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File: EAC 07 024 51564 Office: VERMONT SERVICE CENTER Date: NOV 06 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 withdraw the director's decision and remand the petition to the director for further action and entry of a new decision.

The petitioner seeks to extend the temporary employment of 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 Missouri corporation established in 1994, operates a grocery store. It claims to have a qualifying relationship with Comercial Lido C.A., located in Venezuela. The petitioner has employed the beneficiary in L-1A status since December 2005 and now seeks to extend his status for three additional years.

The director denied the petition, concluding that the petitioner had failed to establish that the U.S. entity would employ the beneficiary 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 contends that the beneficiary will be employed in a primarily executive capacity. Counsel objects to the director's conclusion that the petitioner's business does not require the services of a bona fide manager, and emphasizes that the company is neither "small" nor "new" as suggested by the director. Counsel also objects to the director's finding that the beneficiary's offered salary of \$30,000 is "incongruous" with a managerial or executive position. Finally, counsel asserts that the petitioning company has ample staff to carry out the managerial and non-managerial day-to-day operations of the business. 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(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.
- (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 established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

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 2, 2006. The petitioner indicated on Form I-129 that the beneficiary would continue to be employed as vice president of the U.S. company, which operates a grocery store and claims to have eleven employees. In an attachment to Form I-129, the petitioner provided the following description of the beneficiary's duties:

The beneficiary is employed in the executive capacity of the Vice President of [the petitioning company] for the past year. His job duties including ensuring that [the petitioner] successfully adheres, either via the Beneficiary or the delegation of said duties, to the business purposes listed in Article Ten of the Articles of Incorporation (see attached).

In addition, to briefly summarize the Beneficiary's other duties; they are as follows, to-wit:

- a. Reports to the President of [the foreign entity] regarding all matters, especially opportunities for expansion and growth;
- b. Controls and oversees the General Manager and guides the General Manager in resolving difficult decision-making problems;
- c. Reviews reports from the General Manager which discuss the supply and demand of items purchased or are to be purchased for [the petitioner] and decides which items are to be purchased or discontinued;
- d. Reviews the buying and selling of products with vendors and customers;
- e. Reviews reports from the General Manager, Manager of Quality Assurance, and Produce Manager to ensure they are complying with inventory and purchasing standards;
- f. Reviews reports from the Controller to ensure that the bookkeeping, which includes payroll, inventory, and accounts receivables and payables, conforms with company standards;
- g. Assists the President by preparing acquisitions and dispositions of large corporate assets, and ensuring that the corporation is complying with all city, state and federal code and tax regulations;
- h. Advises and teaches General Manager, Manager of Quality Assurance, and Produce Manager in international marketing and business;
- i. Ensures that each department has fulfilled the requirement that all company policies and standards are implemented and taught to all employees; and
- j. Prepares and presents new goals, policies and incentive programs for the employees and the corporation as a whole to increase productivity, quality and success.

The director issued a request for evidence on December 11, 2006, in which he requested: (1) an organizational chart for the U.S. entity which clearly specifies the beneficiary's proposed subordinates; and (2) a complete position description for the beneficiary's proposed subordinates and educational credentials for each employee. The director advised that the initial evidence did not establish that the beneficiary would function at a senior level in an organizational hierarchy, or that he would supervise and control the work of supervisory, professional or managerial staff.

In response to the director's request for evidence received on February 5, 2007, the petitioner provided an organizational chart which shows the beneficiary as vice president, reporting to the president of the U.S.

company. The beneficiary's direct subordinate is a general manager, who is depicted as supervising a controller, a quality assurance manager, a produce manager, two cashier/stockers and two cashiers. The chart shows that the produce manager supervises one "employee/stocker." The petitioner provided a brief curriculum vitae for the general manager, controller, produce manager and quality assurance manager. According to the information provided, none of these employees completed any secondary or university education.

In a letter dated January 31, 2007, counsel for the petitioner re-iterated the beneficiary's previously described duties and stated that such duties establish his employment in an executive capacity. Counsel's letter also included a detailed position description for the company's other employees, which are part of the record and will not be repeated in their entirety here. Briefly, the petitioner indicated that the general manager reports to the beneficiary; places promotional and recruitment advertisements; makes hiring decisions; interviews and trains staff; prepares inventory reports; makes purchasing recommendations; enforces company policies and standards; reconciles cash register receipts; calculates time cards; creates the work schedule for cashiers and stockers; and is responsible for ordering inventory and ensuring timely delivery. Counsel provided job descriptions for all positions that report to the general manager, including the controller, quality assurance manager, produce manager, cashier, stocker, and "employee." Counsel indicated that all employees work 40 hours per week.

The director denied the petition on February 28, 2007, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director acknowledged the position descriptions submitted for the beneficiary's subordinates and stated "it appears that the duties you have outlined would normally require the skills of bona-fide professionals." The director determined, however, that "the nature of [the petitioner's] small, new grocery store is not such that it would require workers who have professional-level expertise to fulfill the duties affiliated with the job titles." The director therefore found that the beneficiary would not be employed in a managerial or executive capacity based on his supervisory responsibilities, as he would not supervise and control the work of supervisory, managerial or professional employees.

The director also conceded that a number of the beneficiary's listed duties "would normally be required of or associated with a manager or executive," but noted that "this service is not convinced that the beneficiary will actually be carrying out these duties." The director observed that the petitioner's "small, new grocery store does not appear to require a bona fide manager or executive who would perform the tasks you have listed on a fulltime basis." The director concluded that "it appears that [the beneficiary] would be engaged in the non-managerial, day-to-day operations of your establishment." Finally, the director noted that the beneficiary's proffered salary of \$30,000 "is incongruous with that of an employee who is actually managing other bona fide managers or professionals."

On appeal, counsel for the petitioner objects to the director's characterization of the petitioning company as "small" and "new," noting that the company was established in 1994, not 2005 as stated by the director, and in fact achieved sales of nearly \$6 million in 2005. Counsel asserts that the petitioning company, based on its age and size, does in fact require workers with professional-level expertise to fulfill the positions of vice president, general manager, controller, quality assurance manager and produce manager.

Counsel further asserts that the beneficiary, as an owner of the foreign entity, has an indirect ownership interest in the petitioning company. Counsel contends that the beneficiary's salary of \$30,000 is not inconsistent with that of an owner/employee, who must consider his long-term interest in the company and may make a business decision to receive a lower salary at this time.

Finally, counsel contends that the petitioner requires a bona fide, full-time executive and has ample staff to perform both the managerial and non-managerial day-to-day operations of the business.

In support of the appeal, the petitioner submits an advisory opinion from [REDACTED] Adjunct Professor of Management at Saint Louis University, who addresses the beneficiary's seemingly low salary and states that it is not unusual for an executive to be paid consistent with the organization's current financial performance, and that the entire compensation package must be taken into account. [REDACTED] opines that "in a majority of cases where an organization has only 11 employees, it would be difficult to conclude anything different from the [director's decision]," as such a simple organization would not typically support more than one person in a managerial/executive capacity." However, [REDACTED] finds that the petitioning company is "an exception to this general assumption given the fact that [the beneficiary] has 50 percent ownership of [the foreign entity], and thus 25 percent ownership of [the petitioner]." [REDACTED] states that it is her expert opinion that the beneficiary is an executive "due to the fact that he is a 25 percent owner of the organization." [REDACTED] concludes that she agrees with the director's decision that the record did not establish the beneficiary's eligibility as a manager or executive, but notes that because the crucial fact of the beneficiary's ownership of the company was omitted, the decision should be reversed.

Upon review, the AAO will withdraw the director's decision and remand the petition to the director for further action and entry of a new decision.

The director's decision was largely based on conjecture and speculation with no explanation as to why the director concluded that the beneficiary and his subordinates would not actually perform the stated job duties. Furthermore, the director's determination that the beneficiary's salary is "incongruous" with an executive or managerial position is contrary to the statute and regulations, which neither require, nor permit, a beneficiary's salary to be considered as a factor in determining the beneficiary's employment capacity. Finally, the director's repeated references to the petitioning company as "small" and "new" reflect an incomplete review of the evidence provided, which shows that the company was established in 1994 and achieves significant annual sales of \$6 million.

The AAO finds that the evidence of record does not directly reflect that the petitioner or beneficiary is ineligible for the benefit sought. However, although the director issued a request for evidence in this matter, the AAO finds that additional evidence will be required in order to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. The petition will be remanded to the director, who is instructed to request additional evidence consistent with the discussion below.

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 petitioner's description of the job

duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The position description provided for the beneficiary is vague and nonspecific and provides little understanding as to what managerial or executive tasks the beneficiary performs on a day-to-day basis. For example, it is unclear what qualifying duties are included in the beneficiary's responsibility for "reviewing buying and selling of products with vendors and customers." Accordingly, the director is instructed to request that the petitioner provide a comprehensive, specific description of the duties performed by the beneficiary, including a breakdown of the percentage of time he will devote to those duties on a weekly basis, and a description of the duties he performed on a "typical day," as of the date the petition was filed. If the petitioner indicates that the beneficiary "oversees," "supervises," "directs," "reviews" or "manages" an activity or function, the petitioner should clearly indicate who among its employees performs the routine duties associated with the particular activity or function.

When examining the managerial or executive capacity of a beneficiary, United States Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the number of hours worked by subordinate employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

The petitioner claims to operate a retail grocery store with eleven employees. Of these eleven employees, the petitioner claims to have two executive employees (the beneficiary and the president), four managers, and five cashiers/stockers. The petitioner should provide additional explanation of the duties performed by its president and explain any overlap between the president's duties and the beneficiary's duties, particularly in light of [REDACTED] comments that such an organization would typically not support more than one managerial or executive position. Without further explanation, the AAO questions the need for five layers of employees in an organization with eleven employees. Furthermore, the petitioner should provide a more detailed organizational chart that identifies all employees by name, including the cashiers/stockers, as of the date the petition was filed.

The record also contains no evidence of wages paid to employees to support the petitioner's statements that all eleven employees work on a full-time basis. Given the labor intensive nature of the petitioner's retail business and its relatively small staff size, the AAO finds this evidence critical to a determination that the lower-level employees would relieve the beneficiary from performing first-line supervisory and operational tasks. The petitioner should therefore be instructed to provide evidence of wages paid to employees in the form of IRS Forms 941, Employer's Quarterly Tax Return, and state quarterly wage reports for the last quarter of 2006 and the first quarter of 2007, as well as copies of IRS Forms W-2, Wage and Tax Statement, issued to employees

in 2006. The petitioner should also identify the hourly wage paid to any non-salaried employees as of November 2006.

In addition, the AAO notes that the record as presently constituted contains no evidence of the ownership of the United States company. While the regulation at 8 C.F.R. § 214.2(l)(14)(i) does not specifically require the submission of such evidence, the AAO notes an apparent inconsistency that requires resolution. The petitioner claims that the foreign entity acquired a 50 percent interest in the petitioning company in 2005, however, the beneficiary's initial L-1A petition was filed in December 2004, before the purported acquisition of the foreign entity's ownership interest in the U.S. company.

The petitioner should be instructed to submit copies of all stock certificates issued by the U.S. company to date, a copy of its stock transfer ledger, evidence related specifically to the foreign entity's acquisition of an ownership interest in the company, and any other independent and objective evidence that will clearly demonstrate the foreign entity's ownership interest in the U.S. company.

It is emphasized that 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). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, November 2, 2006. Documentation of business activity and hiring that occurred after the date of filing is not probative of the petitioner's and beneficiary's eligibility and will not be considered.

In this matter, the evidence of record is insufficient to establish the beneficiary's and petitioner's eligibility. Further evidence is required in order to establish that the beneficiary meets the requirements for L-1A classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated February 28, 2007 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.