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File: SRC 04 070 50409 Office: TEXAS SERVICE CENTER Date: OCT 16 2007

IN RE: Petitioner:
Beneficiary:

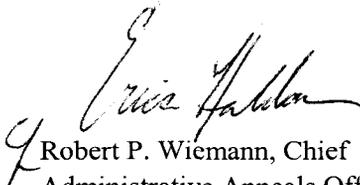


Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Texas Service Center, denied the nonimmigrant visa petition and a subsequent motion to reopen was dismissed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is engaged in the import and export business and seeks to extend the employment of its general manager in the United States as an 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).

Noting that the record was deficient, the director requested additional evidence in support of the petition. After the petitioner failed to submit the requested evidence, the director denied the petition for abandonment, pursuant to 8 C.F.R. § 103.2(b)(15).

The director correctly informed the petitioner that no appeal would lie from the decision, but that the petitioner was permitted to file a motion to reopen or reconsider within thirty (30) days of the decision. An untimely motion to reopen was filed by the petitioner on July 1, 2004. Exercising her discretion to accept the untimely motion, the director reopened the proceedings but upheld the denial, finding that the evidence submitted on motion was insufficient to establish that the beneficiary would be employed in a capacity that was primarily managerial or executive. The matter is now before the AAO on appeal.

On appeal, the petitioner asserts that the beneficiary will be in fact managing the petitioner's business and thus will be employed in a primarily managerial and/or executive capacity. In support of this contention, the petitioner submits a 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) 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.

This primary 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.

The nonimmigrant petition was filed on January 9, 2004. In the initial petition, the petitioner provided a general overview of the beneficiary's proposed duties in the United States. The director found this evidence insufficient to warrant approval of the petition and, as a result, issued a request for evidence on January 21, 2004. The director requested a definitive statement describing the U.S. employment of the beneficiary, including but not limited to his position title and all duties associated with the position, the percentage of time he devoted to each duty, a description of the beneficiary's subordinate employees including their job titles, duties, and educational credentials, and a statement clarifying who provided the product sales/services or produced the product of the business. The director properly gave notice to the petitioner that it had twelve weeks from the date of the request to submit a response.

On May 24, 2004, the director noted that a response had not been submitted in accordance with the twelve week deadline. As a result, the director denied the petition for abandonment. On July 1, 2004, the petitioner submitted a motion to reopen, claiming that the request for evidence was mailed to an incorrect address and thus the petitioner did not receive it in a timely fashion nor was it able to submit a timely response. The director reopened the case and reviewed the evidence submitted with the motion.

In response to the director's request for a definitive statement describing the beneficiary's U.S. employment, the petitioner provided the identical overview of the beneficiary's duties that was submitted with the initial petition:

- The control of the employees and future employees employed with the company;
- Managing the Finances;
- Planning, developing and implementing company strategy;
- Planning the future expansion of the business and the possibility of franchising the said business;
- Developing and implementing policies and procedures for company operations;
- Determining mark-up percentages necessary to insure profit, based on estimated budget, profit goals and average rate of client acquisition;
- Developing policies and procedures for procurement of services;
- Oversee the negotiating of contracts with clients;
- Authorizing purchase of contract services based on estimates;
- Formulating pricing policies for sale of services;
- Review statements, invoices, bill[s] of lading and insurance certificates;
- Coordinate the purchase of services, supervising the contract with the different vendors to attain the desired services;
- Plan business objectives, develop organizations polices [sic] and establish responsibilities and procedures for attaining objectives with the business operations of the internet services business;
- Review activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions;

- Direct and coordinate formulation of financial programs to provide funding of new or continuing operations to maximize returns on investments and increase productivity[.]

Regarding the percentage of time the beneficiary devoted to each duty, the petitioner stated, "The percentage of time spent on each duty was equitably [sic]." In the same proportion or average, because all of them was important and will continue been [sic] important."

The petitioner further claimed that the beneficiary oversaw four subordinate employees, but just two of these employees were under his direct supervision. In support of these contentions, the AAO notes that the petitioner had previously provided copies of its quarterly tax returns for the first two quarters of 2003, as well as a payroll register for the period from January 2003 to September 2003, both of which showed that the petitioner employed only one other person in addition to the beneficiary during this period.

On July 30, 2004, the director upheld the denial. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States. Specifically, the director concluded that at the time of filing, the beneficiary was not employed in a primarily managerial or executive capacity. In addition, the director noted that the employment situation of the beneficiary was not credible based on the documentary evidence contained in the record.

On appeal, the petitioner alleges that the director's decision was erroneous, and contends that the petitioner has expanded to employ a staff of eight persons, thus enabling the beneficiary to exclusively perform managerial and/or executive tasks.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the confirmed employment of only one subordinate employee at the time of filing, has failed to establish that it will support the beneficiary in a capacity that is primarily managerial or executive in nature. In addition, the AAO notes that the description of duties was too vague to ascertain whether the beneficiary will be acting in a primarily managerial or executive capacity. While the beneficiary is the intended general manager of the company, there is insufficient evidence to show that he will be acting primarily in a managerial or executive capacity during his U.S. employment.

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). In this case, the petitioner vaguely described the beneficiary's duties but failed to provide a specific overview of how he will refrain from performing non-qualifying tasks. Despite the director's specific request for a definitive overview of the beneficiary's employment in the United States, the petitioner chose to resubmit the same description of duties it included with the petitioner which the director had previously deemed insufficient. Instead of providing a comprehensive overview of the percentage of time he devoted to each of these generalized duties, which would have assisted the director and the AAO in ascertaining the exact nature of his position, the petitioner merely stated that he devoted equal time to all of the listed duties. 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).

On appeal, the petitioner, for the third time, resubmits the same list of duties included with the petition and in the motion to reopen. Based on this list of duties, and the claim that the petitioner now employs eight persons, the petitioner contends that the beneficiary has met the regulatory requirements. The AAO disagrees.

There are two problems with the beneficiary's stated duties. First, the beneficiary's proposed duties include numerous non-managerial and non-executive tasks that are essential to the daily operations of the business. Specifically, the assertion that the beneficiary will "manage the finances," "determine mark up percentages," and formulate pricing policies" suggests that he will be performing many undertakings that would normally be delegated to sales representatives or other non-managerial personnel. In this case, it is clear that the proposed duties include many practical obligations that would normally be delegated by a manager or supervisor to a subordinate staff. 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).

Secondly, the description of his duties is vague and not specific enough to clearly establish the beneficiary's role in the company. Despite the director's request for specifics with regard to the beneficiary's position, the petitioner chose to repeatedly submit the same list of duties deemed insufficient by the director. These descriptions are insufficient to clearly document the exact role of the beneficiary in the petitioner's organization, and it is evident that despite being afforded the opportunity to provide additional information to supplement the record, the petitioner failed and/or refused to do so. Such omissions, coupled with the lack of subordinate staff members to relieve him from performing day-to-day tasks, fails to adequately show when and how the beneficiary would be relieved from performing non-qualifying duties. 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 will the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108.

An additional basis noted by the director in upholding the denial is the credibility of the petitioner's claim that the beneficiary functions in a primarily managerial or executive capacity within the petitioner's organization. A critical analysis of the nature of the petitioner's business undermines the assertion that the subordinate employee(s) relieve the beneficiary from performing non-qualifying duties. The petitioner claims that at the time of filing, there were four employees working under the beneficiary, two of which directly reported to him. However, the payroll records and quarterly tax returns indicate that the petitioner employed only one other person in addition to the beneficiary at the time of filing.¹ It stands to reason, therefore, that these two

¹ The AAO notes that the most recent documentation pertaining to payroll is for September 2003. Since the record is devoid of evidence pertaining to the staffing of the petitioner on January 9, 2004, the date the petition was filed, the AAO will rely on this most recent documentation as evidence of the petitioner's organizational hierarchy at the time of filing. Despite the petitioner's claim that four persons, in addition to the beneficiary, were employed at this time, there is no evidence to corroborate this claim. Going on record

individuals were the only staff members at the time of filing, and thus they were performing all sales, marketing, and administrative functions. Such a conclusion is supported by the petitioner's sales invoices for the months of July through September 2003, all of which identify the beneficiary as "sales person." 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).

Furthermore, the director noted a unique discrepancy in the record pertaining to the wages of these two employees. According to the petitioner's year-end profit and loss statement for 2003, the petitioner had payroll expenditures of \$35,722.20. Noting that the beneficiary's stated salary was \$650.00 per week, or \$33,800.00 per year, the director concluded that this would mean less than \$2,000.00 was allotted to the petitioner's other employee who, at best, could only be a part-time employee. Upon review of the petitioner's payroll records from January through September 2003, it appears that the beneficiary had earned \$25,200.00 and the subordinate employee had earned \$4,320.00 as of that period, which alters the director's calculations and calls the beneficiary's claimed salary of \$650.00 per week into question. 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). Nevertheless, the fact remains that the minimal wages paid to the beneficiary's subordinate employee suggest, as the director noted, that he is either a part-time or seasonal employee, and thus cannot plausibly relieve the beneficiary from performing non-qualifying duties.

Although the appeal will be dismissed, the AAO notes that the director based her decision, in part, on an improper standard. The director noted that the petitioner's reported annual sales of \$107,235 in 2003 would not support a managerial position, and questioned whether a "prudent company would expense almost one-third of its income on salary expenses for an individual who is not engaged in a revenue producing position." The director should not hold a petitioner to her undefined and unsupported view of how much a "prudent company" would expense for the salaries of its employees. The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although Citizenship and Immigration Services (CIS) must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some rational basis for finding a petitioner's staff or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in a particular industry will not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act.

Finally, it is noted that the evidence in the record shows that the petitioner acquired a 49% interest in "Millennium Medical Group" in December of 2003, as well as an interest in United National Learning

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)).

Academy.” The petitioner claims that as a result of the acquisition of these two businesses, the beneficiary will have control over an additional twenty professional workers, including doctors, medical personnel, and teachers. The petitioner, however, failed to supplement the record with specific evidence pertaining to the identities, experience or educational backgrounds of these alleged subordinates, and further failed to discuss the nature of the beneficiary’s role in supervising the employees of these two entities. 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, therefore, has failed to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, 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.