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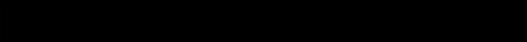
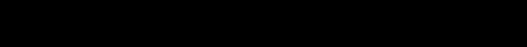
U.S. Citizenship
and Immigration
Services

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File: EAC 07 033 52488 Office: VERMONT SERVICE CENTER Date: **MAY 30 2008**

IN RE: Petitioner: 
Beneficiary: 

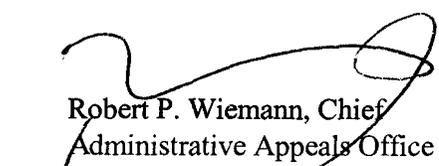
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF THE 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 extend the employment of its business manager 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 New Hampshire limited liability company, states that it is engaged in the sale of parts for classic automobiles. The beneficiary was initially granted a one-year period in L-1A classification in order to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for three additional years.

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. In denying the petition, the director observed that the petitioner had failed to establish that it had hired employees to relieve the beneficiary from performing the day-to-day non-managerial duties of the organization.

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 emphasizes that the U.S. company achieved "remarkable results" during its first year of operations in terms of its customer base and that such performance is "a direct reflection" of the beneficiary's efforts. Counsel asserts that the petitioner provided evidence that 90 percent of the beneficiary's time is allocated to managerial duties, and contends that the director failed to consider the reasonable needs of the organization in light of its overall purpose and stage of development. Counsel further contends that U.S. Citizenship and Immigration Services may not make a determination regarding the beneficiary's claimed managerial capacity based solely on the number of employees to be supervised. Counsel submits a brief and documentary evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also 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 sole issue addressed by the director is whether the petitioner established that the beneficiary would 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 visa petition was filed on November 17, 2006. On the Form I-129 petition, the petitioner indicated that the company has one employee. In a letter dated November 10, 2006, the petitioner stated that it had achieved substantial growth in terms of its number of suppliers and customers over the previous year, and emphasized that the beneficiary had been responsible of maintaining long-standing relationships and developing new relationships during his first year with the U.S. company. The petitioner expressed a desire to have the beneficiary "continue to oversee the further development of the company."

With respect to the petitioner's staffing levels, the petitioner stated:

The company has now grown to the point where it will be seeking U.S. citizens to fill an additional one or two staff positions at the beginning of 2007 to assist [the beneficiary] with the management of the growing enterprise. The company's supplier and customer base has grown to the point that the business must expand its workforce in order to continue to provide top-notch customer support, and the revenue stream is now sufficient to support the additional staff.

[The beneficiary's] continued presence in the U.S. is necessary to oversee the company's staff and to assure that the U.S. company continues with the successful commencement of operations and maintains its sound financial and operational footing

We believe that only [the beneficiary] can successfully complete the tasks of managing the U.S. office, in view of his intimate familiarity with the company's product line, customer base, and business expertise. [The beneficiary] has an in-depth knowledge of the company's products and customers' needs, and he will continue to devote virtually all of his time to the U.S. operations to ensure its success after he departs.

The petitioner also submitted an organizational chart for the U.S. company which depicts the beneficiary as business manager. The chart depicts two proposed subordinate positions, a sales associate and an administrative clerk. The petitioner also submitted reference letters from a Brazilian customer and from three U.S. suppliers, who attested to their commercial relationship with the beneficiary and the petitioner.

On December 12, 2006, the director issued a request for additional evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In part, the director instructed the petitioner to submit: (1) evidence that establishes the duties performed by the beneficiary in the past year and the duties he will perform if the petition is extended; (2) evidence documenting the petitioner's use of contract employees, and information regarding the number of employees and the duties they perform, if applicable; and (3) a copy of the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the first three quarters of 2006.

In a response dated March 8, 2007, the petitioner provided the following overview of the beneficiary's role as business manager for the U.S. company:

As [the beneficiary] has worked to establish the U.S. operations during 2006 and into 2007, he has been involved in some duties that are more hands-on in nature than that of a typical manager. However, the majority of his time has been spent on the management and oversight of the business from a purchasing, sales and business development function.

According to FAM 41.54, N.12.3(b), it is expected that a manager or executive in a new office will be more than normally involved in day-to-day operations during the initial phases of the business, but he or she must have authority to hire staff and have wide latitude in making decisions about the goals and management of the organization to be considered acting in a managerial or executive role.

[The beneficiary] has the authority to hire staff and maintains wide latitude in making decisions about purchase and sales goals and management of that function. Enclosed is a copy of an advertisement that the company is currently running seeking to expand its staff by hiring an Office Clerk. The company has now grown to the point that it must add staff to handle the current and anticipated future volume of business and allow [the beneficiary] to

focus exclusively on the most important of managerial duties, business oversight and expansion.

The petitioner provided the following description of the beneficiary's duties, noting that the position consists "primarily of policy and general operations oversight."

- Coordinate activities of business in connection with purchasing, pricing, sales and distribution of products. (20%)
- Direct and coordinate the organization's financial and budget activities in order to fund operations, maximize investment, and increase efficiency. (20%)
- Determine goods to be sold and set prices and credit terms based on forecasts of customer demand. (15%)
- Communicate with existing customers to identify future restoration projects. (12%)
- Contact potential customers and negotiate pricing to secure business. (12%)
- Oversee activities directly related to vendor purchases and sales transactions. (10%)
- Ensure compliance with customs laws. (6%)
- Prepare budgets, including those for funding and implementation of expansion of operations. (5%)

The job duties described above are clearly managerial in nature and consistent with those delineated at 8 CFR § 214.2(l)(1)(ii)(B) in that the employee:

- (1) Manages the organization;
- (2) Has the authority to hire, fire and take other personnel actions; and
- (3) Exercises discretion over the day-to-day operations of the organization.

[The beneficiary] plans, directs, and coordinates the operations of the company. He establishes goals and objectives and has wide latitude over the operation as a whole.

The petitioner submitted a copy of a help wanted advertisement published in the *New Hampshire Union Leader* on March 8, 2007. The position opening is for an office clerk, who would be responsible to: "Place and fill orders with vendors and customers; prepare invoices [and] track billing; package [and] label goods for shipment; maintain filing and database systems; copy scan and fax documents; assist with other business activities."

The director denied the petition on July 31, 2007, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the beneficiary was the sole employee of the company as of the date of filing and determined that the petitioner had failed to demonstrate that the beneficiary is relieved of performing non-managerial duties. Rather, the director found that the beneficiary himself must be performing all of the day-to-day activities of the company, such as purchasing, sales, shipping and inventory, rather than engaging in primarily managerial or executive duties. The director concluded that the U.S. company had not grown to the point where it could employ the beneficiary in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner emphasizes that the petitioning company achieved a “remarkable result” during its first year of operation, which is a reflection of the beneficiary’s efforts. Counsel asserts that the breakdown of the beneficiary’s day-to-day activities provided in response to the request for evidence demonstrated that 90 percent of his time is devoted to managerial duties.

Counsel further objects to the director’s emphasis on the lack of subordinate employees. Counsel asserts that “USCIS failed to provide any explanation that it took into account the reasonable needs of the organization and function in light of the overall purpose and stage of development of the organization and function.” Counsel asserts that “not all new offices ramp up at the same rate” and that “some take a little longer to develop than others.” Counsel suggests that the petitioner’s plans to hire a sales associate and administrative clerk during 2007 should have been taken into account, and submits evidence demonstrating that the petitioner has in fact hired an office clerk as of August 2007.

In addition, counsel states that the beneficiary “effective manages a necessary function of the company, sourcing auto parts available only in the U.S. for foreign clients who restore, own and collect vintage U.S. automobiles abroad.” Counsel emphasizes that the beneficiary is in the United States to manage the U.S. operations of its affiliated foreign entity and to establish a network of suppliers.

In support of the appeal, the petitioner submits: payroll records for its new employee; a copy of the new employees’ IRS Form W-4, Employee’s Withholding Allowance Certificate; a copy of a check issued to the new employee on August 10, 2007; evidence that the company has obtained worker’s compensation and employer’s liability insurance as of August 2007; and photographs showing that the company now has a room adjoining its office which can be used for storage.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show 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). Here, while the beneficiary evidently exercises authority over the petitioner’s business as its business manager and sole employee, the record is insufficient to establish that his actual duties would be 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 petitioner's description of the beneficiary's job duties fails to establish that he would perform primarily managerial or executive duties under the extended petition. While several of the beneficiary's duties are given managerial connotations, a review of the totality of the record does not support the petitioner's claim that 90 percent of his time, as of the date of filing, would be devoted to qualifying managerial duties. For example, the petitioner stated that the beneficiary would devote 20 percent of his time to "coordinate activities" associated with "purchasing, pricing, sales, and distribution of products." The petitioner did not elaborate as to what "activities" would be coordinated, or who would accomplish the petitioner's day-to-day purchasing, sales and shipping functions, if not the beneficiary. A review of the evidence of the petitioner's business activities shows that the company purchases automobile parts from U.S. suppliers, packages the parts, and ships these goods directly to customers in Brazil. When this petition was filed, the petitioner did not employ anyone other than the beneficiary, nor has it claimed to have used the services of any contractors to assist with these activities. Therefore, it is reasonable to conclude, and has not been shown to be otherwise, that the beneficiary himself is responsible for the purchase, sale and distribution of products rather than "coordinating" such activities, as stated by the petitioner. Several of the beneficiary's other claimed "managerial" duties, such as contacting potential customers, negotiating pricing, communicating with existing customers, and "overseeing" activities related to vendor purchase and sales transactions, also reflect his direct involvement in the petitioner's sales, purchasing and customer service functions and these duties have not been shown to fall under the statutory definitions of managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act.

Overall, these sales, purchasing and shipping/distribution duties account for 54 percent of the beneficiary's time, according to the petitioner's breakdown. Furthermore, the beneficiary's responsibility to "direct and coordinate the organization's financial and budget activities," which is said to require an additional 20 percent of his time, would necessarily include such non-qualifying tasks as creating invoices, paying bills, bookkeeping, and maintaining the company's accounts, as the petitioner has not claimed to use any outside services to perform these non-managerial duties. 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).

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. As observed by the director, the record does not demonstrate that the petitioner has a sufficient number of direct or contracted employees who could perform the non-managerial duties associated with operating the petitioner's business on a day-to-day basis.

Counsel correctly suggests on appeal that the regulations do not explicitly require the U.S. company to establish that it has hired employees during the first year of operations. The AAO acknowledges that in certain situations a beneficiary who is the sole employee of a company may qualify as a manager or executive. It is the petitioner's obligation to establish however, through independent documentary evidence

that someone other than the beneficiary performs the day-to-day non-managerial and non-executive tasks of the petitioning entity.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS 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 USCIS 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.

At the time of filing, the petitioner was a one-year-old company that was operating primarily as a purchaser and exporter of parts for classic American automobiles. As of November 2006, the beneficiary was the petitioner's sole employee. The petitioner reasonably requires someone to locate and purchase parts, to maintain relationships with suppliers and find new suppliers, to handle customer sales and service activities, to package the purchased products and ship them to customers, to maintain the company's day-to-day finances, manage accounts payable and receivable, and to perform routine clerical and administrative tasks associated with operating a small business. The petitioner has not established that anyone other than the beneficiary was responsible for performing any of these non-managerial day-to-day functions of operating its business at the time the petition was filed. It is reasonable to conclude that these activities would require far more of the beneficiary's time than any managerial duties he may perform given the petitioner's current stage of development. 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).

Furthermore, although the petitioner disputes the director's reliance on the petitioner's staffing levels, there is no indication in this matter that the director did not consider the reasonable needs of the organization. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act. Contrary to the petitioner's assertions, the record does not establish that the beneficiary was relieved from primarily performing non-managerial duties associated with the company's sales, purchasing, customer service, packing and shipping, financial, administrative and clerical functions.

Collectively, the lack of a subordinate staff brings into question how much of the beneficiary's time can actually be devoted to the claimed managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner

may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The AAO has consistently interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also consistently required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner asserts on appeal that the beneficiary manages the "necessary function" of "sourcing auto parts available only in the U.S. for foreign clients" for the foreign affiliated company. 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, 8 U.S.C. § 1101(a)(44)(A)(ii). 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 detailed position description explaining the duties 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 operational duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function, as it has not established that he performs managerial duties associated with "sourcing auto parts." Rather, the beneficiary, as the petitioner's sole employee, is solely responsible for purchasing auto parts and essentially all other operational aspects of the petitioner's business. While the beneficiary evidently exercises discretion over the business as its sole employee, the petitioner has not established that his primary duties are the high-level duties contemplated by the statutory definition of managerial capacity.

Although the petitioner appears to have hired an administrative employee subsequent to the filing of the petition, and claims that the U.S. company will hire a sales associate in the future, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. 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.