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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FEB 23 2005

File: SRC 04 191 51250 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its 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 organized in the State of Florida that is engaged in the retail sale of handmade saddles and related equipment. The petitioner claims that it is the subsidiary of Talabarteria Inglesa located in Cali, Colombia. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in a 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, former counsel for the petitioner asserts that the denial was based on inaccurate information, explains the hardships faced by the beneficiary in commencing operations in the United States, and contends that the beneficiary will be primarily engaged in managerial or executive duties. A statement from the beneficiary and additional evidence are submitted in support of the appeal.[1]

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.

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[1] On January 25, 2005, the AAO received a letter from the petitioner's former counsel stating, in pertinent part, "This letter is to advise you . . . that we are withdrawing from [the beneficiary's] case to due the client's breach of contract."

(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 management or executive capacity; and

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

The 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.

In the initial petition submitted on July 2, 2004, the petitioner did not provide a description of the beneficiary's duties, other than a brief summary of actions taken since the beneficiary's arrival in order to commence business operations in the United States. In a letter from the beneficiary dated June 16, 2004, he stated that he entered the United States on October 23, 2004 (nearly three months after the initial petition was approved), handled the "legal requirements and papers" necessary to open the business, and located an establishment for his store. The petitioner further indicated that he returned to Colombia from December 24, 2003 until March 18, 2004 in order to "fix the things related whit [sic] the production of the merchandise to import to U.S." The beneficiary subsequently returned to the United States to "finish the conditioning of the tack shop" and opened the store on May 7, 2004.

On the Form I-129 Petition, the petitioner indicated that the company had one employee. The petition contained no information regarding the company's gross and net income. The beneficiary indicated in his letter that the petitioner had imported $95,000 in merchandise and had invested an additional $29,000 in the business. The only other documents submitted in support of the petition were copies of the petitioner's business license, certificate of registration with the Florida Department of Revenue, and confirmation that the company filed its articles of incorporation on August 13, 2002, along with evidence of the beneficiary's current L-1A status.

The director denied the petition concluding that the beneficiary would not primarily be engaged in executive or managerial duties under the extended petition. The director noted that the petitioner did not establish that the beneficiary would be supervising managers, professionals or supervisors, or that the petitioner employed sufficient staff to relieve the beneficiary from performing non-qualifying duties.

On appeal, former counsel for the petitioner states that the denial was based on inaccurate information. The appeal is accompanied by a statement from the beneficiary, provides an explanation for the delay in commencing business operations, noting that he experienced a significant delay in obtaining a visa appointment at the U.S. Embassy in Bogotá, and experienced additional hardships including instances of fraud and theft perpetrated by his previous attorney and former employee. The beneficiary notes that he hired a new employee in May 2004 and that the business has generated some sales since opening in May 2004. In support of these statements, the petitioner submitted copies of sales receipts and evidence of payments to its employee beginning in June 2004. The petitioner's former counsel stated on appeal that the beneficiary "handles the executive duties such as interacting with the suppliers in his country, advertising, supervising, maintaining corporate accounts and facilities and otherwise maintaining the corporate structure of his enterprise. Therefore, the Petitioner does and will primarily engage in executive duties."

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary would be employed in a 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.*

In this matter, the AAO notes that the petitioner did not provide any initial evidence to establish whether the beneficiary has been or will be employed in a qualifying managerial or executive capacity. Pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(C), in order to support a request for an extension in a case which involved the opening of a new office, the petitioner is required by regulation to submit a statement of the duties performed by the beneficiary for the previous year and a statement of duties to be performed by the beneficiary under the extended petition. Therefore, it appears that the director erred in denying the petition based *solely* on this issue without first requesting additional documentation pursuant to 8 C.F.R. § 103.2(b)(8). The appropriate remedy is to consider the evidence that would have been submitted in response to such a request on appeal.

On appeal, the petitioner submits no evidence to establish that the beneficiary would be engaged in a primarily managerial or executive capacity under the extended petition. The petitioner has provided only a brief and vague description of the beneficiary's duties that provides no understanding of what he actually does on a day-to-day basis. For example, the beneficiary is described as "maintaining the corporate structure of the enterprise." The petitioner did not, however, articulate any specific managerial or executive duties that fall within this broad responsibility. 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). 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).

In addition, former counsel for the petitioner describes the beneficiary as "interacting with suppliers, advertising, maintaining corporate accounts and facilities" but has not explained how these duties meet the statutory definitions of managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. 8 U.S.C. § 1101(a)(44)(A) and (B). Rather, it appears that the beneficiary directly performs many of the petitioner's day-to-day operational and administrative activities, including personally arranging for the import of goods to be sold in the store. In addition, the beneficiary states that he returned to the parent company's factory in Colombia for nearly three months to "plan, design and prepare another style of saddles," which suggests that he is personally involved in designing and/or fabricating the products sold in the petitioner's store. 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).

Although the petitioner has submitted evidence that the beneficiary has a subordinate employee, it has provided no information regarding the employee's job title, job duties, the number of hours she works, or the educational background required for her job. However, based on the petitioner's representations, it appears that she is responsible for routine customer service and retail sales activities. Thus the petitioner has not established that this employee possesses or requires a bachelor's degree, such that she could be classified as a professional. Nor has the petitioner shown that the employee supervises subordinate staff members or manages a clearly defined department of function of the petitioner, such that she could be classified as a manager or supervisor. Thus the petitioner has not shown that the beneficiary's subordinate employee is supervisory, professional or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

In addition, while the petitioner's former counsel claims on appeal that the beneficiary's subordinate "handles the day-to-day operations of the business that he as the manager will personally oversee," without documentary evidence to support the claim, the assertion of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983). *Matter of Ramirez-Sanchez*, 17 O&N Dec. 503, 506 (BIA 1980). Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business, when examining the managerial or executive capacity of a beneficiary. Based on a review of a totality of the evidence presented in the record, the AAO concurs with the director's finding that the beneficiary will spend the majority of his time engaged in the day-to-day operations of the business and thus will not primarily be engaged in executive or managerial duties.

The petitioner indicates that its business is still in the start up phase and expects to expand in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). Furthermore, although the petitioner explains in detail why its operations have been limited in the first year, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States 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 is not sufficiently operational after one year, 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. For this reason, the petition may not be approved.

While not directly addressed by the director, the AAO notes, based on the petitioner's admission that it did not commence business operations until May 7, 2004, more than nine months after the approval of the initial new office petition, the beneficiary is ineligible for a petition extension by regulation. Pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition, which in this case was July 2003. The petitioner has not met this requirement. For this additional reason, the petition may not be approved.

In addition, the petitioner has not established that it is eligible for an extension of the initial one-year "new office" validity period. The regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not satisfied any of the enumerated evidentiary requirements. The petitioner has not submitted evidence that the United States and foreign entities are still qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has not submitted evidence that the United States entity has been doing business for the previous year as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H). The petitioner has not submitted a detailed statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition so that the AAO can determine whether the beneficiary is employed in a primarily managerial or executive capacity. The petitioner has not submitted a statement describing the staffing of the new operation. Finally, the petitioner has not submitted evidence of the financial status of the United States operation. For all of these reasons, the petition may not be approved and the appeal will be dismissed.

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).

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. Accordingly, the decision of the director will be affirmed and the appeal will be dismissed.

ORDER: The appeal is dismissed.