



U.S. Citizenship  
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D-7

File: SRC 04 207 51470 Office: TEXAS SERVICE CENTER Date: **SEP 18 2007**

IN RE: Petitioner:  
Beneficiary:



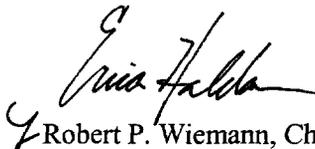
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

The petitioner seeks to extend the temporary employment of the beneficiary as its vice president in the United States 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 corporation organized in the state of Florida, claims to be engaged in the manufacture and sale of security apparel. It also claims to be the subsidiary of [REDACTED], located in Caracas, Venezuela. 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.

Counsel for the petitioner subsequently filed an appeal. On appeal, counsel for the petitioner asserts that the directly based his decision on an incorrect interpretation of the evidence available at the time of filing. In support of this contention, counsel submits a brief and additional evidence in support of the beneficiary's claimed eligibility.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The 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:

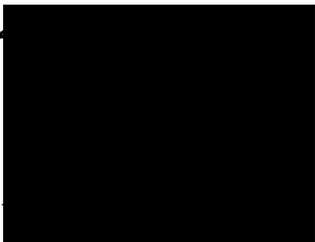
- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter dated June 16, 2004, the petitioner provided the following description of the beneficiary's duties:

As Vice-President of [the petitioner], [the beneficiary] shall continue assisting the President in developing operating policies and procedures and long-term objectives. She shall continue developing fiscal policies and practices consistent with U.S. law, supervise accounting policies (directly and through sub-contracting to outside sources) and develop policies for and implementation of human resources practices. She shall continue coordinating and supervising the import and export activities of the company and the relationship with the authorities and/or companies that are involve[d] in those process[es].

An attachment to the letter, entitled "Proposed Duties For Vice-President" listed her duties under six different headings: generally, specifically, export/import, parent company, and human resources, and fiscal responsibility. The petitioner also submitted its Form 1120, U.S. Corporation Income Tax Return, for 2003, which showed that no salaries or wages were paid during that year. A copy of the petitioner's Form 941, Employer's Quarterly Federal Tax Return for the quarter ending March 31, 2004, was submitted to demonstrate that two persons were employed during that period, receiving total wages of \$1,242.67. No attachments were included, however, so it was unclear which two employees were employed by the petitioner during that time. A payroll summary, however, indicated that during the period from January 26, 2004 through May 2, 2004, the beneficiary and the petitioner's president, [REDACTED] received wages. Another section of the payroll summary listed a third employee, [REDACTED], who began working for the petitioner on March 1, 2004. Finally, the payroll records indicate that a fourth person, [REDACTED] began working for the petitioner on March 10, 2004, and a fifth person, [REDACTED], began working for the petitioner on April 19, 2004.

The petitioner also submitted an organizational chart dated May 7, 2004, which listed the following persons:



President/Secretary  
Vice-President/Treasurer  
Production Manager  
Sewing Machine Operator  
Sewing Machine Operator  
General Helper

It is noted that despite the organizational chart listing six employees, the payroll records confirm the employment of only five persons [REDACTED] was not listed on the payroll records).

On August 20, 2004, the director denied the petition. 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 noted that the quarterly tax return indicated that the petitioner employed only two persons, and that the beneficiary, as a result, could not have been relieved from performing day-to-day duties of the business. The director also noted that based on the evidence submitted, it could not be established that the beneficiary oversaw a subordinate staff of managerial, supervisory, or professional employees.

On appeal, counsel for the petitioner argues that the director's focus on the quarterly return for the first quarter of 2004 erroneously led to a conclusion that the petitioner employee two persons rather than six persons. Counsel contends that since the quarterly return for the second quarter of 2004 was not available at the time of filing, the petitioner should not have been penalized and that such evidence should be considered on appeal.

The AAO, upon review of the record of proceeding, concurs with the director's finding. While the AAO notes that the director's decision simultaneously acknowledged the petitioner's claim that it employed six persons but relied on the quarterly return and seemed to base the decision on the evidence showing two employees, the fact remains that the petitioner did not have the organizational complexity at the time of filing to support the beneficiary in a qualifying capacity. Specifically, upon review of the beneficiary's stated duties and the brief description of her subordinate employees and their position titles, it does not appear that the beneficiary was employed in a primarily managerial or executive capacity.

While the beneficiary is the intended vice president of the company, there is insufficient evidence to show that she will be acting primarily in a managerial or executive capacity during her 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 description of duties provided in the June 16, 2004 letter of support, as well as those listed on the list of proposed duties, failed to sufficiently document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. In addition, the AAO notes that while the petitioner claims that that the beneficiary will manage import/export, administrative, and financial matters, the petitioner does not claim to employ any staff to perform non-managerial duties associated with these functions. It appears upon review of the record that all of the beneficiary's subordinates are engaged in production tasks, and while the use of subcontractors has been implied in the record, the petitioner has submitted no evidence to verify that such persons are actually contracted and receiving wages.

The AAO notes that the petitioner divided the beneficiary's duties into six categories and briefly listed key tasks that the beneficiary would perform. However, the list is vague, and duties such as "maintain employee records" and "contract out support services" do not specifically identify the nature of her position or her 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 does the beneficiary primarily do on a daily basis? The actual duties themselves will 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). Since the description of the beneficiary's duties includes both managerial and administrative or operational tasks, but fails to quantify the exact amount of time the beneficiary spends on them, the AAO cannot determine what an average day or week consists of for the beneficiary. In addition, the fact that the record contains numerous discrepancies regarding the beneficiary's alleged subordinate employees makes it difficult to determine whether the beneficiary is relieved from performing non-qualifying duties.

Specifically, the record contains evidence, by way of the 2003 income tax return, that no wages were paid to any employees in the calendar year 2003, nor was any amount of compensation paid to officers of the company during that period. This alone is questionable, since the beneficiary's initial visa was approved on July 29, 2003. There is no explanation in the record with regard to the beneficiary's activities during the first five months of her approved L-1A status. Furthermore, the payroll records submitted indicate that the first day of work for the beneficiary appears to have been January 26, 2004; however, the records also indicate that no paychecks were issued, however, until April 9, 2004. It appears, therefore, that the beneficiary and the president, [REDACTED], are paid differently than the petitioner's other employees, since the total wages claimed on the quarterly return for the quarter ending on March 31, 2004 equal the amounts paid to [REDACTED] and [REDACTED]. As a result, the AAO makes the following conclusions. First, the beneficiary and the president appear to have begun rendering their services to the petitioner, according to the payroll records, on January 26, 2004. [REDACTED] began working for the petitioner in March 2004, on March 1, 2004 and March 10, 2004, respectively. [REDACTED] began working for the petitioner on April 19, 2004. However, there is no evidence in the record of any wages paid to the sixth person listed on the organizational chart, [REDACTED] although, based on the petitioner's representations, she was employed as the petitioner's production manager as of May 7, 2004.

It is further noted that the payroll summary submitted documents wages paid to these employees up to May 7, 2004, for services rendered for the pay period ending May 2, 2004. Although the petition was filed on July 23, 2004, the petitioner submits no additional payroll records to demonstrate wages paid for work performed between May 3, 2004 through July 23, 2004. Counsel on appeal asserts that the quarterly wage report for the quarter ending on June 30, 2004 was not yet available at the time of filing, thereby justifying the omission of this information. However, since the payroll summary included in the record demonstrates that wages are paid every two weeks, it is questionable as to why the petitioner failed to submit its most recent payroll records in support of the petition. Nevertheless, the AAO notes that on appeal, the petitioner submits its quarterly report for the second quarter of 2004, which demonstrated that at the end of the quarter, a total of five employees, including the beneficiary and the president, [REDACTED] were employed by the petitioner.<sup>1</sup>

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<sup>1</sup> It is noted that while seven employees are listed on the quarterly report, the report verifies that during the third month of the quarter, only five persons were employed. It appears from the report that [REDACTED], who earned \$956 during this period, did not work for the petitioner during the entire quarter. In addition, the "production manager," [REDACTED] earned only \$2,100 during the quarter, which therefore suggests that she was employed on a part-time basis. This conclusion is supported by the fact that her wages, in comparison to those of the sewing machine operator and "helper," are significantly less. As a result, it is reasonable to conclude that during the second quarter and at the time of filing, the beneficiary supervised only three subordinates: a part-time employee designated as a production manager, in addition to a sewing machine operator and a "helper."

The record asserts that the beneficiary reports only to the president; therefore, it can be presumed that the beneficiary oversees the remaining three employees. Although the beneficiary is not required to supervise personnel, if it is claimed that her managerial duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

In the instant case, there is minimal information provided with regard to the duties of the three employees in question. However, it is reasonable to conclude that positions involving operating a sewing machine or providing services identified as "general help" do not require a bachelor's degree and thus cannot, without further information, be deemed to be professional in nature. The petitioner, therefore, has not established that a bachelor's degree is actually necessary to perform the labor-based work of a sewing machine operator and general helper.

Furthermore, the petitioner has not shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Although counsel claims on appeal that the organizational structure of the petitioner is complex enough to support a finding that the beneficiary is acting in a primarily managerial or executive capacity, the petitioner's vague description of the beneficiary's duties, coupled with the failure to provide position descriptions for the other employees identified on the organizational chart, fails to provide a clear overview of the nature of the petitioner and the manner in which the business operates. Without further evidence to support a structured hierarchy, it cannot be determined whether these employees are managerial or supervisory in nature. 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)). Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Additionally on appeal, counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (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 size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* As discussed above, the numerous omissions regarding job duties, coupled with lack of payroll records, makes it difficult to resolve these questions.

In the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. The fact that the company employs one part-time production manager, a sewing machine operator and one general helper does not create a presumption that the beneficiary is relieved from performing day-to-day tasks necessary to the continued success of the business. The petitioner claims that it imports, manufactures and sells security attire. However, the petitioner does not, according to the record, have any sales or marketing personnel on staff, nor does the record indicate that it employs any person in the areas of human resources, financial operations, import/export or administration. There is no evidence in the record to support a finding that the beneficiary is relieved from performing non-qualifying duties such as these, since it is clear that the petitioner does not yet have a complete staff to sufficiently perform dedicated duties in these areas.

Counsel on appeal seems to rely on the director's erroneous statement that the petitioner employed two persons, and subsequent conclusion that the beneficiary was thus not relieved from performing non-qualifying duties. By providing evidence that the petitioner employed five persons by the end of the second quarter of 2004, counsel presumes that it has met its burden by establishing that sufficient staff exists to allow the beneficiary to perform only qualifying duties. As discussed above, however, the beneficiary must be supervising a subordinate staff of managers, supervisors, or professionals, and must not merely act as a first line supervisor. The lack of discussion with regard to the duties and educational backgrounds of the subordinate employees at the time of the petition's filing and the continued omission of any discussion of their duties on appeal prohibits the AAO from concluding that the beneficiary is relieved from performing non-qualifying duties. Since the nature of her relationship with her fellow employees, including their duties and tasks, and not merely their number, is the critical factor to be examined, the petitioner has failed to address the relevant issue and thus has failed to show that the beneficiary has a subordinate staff of managerial, supervisory or professional employees to relieve her from performing non-qualifying duties. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The petitioner has failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has failed to establish that the petitioner is doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services. The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to submit evidence that it has been doing business for the previous year. The petitioner claims to be engaged in the manufacture and sale of security attire, such as bullet-proof vests. However, the only documentation submitted in support of the business activities of the petitioner are bank statements, utility bills, and office purchase documents. Evidence of continuous business dealings should include invoices for the sale of its products, or order forms or inquiries from potential customers. Furthermore, the petitioner submitted a "Statement of Revenue & Expense" for the period from April 2003 through March 31, 2004, which indicates that no sales were achieved. According to the petitioner's letter dated July 9, 2004, its products are still in the design, testing and prototype phase. For this additional reason, the petition may not be approved.

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). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.