U.S. Department of Homeland Security
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Washington, DC 20529

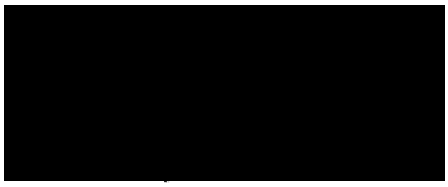
U.S. Citizenship and Immigration Services

File: SRC 03 045 50192 Office: TEXAS SERVICE CENTER Date:

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, Director
Administrative Appeals Office

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

The petitioner is a corporation organized in the State of Florida in September 2001. It is a tire distributor. It seeks to extend the temporary employment of the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as a 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 claims that the beneficiary owns a 55 percent interest in the petitioner and a 40 percent interest in La Carnita, S.A. De C.V., located in La Libertad, El Salvador.

The director denied the petition concluding that the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner questions the director's conclusion and asserts that the beneficiary is employed in a managerial and executive capacity.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). 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) further 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) states that a visa petition which included the opening of a new office, may be extended by filing a new Form I-129, Petition for a Nonimmigrant Worker, 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 position held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily
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> 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;
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> 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
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> 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), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily
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> 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 November 25, 2002 letter appended to the petition, the petitioner stated that the beneficiary's main duties included:

> Continue developing all manage, [sic] administrative and financial activities of the new branch and business establishment [,] coordinate all purchase and sales activities of new and used tires, supervising the employee's activities at the installation, mount, balance, alignment and repair of damage[d] tires. She will be continuing engaged [sic] in the expansion of the business, which concentrates in the business of distribution of tires. She will manage and control the yearly budget and store inventory, preparing and present weekly, monthly, and yearly reports. She will use and experiment with the different types of software and computer skills. She will interview, hire the new personnel and determinate [sic] their training needs to increased [sic] their knowledge and performances with the new technologies. She will continue to promote vision and objectives of the company.

The petitioner noted on the Form I-129 that it employed two individuals. The petitioner also included the beneficiary's resume which included the same description as above and added that the beneficiary would "[m]eet with potential customers and tires distributors. Supervise and manage all business operation."

On March 12, 2003, the director requested: (1) the petitioner's latest quarterly income tax return; and (2) a list of the petitioner's two employees and their job titles.

In response, counsel for the petitioner provided the petitioner's 2002 Internal Revenue Service (IRS) Form 1120-A, U.S. Corporation Short-Form Income Tax Return, showing $9,827 paid in salaries. The petitioner provided a list showing four employees: the beneficiary in the position of president and individuals in the

positions of vice-president, secretary, and tire changer. The petitioner also included its Florida Form UCT-6, Employer's Quarterly Report, for the quarter ending March 31, 2003. The Florida Form UCT-6 depicted the employment of the four individuals identified on the petitioner's list of employees.

The director determined that the petitioner had not demonstrated that it had sufficient staff to relieve the beneficiary from performing primarily the non-managerial day-to-day operations of the petitioner. The director observed that the two employees hired subsequent to filing the petition could not be considered when adjudicating the petition. The director concluded that the petitioner had not established the beneficiary's eligibility for this visa classification.

On appeal counsel for the petitioner questions the director's conclusions that: (1) the petitioner's two full-time employees when the petition was filed is insufficient to show that the beneficiary is acting in a managerial or executive capacity; (2) the two employees hired subsequent to filing the petition could not be considered when adjudicating the petition; and (3) the beneficiary is working in the petitioner's day-to-day operations as the director did not provide the specific tasks the beneficiary is purportedly performing in the petitioner's day-to-day operations.

Counsel asserts that the number of the petitioner's employees is not determinative. Counsel also provides a list of additional duties performed by the beneficiary including:

> Representing the company on rental contracts, shipping orders, pricing policy, and customer service;
> Participating in events, such as trade shows;
> Creating and maintaining a management system;
> Keeping track of orders, backorders, verifying computer inputs from the employee, managing purchasing, and obtaining best costs; and,
> Negotiating pricing with suppliers and wholesalers.

Counsel claims that the beneficiary manages and directs the company and does not engage in changing and mounting the tires, the primary function of the petitioner. Counsel references functional managers and contends that the beneficiary is also a "functional manager." Counsel also references the use of independent contractors and states that the beneficiary is associated with outside vendors, suppliers, and contractors such as delivery and wholesale tire distributors.

Counsel cites several unpublished matters and the "law according to INS Operations Instructions 214.2(I)(5)(i)" and the "Law according to the *Foreign Affairs Manual*." Counsel has also submitted additional evidence that the petitioner continues to expand by opening new offices and employing additional personnel.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial

capacity. *Id.* Although the director did not articulate the deficiencies in the petitioner's description of the beneficiary's duties, the petitioner clearly describes an individual who performs the routine tasks of a buyer, salesperson, first-line supervisor, and administrative clerk and bookkeeper. For example, the petitioner indicates it is the beneficiary who "coordinates the purchase and sales activities," supervises the petitioner's one employee, and prepares the budget and inventory reports. These duties are operational and administrative tasks necessary to continue the operation of the company. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The remaining portion of the petitioner's description of the beneficiary's duties is vague and nonspecific. For example, the petitioner claims that the beneficiary will continue to develop the management, administrative, and financial activities of the business. However, the petitioner does not clarify who will carry out all the non-qualifying administrative and financial duties, if not for the beneficiary. 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). Moreover, as the director observed, the petitioner must establish eligibility when the nonimmigrant petition is filed. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner's plans to expand and to add employees, as well as the addition of two employees after the petition was filed, cannot be considered evidence in this petition proceeding.

Upon review, the petitioner's description of the beneficiary's duties and the petitioner's staff of two employees when the petition was filed does not substantiate that the beneficiary will be relieved from primarily performing the petitioner's routine operational and administrative tasks. 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* section 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). 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)(A) and (B). As determined above, the record does not establish that the beneficiary will spend the majority of her time on managerial or executive tasks but rather will spend a majority of her time on non-qualifying duties.

Similarly, counsel's list of the beneficiary's specific duties does not demonstrate the beneficiary's managerial or executive capacity, but rather reiterates that the beneficiary continues to market the business, perform clerical tasks such as keeping track of orders, and purchase product from suppliers and wholesalers. Again, these duties are not managerial or executive duties but the petitioner's routine operational tasks.

Counsel's claim that the beneficiary does not perform the petitioner's main function of changing and mounting tires does not translate into a managerial or executive position for the petitioner. As observed above, when the petition was filed, the beneficiary performed the petitioner's everyday functions of promoting the business, buying and selling the tires needed for the petitioner's product, bookkeeping and office work and supervising the petitioner's one other employee. These duties are not managerial or executive.[1] Counsel's assertion that the beneficiary is a functional manager is not persuasive.

Further, if a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. 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). In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this matter, the petitioner has not adequately identified the function the beneficiary purportedly manages, and has not explained how the beneficiary's duty of supervising the employee changing tires translates into managing an essential function.

Counsel's reference to the petitioner's use of independent contractors is not persuasive. The record does not contain evidence that the petitioner used the services of independent contractors. Counsel's statement to the contrary is not sufficient. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel's citation to unpublished cases carries little probative value. Counsel has not furnished sufficient evidence to establish that the facts of the instant petition are analogous to those in the unpublished cases. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c). Counsel's citation to the legacy Immigration and Naturalization Services operating instructions and foreign affairs manual are similarly lacking probative value. The petitioner must establish the beneficiary's managerial and executive capacity. Although operating instructions and the foreign affairs manual serves as a useful guidance in many matters, the petitioner's facts in this matter speak for themselves. The beneficiary is not performing primarily managerial or executive tasks but is performing primarily non-qualifying duties.

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[1] 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. The record does not contain information regarding the duties of the petitioner's one other employee when the petition was filed. However, it appears the petitioner's employee, other than the beneficiary, would have been the individual in charge of mounting, repairing, and changing tires. These tasks are not considered tasks associated with a professional position.

Beyond the decision of the director, the petitioner has not established a qualifying relationship with the beneficiary's foreign employer. To establish eligibility in this matter it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "*de jure*" by reason of ownership of 51 percent of outstanding stocks of the entity or it may be "*de facto*" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this matter, the petitioner claims that the beneficiary owns a 55 percent interest in the petitioner and a 40 percent interest in the foreign entity. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the beneficiary owns and controls both entities. The record does not contain adequate documentation substantiating the ownership and control of either entity. Again, 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. at 190. The petitioner has not established that it and the foreign entity are affiliates as defined in the regulations. *See* 8 C.F.R. § 214.2(l)(1)(ii).

Further, the petitioner has not established that the beneficiary was employed in a managerial or executive capacity for the foreign entity in one of the three years prior to entering the United States as a nonimmigrant. In the petitioner's November 25, 2002 letter in support of the petition, the petitioner indicated that the beneficiary had been the administrative general manager in her own business. The beneficiary's resume indicates that she managed administration and computer programming, supervised and controlled employee's activities, and implemented new computer systems for the foreign entity. These general statements are insufficient to establish that the beneficiary's duties for the foreign entity comprised primarily managerial or executive tasks.

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). For these additional reasons, the petition will not be approved.

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.