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U.S. Citizenship
and Immigration
Services

07

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File: LIN 06 047 50616 Office: NEBRASKA SERVICE CENTER Date: **SEP 07 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:



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, Nebraska 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 visa petition seeking to extend the 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 is a corporation registered to do business in the State of Illinois and is allegedly a distributor and manufacturer of food processing machines.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will 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, the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or that the beneficiary is employed in a position involving specialized knowledge. In support of this assertion, 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.

The primary issue in the present 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 petitioner does not clarify in the initial petition whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, although counsel on appeal asserts that the beneficiary will be employed in an executive capacity. Given the lack of clarity, the AAO will consider the appeal as if the petitioner is asserting that the beneficiary will be employed in either an executive *or* a managerial capacity and will consider both classifications.

The petitioner described the beneficiary's duties in an undated letter appended to the initial petition as follows:

As Vice President, [the beneficiary] is responsible for the U.S. operations. [The petitioner] owns the real estate at our location and [the beneficiary] is responsible for the warehouse as well as sales operations.

[The beneficiary] is responsible for the operations of [the petitioner]. These job duties include:

- 1) Customer contact business negotiations contacts[.]
- 2) Budget/financial operations of [the petitioner][.]
- 3) Trade Shows at the Trade schools [the beneficiary] will negotiate with customers as to the purchase of equipment, pricing incentives, and production delivery.
- 4) [The beneficiary] will oversee and direct U.S. operations. This includes directing and supervising the sales staff/office staff/warehouse workers in the United States. [The beneficiary] will also direct the five production managers as to the production of the equipment.

[The beneficiary] will spend 80% of this time in the office in the executive capacity of Vice President. The remaining 20% of the time [the beneficiary] will attend trade shows and meet with customers at their locations.

[The beneficiary] is solely responsible for the hiring/firing of all US staff. He orders all equipment and is responsible and reports directly to the President/Owner of [the foreign entity].

He is responsible for all operations including policies, goals, personnel, budget, sales, production and all related matters.

The petitioner further indicated in the Form I-129 that it currently employs one person.

On December 23, 2005, the director requested additional evidence. The director requested, *inter alia*, further evidence establishing that the beneficiary will be employed primarily as an executive or manager; descriptions of subordinate employees; an organizational chart; and wage reports.

In response, the petitioner provided copies of wage reports confirming that the petitioner employs one person, a secretary. The beneficiary does not appear to be an employee of the petitioner, and the record does not reveal how the beneficiary is compensated.

The petitioner also further described the beneficiary's job duties in a letter dated February 22, 2006 as follows:

Specifically, [the beneficiary] is the executive solely responsible for the development of a market and distribution of [the foreign entity's] product line in the U.S. As Vice President, [the beneficiary] not only develops volume and profits in the U.S., but he uses his independent discretion and authority in:

- establishing the overall marketing plan and philosophies;

- identifying and cultivating new markets for penetration and making sure these markets are accessed;
- conducting trade shows throughout the United States;
- developing strong and mutually beneficial relationships with customers;
- establishing sales and profit goals;
- establishing pricing and discounts on product line;
- negotiating contracts and bulk sales;
- educating wholesalers, distributors, and dealers regarding the characteristics of the product line;
- overseeing distribution and inventory control of the product;
- conducting market research and providing market feedback for the modification and production of products;
- identifying and directing opportunities for the modification of products;
- and identifying, directing, and providing guidelines for the development of new products.

The petitioner also explained in the letter dated February 22, 2006 that the beneficiary reports directly to the owner and president of the foreign entity; that the petitioner employs no other managerial, supervisory, or professional workers; and that, in Italy, the beneficiary is "in charge of production managers."

Finally, the petitioner submitted an organizational chart showing the beneficiary supervising the petitioner's single United States employee and five "product managers" in Italy.

On April 5, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the beneficiary's duties are primarily those of an executive or involve specialized knowledge. Counsel also attempts in her brief to substantially expand upon the beneficiary's job duties in an attempt to establish that his duties are executive in nature or involve specialized knowledge.

Upon review, the petitioner's assertions are not persuasive.

As a threshold matter, counsel's attempt to expand upon the beneficiary's job duties in her appellate brief and to further assert, apparently in the alternative, that the beneficiary will be employed in a position involving specialized knowledge were both inappropriate and will not be considered by the AAO. The appeal will be adjudicated based on the record of proceeding before the director. First, counsel's expansion upon the beneficiary's job duties is not supported by any evidence. The unsupported statements of counsel on appeal 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). Second, a petitioner cannot offer a new position to the beneficiary on appeal, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Third, the petitioner was put on notice in the

Request for Evidence that it needed to further describe the beneficiary's job duties in the United States and was given a reasonable opportunity to provide this evidence before the visa petition was adjudicated. The petitioner, however, failed to submit the requested evidence and now attempts to expand upon the beneficiary's job duties on appeal. The AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Moreover, it is noted for the record that counsel's request to amend the petition on appeal and to alternatively consider it as a petition for L-1B classification is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(l)(7)(i)(C) state:

The petitioner shall file an amended petition, with fee, at the service center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The request to reconsider the original petition on appeal as a petition for L-1B classification is, therefore, rejected.

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's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary is responsible for policies and goals, overseeing the United States operation, and establishing marketing plans and philosophies. The petitioner did not, however, specifically define what policies, goals, plans, or philosophies will be established or what, exactly, he does to "oversee" the petitioner's business operations. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description does not establish that the beneficiary is actually performing managerial 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, while the petitioner asserts that the beneficiary devotes 80% of his time to performing his "executive" duties and 20% of his time to attending trade shows and visiting customers, the petitioner did not credibly define these executive duties (*see supra*) nor did he provide a breakdown of how much time the beneficiary devotes to each of the other duties ascribed to him. This is particularly important in this matter because many of the duties listed by the petitioner, in addition to attending trade shows and visiting customers, appear to be non-qualifying administrative or operational tasks which do not rise to the level of

being managerial or executive in nature. For example, the petitioner states that the beneficiary is responsible for the warehouse, marketing, sales, pricing, negotiating contracts, educating wholesalers and distributors, and conducting market research. However, such duties constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the organizational chart fails to identify any employees who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to both these duties and the management of the business in general, it must be concluded that he is performing these tasks. As the petitioner has not established how much time the beneficiary devotes to such non-qualifying tasks, it cannot be confirmed that he is "primarily" employed as a manager. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, as the petitioner asserts that the beneficiary is "in charge of production managers" in Italy, it must be noted that managerial or executive duties performed abroad for the foreign entity may not be used to classify the beneficiary as a manager or executive in the United States. The definition of "intracompany transferee" clearly states that a beneficiary must be entering the United States to "render his or her services to" the United States operation. See 8 C.F.R. § 214.2(l)(1)(ii)(A). Therefore, any duties performed by the beneficiary for the foreign entity in Italy, including managerial or executive duties, may not be used to classify the beneficiary as one "primarily" employed in a managerial or executive capacity in the United States.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart and support letters, the beneficiary appears to supervise one employee, a secretary. This subordinate employee appears to be engaged in performing the tasks related to providing a service or producing a product and, by the petitioner's own admission, is not a supervisory, managerial, or professional employee. Therefore, the beneficiary appears to be a first-line supervisor. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Finally, the petitioner has not established that the beneficiary manages 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. 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 in managing the essential function, 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. See 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. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained

above, it appears that the beneficiary is primarily performing the tasks related to a function rather than managing the function through subordinate employees or contractors. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary does on a day-to-day basis. Moreover, as explained above, the beneficiary appears to be primarily performing administrative or operational tasks and/or is acting as a first-line supervisor. Therefore, the petitioner has not established that the beneficiary is employed primarily in an executive capacity.

Although a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in approving a visa for a multinational manager or executive (*see* § 101(a)(44)(C) of the Act), it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner failed to establish that it has a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(i).

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e., one

entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). The petitioner must also establish that the foreign entity and the petitioner are both "doing business," which is defined in pertinent part in 8 C.F.R. § 214.2(l)(1)(ii)(H) as "the regular, systematic, and continuous provision of goods and/or services." *Id.* In the instant matter, the petitioner alleges that the same individual owns and controls both the petitioner and the foreign entity, thus establishing, if true, that the two business organizations are affiliates.

However, the record is entirely devoid of any evidence that either the foreign entity or the petitioner is engaged in the regular, systematic, and continuous provision of goods and/or services. The record is also devoid of any evidence that the same individual owns and controls both the petitioner and the foreign entity. 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. at 165.

Accordingly, as the petitioner has not established that it has a qualifying relationship with the foreign entity, the petition may not be approved for this additional reason.

The initial approval of an L-1A petition does not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ.*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *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); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.