiary does in fact manage the entire organization, supervise and control the work of professionals, has the authority to hire and fire all personnel within the company, and exercises discretion over the day-to-day operations of the company. The AAO concurs with counsel that the director provided inadequate explanation for his determination that the petitioner does not employ professionals, and for his finding that the beneficiary would primarily perform the day-to-day non-managerial operations of the company. The petitioner need only

establish by a preponderance of the evidence that the beneficiary's duties are primarily managerial in nature. The AAO is satisfied that the beneficiary performs the high-level duties associated with the statutory definition of managerial capacity and that he would reasonably be required to devote more than half of his time to such duties.

The record also demonstrates that the petitioner has met or exceeded all goals and objectives outlined in its business plan for its first year of operations, and has achieved significant growth in terms of sales and staffing. The director's finding that the size of the subordinate staff remains too small to support a managerial position is contrary to the evidence presented, and the director was not able to articulate any basis for this finding, or indicate what specific non-managerial duties would be performed by the beneficiary.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. The AAO has also consistently required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. As noted above, the petitioner has established that it has a reasonable need for the beneficiary to perform primarily managerial duties within the context of its current staffing levels, overall purpose, and current stage of development. The petitioner has adequately demonstrated that that the majority of the day-to-day, non-managerial functions of the company are performed by the petitioner's employees and independent contractors.

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, the petitioner has sustained that burden. Accordingly, the director's decision dated February 10, 2006 is withdrawn.

ORDER: The appeal is sustained. The petition is approved.