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File: EAC 07 031 51583 Office: VERMONT SERVICE CENTER Date: OCT 02 2007

IN RE: Petitioner:  
Beneficiary:



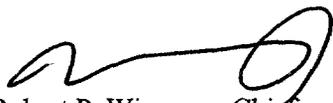
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 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 Texas corporation, states that it operates as a customs broker and freight forwarder. The petitioner claims that it is an affiliate of Corporación Mexico Express, S.C., located in Mexico. The petitioner seeks to employ the beneficiary as its president for a two-year period.

The director denied the petition concluding that the petitioner did not establish 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 asserts that the beneficiary will be employed in a managerial/executive position based on his responsibility for controlling all company departments and employees. Counsel asserts that the beneficiary "will not be performing any duties the employees do." In support of the appeal, counsel re-submits documentary evidence that was previously provided.

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 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.

The nonimmigrant petition was filed on November 14, 2006. The petitioner stated on Form I-129 that the beneficiary would serve as president of the ten-person company, with responsibility for "control of all

departments and employees." The petitioner did not submit a supporting letter or a statement further describing the beneficiary's proposed job duties as president of the U.S. company.

The petitioner provided a list of U.S. employees, which included their names and social security numbers only, as well as copies of IRS Forms W-2, Wage and Tax Statement, for 2005. Six of the ten employees earned wages consistent with full-time employment, while the remaining employees were likely either employed on a part-time basis, or employed for only part of the year. The AAO notes that two of the employees, [REDACTED] and [REDACTED] are identified as having the same U.S. Social Security Number. 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 submitted its Texas Form C-3, Employer's Quarterly Report, for the fourth quarter of 2005, which indicates that the U.S. company employed six employees during the months of October and November 2005, and seven employees in December 2005.

The director issued a request for additional evidence on November 24, 2006, in which he instructed the petitioner to submit: (1) an organizational chart for the United States entity specifically outlining the beneficiary's position; (2) complete position descriptions for the positions subordinate to the beneficiary's proposed position; and (3) a comprehensive description of the beneficiary's proposed duties, with an explanation as to how the beneficiary's duties will be managerial or executive in nature. The director advised the petitioner that it should demonstrate that the beneficiary will function at a senior level within an organizational hierarchy, or demonstrate that the beneficiary will be managing a staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. Finally, the director requested that the petitioner specify what executive/managerial and technical skills are required to perform the proposed duties in the United States.

The petitioner, through counsel, submitted its response to the request for evidence on January 12, 2007. The response included an organizational chart identifying the beneficiary as director of the U.S. company, and directly supervising the general manager. The petitioner indicated that the general manager supervises an accounting employee, three traffic employees, one classification employee, and two warehouse employees. The record contains no evidence of wages paid to three of the eight subordinate employees listed on the organizational chart, including the accounting employee and two of the traffic employees.

The petitioner did not acknowledge the director's requests for a comprehensive description of the beneficiary's duties, nor did it provide the requested complete position descriptions for the beneficiary's proposed subordinates. With respect to the skills required to perform the proposed duties in the United States, the petitioner provided the following statement:

It requires from the person in this position take the responsibility to verify and confirm that all the information provided are [sic] in conjunction with the custom broker law, and it is important that this person has the knowledge to classify all the merchandise between with the correct section of the ability to identify the merchandise with the correct invoice, sales

receipt, and import and export documentation to protect the custom broker to be penalized or lost the customs broker license.

As executive/managerial position, the employee should be prepared to control the business including all departments and employees.

[The beneficiary] posses [sic] all technical skill [sic] that are required for this position.

On January 24, 2007, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. The director observed that the evidence submitted did not demonstrate that the beneficiary would be supervising a subordinate staff of managers, supervisors, or professionals who would relieve the beneficiary from performing the services of the corporation. The director also found insufficient evidence to establish that the beneficiary would manage an essential function of the company, or that he would function at a senior level within the organizational hierarchy, other than in position title. The director concluded that the petitioner's "modest-sized brokerage" does not appear to require the services of a full-time manager or executive.

On appeal, counsel provides the following statement on Form I-290B, Notice of Appeal:

1. It was a clerical error in the amount being offered to the beneficiary. The correct amount will be \$73,000.00 and not \$30,000.00.
2. As we mentioned [the beneficiary] will be controlling all company departments and employees as well as making desicions [sic] to the benefit of the company and the business. We beleive [sic] that is a managerial/executive position.
3. [The beneficiary] will be managing and directing the company. As such, he will not be performing any duties the employees do.
4. [The beneficiary] created the business and has the knowledge to make it grow. Right now it is making \$998,268.00 dollars a year and under his management this business can grow and offer more business and jobs to the U.S.
5. The officer referred to this business as a modest sized business, we believe that a company that hires 10 employees and has a net income of \$462,877.00 a year can not be considered as a mid sized business. Otherwise, we are requesting the oprtunity [sic] to make it biger [sic] with [the beneficiary's] experience.

In support of the appeal, counsel re-submits copies of supporting documents previously provided at the time the petition was filed.

Upon review, counsel's assertions are not persuasive. 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 petitioner, despite multiple opportunities, has failed to provide any description of the beneficiary's proposed duties beyond its initial statement that the beneficiary will be responsible for "control of all departments and employees." The director clearly and specifically requested a "comprehensive description of the beneficiary's proposed duties." The petitioner failed to even acknowledge this request for required evidence. 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). For this reason, the appeal will be dismissed.

The definitions of executive and managerial capacity have two specific requirements. 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).

While the AAO does not doubt that the beneficiary would exercise authority over the U.S. company as its president and sole shareholder, his eligibility for this visa classification must be based on a finding that his actual duties are primarily managerial or executive in nature. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

On appeal, counsel suggests that the beneficiary will be performing only managerial or executive duties, as he "will not be performing any duties the employees do." However, counsel's unsupported assertions will not be accepted in lieu of a description of the beneficiary's actual duties. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Finally, the AAO notes that the petitioner's explanation of the skills required for the beneficiary's U.S. position appear to describe an employee who would be involved to some extent in providing the services of the petitioner's customs brokerage business. For example, the petitioner indicated that the person who fills the position must "take the responsibility to verify and confirm that all of the information provided are in conjunction with the custom broker law," have the "knowledge to classify all the merchandise between with the correction section," and have the "ability to identify the merchandise with the correct invoice, sales receipt and import and export documentation." This explanation implies that the beneficiary would be required to perform non-managerial tasks associated with the day-to-day operations of the petitioner's business. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see

also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Again, as the petitioner has declined to provide the requested comprehensive description of the beneficiary's actual duties, the AAO cannot make a determination as to what his primary duties would be.

On appeal, counsel objects to the director's characterization of the U.S. company as "modest-sized" and emphasizes that the company has ten employees and significant income. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

Preliminarily, the AAO notes that the petitioner has not adequately documented the number of employees working for the company at the time the petition was filed. The employee list submitted with the petition at the time of filing in November 2006 appears to include all employees who worked for the company during 2005. The evidence submitted, namely the petitioner's quarterly report for the fourth quarter of 2005, suggests that some of these workers were no longer employed by the company as of December 2005, much less still employed with the company as of November 2006 when the petition was filed. Furthermore, the fact that the petitioner claimed to employ two individuals who were using the same social security number raises questions regarding the credibility of the evidence submitted. 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. *Id.* at 591.

The petitioner submitted a different employee list just two months after the petition was filed, which indicated that the petitioner has only eight employees, three of which were not included in the previous employee list. Since the petitioner has offered no payroll records for 2006, the AAO cannot determine who was actually working for the company as of November 2006. 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)). Without this information, the AAO cannot conclude that the beneficiary would primarily supervise managerial, supervisory or professional employees, or find that he would otherwise be relieved from performing the non-managerial, day-to-day operations of the company.

The director specifically requested that the petitioner provide complete position descriptions for every employee who would be subordinate to the beneficiary. The petitioner ignored this request. Again, 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). Based on the lack of evidence regarding the beneficiary's proposed duties, the number of employees working for the company as of the date of filing, and their job titles and duties, the AAO cannot make a determination as to whether the petitioner, which appears to have operated for seven years without a company president, currently has a reasonable need for a president who would perform primarily managerial or executive duties.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed by the U.S. company in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

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.