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**U.S. Citizenship
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File: SRC 04 007 52019 Office: TEXAS SERVICE CENTER Date: **APR 01 2005**

IN RE: Petitioner:
Beneficiary:



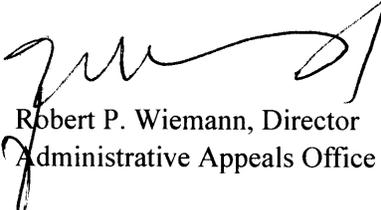
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

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 Director/General 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 is a corporation organized under the laws of the State of Florida and provides consulting services in the field of agriculture. The petitioner claims that it is the subsidiary of Agroconsultores, C.A., located in Merida, Venezuela. 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 will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the beneficiary manages the essential functions of the U.S. company and is qualified to do so due to his professional education and experience. In support of this assertion, the petitioner submits additional evidence.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The 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 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, the petitioner described the beneficiary's job duties as follows:

[He] is in charge of . . . [opening] and maintain[ing] our new office in the city of Miami. He will be responsible for managing and directing the entire operations, analyzing market trend[s] [and] economic conditions to forecast potential purchases and sales. He will engage in negotiations, sign and overse[e] substantial international purchase contracts [to]acquire [sic] the above mentioned commodities on behalf of the company. He will also hire and supervise the professional personnel to guarantee the success of the operation.

On November 25, 2003, the director requested additional evidence. Specifically, the director requested additional information regarding (1) other persons employed by the petitioner, including their job duties and educational background, (2) additional detail on the managerial or executive duties of the beneficiary, and (3) state and federal tax documentation, including state quarterly tax returns for the past two quarters, proof of payment of federal taxes, and federal unemployment tax return documentation.

In response, the petitioner submitted the requested state and federal tax documents along with a letter, dated December 10, 2003. In its December 10, 2003 letter, the petitioner states that it only hires companies (subcontractors), as opposed to employees, on an as needed basis to provide for any additional services required by the petitioner. In addition, the petitioner provided the following additional details on the job duties of the beneficiary:

The work of Mr. [REDACTED] ha[s] been (i) [sic] to direct[] the management of the organization; (ii) [to] establish the goals and policies of the organization in [the United States] and abroad; (iii) [to] exercise[] wide latitude in discretionary decision-making and (iv) [to] receive[] only general supervision or direction from higher level; [sic] executives, the board of directors, or stockholders of the organization.

On January 7, 2004, the director denied the petition. The director determined that, due to the structure of the company, the beneficiary would have to perform the day-to-day, non-managerial and non-executive duties required to run the company. Therefore, absent clear evidence by the petitioner on the specific job duties of the beneficiary, the director concluded that the beneficiary was not and will not be employed primarily in a managerial or executive capacity for the U.S. company.

On appeal, the petitioner indicates that the sponsored position of Director/General Manager is managerial and asserts that "only a professional with a degree and a background comparable to [the beneficiary's]" could manage the essential functions of the U.S. company. The petitioner also claims that the beneficiary is responsible for (1) "the [full] direction and coordination of activities and operation[s] of the corporation" in the United States, and (2) "planning, formulating and implementing administrative and operational policies and procedures."

Upon review, the petitioner'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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In its attempt to meet the statutory definitions for an executive or managerial position, the petitioner initially described the position as executive. Once the petition was denied, however, the petitioner claims on appeal that the position is more managerial. Specifically, in its cover letter dated September 12, 2003, the petitioner states that the beneficiary "has since been promoted to the position of President, a position involving executive functions." Then on appeal, the petitioner in its letter dated January 10, 2004 cites the regulations pertaining to managerial capacity and claims the sponsored position requires someone with the professional background of the beneficiary to perform its managerial duties.

Despite the fact that the petitioner initially claims the position is executive and later changes its position and claims it is managerial, the main issue is that in both instances the petitioner has provided only vague and nonspecific descriptions of the beneficiary's duties that fail to demonstrate what the beneficiary does on a day-to-day basis. For instance, the petitioner states in its attachment to Form I-129 that the beneficiary's job duties include "managing and directing the entire operations" and "hir[ing] and supervis[ing] professional personnel." On appeal, the petitioner describes the beneficiary's job duties as including "the [full] direction and coordination of activities and operation[s] of the corporation" and "planning, formulating and implementing administrative and operational policies and procedures." The petitioner did not, however, define (1) what specifically the beneficiary will manage and direct, (2) evidence, including job titles and duties, of the professional personnel he has hired and supervised, and (3) what specific administrative and operational policies and procedures he will plan, develop and implement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Moreover, in other descriptions of the beneficiary's job duties, rather than providing specific details of the beneficiary's duties, the petitioner generally paraphrased the statutory definitions of both the managerial and executive capacities. For instance, in its letter dated December 10, 2003 the petitioner attempted to depict the beneficiary's job duties as meeting the definition of executive capacity by stating that they include "management of the organization," "establish[ing] the goals and policies of the organization," "exercis[ing] wide latitude in discretionary decision-making," and "receives only general supervision or direction." See § 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). On appeal, the petitioner tried to classify the position as being more managerial by adding the following additional job duty: "[he is responsible for] the [full] direction and coordination of activities and operation[s] of the corporation" in the United States. See § 101(a)(44)(A)(iv) of the Act, 8 U.S.C. § 1101(a)(44)(A)(iv). At the same time, contradictory to its managerial capacity claim, the petitioner apparently attempted to reinforce its original position by stating the beneficiary is also "[responsible for] planning, formulating and implementing administrative and operational policies and procedures." See § 101(a)(44)(B)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(B)(ii). However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Again, the main issue is that the petitioner failed to provide any specific descriptions of the beneficiary's job duties, including details of what he does on a day-to-day basis.

In addition, certain job duties of the beneficiary appear to be neither executive nor managerial. Specifically, the petitioner states on its attachment to Form I-129 that the beneficiary will be responsible for "analyzing market trend[s]" and negotiating "international purchase contracts." As the beneficiary actually performs market analysis and negotiates the contracts, he is performing a task necessary to provide a service or product, and these duties will not be considered managerial or executive in nature. 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).

Further, the petitioner not only fails to provide detailed job duties for the sponsored position but also fails to specifically document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial/non-executive. As indicated above, the petitioner lists many of beneficiary's duties as being executive and managerial (primarily reiterations of the regulations) but fails to quantify the time the beneficiary spends on them. This failure is important because several of the beneficiary's daily tasks, such as market analysis and contract negotiations, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot further determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Furthermore, it should be noted for the record that, although the petitioner initially asserts that the beneficiary will hire and supervise a subordinate staff, no detailed information on the beneficiary's staff was ever submitted. In fact, although the director requested the specific job duties and educational background of the

petitioner's employees, the petitioner only responded with a vague statement indicating that it uses contracting services to meet the employment needs of the company. While the petitioner on appeal did present evidence that it made payments to two employees/contractors, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the petition was adjudicated. The petitioner failed to submit the requested evidence and now submits on appeal evidence of payments to two employees/contractors. However, the AAO will not consider this additional evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Based on the record of proceeding before the director, the petitioner in its letter dated January 10, 2004 actually refers to both of the subordinate personnel as being "clerical employees." A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary is apparently supervising a staff of non-professional employees ("clerical staff"), the beneficiary cannot be deemed to be primarily acting in a managerial capacity. Moreover, even if the supervised staff had been considered to be professional, 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). Therefore, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

Finally, it should also be noted that 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. In this case, the petitioner claims in the initial petition documents (on its attachment to Form I-129) that the beneficiary will "hire and supervise . . . professional personnel." According to the evidence presented, the petitioner has failed to hire any professional personnel since the beneficiary began his duties in the United States. In addition, upon review of the financial documents submitted, it appears that the petitioner was only able to pay the beneficiary approximately \$23,500.00 during the period at issue (October 15, 2002 to October 15, 2003), far short of the designated salary of \$36,000.00 per year. See 8 C.F.R. § 214.2(l)(14)(ii)(E). There is no provision in Citizenship and Immigration Services 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.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

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 director's decision will be affirmed and the petition will be denied.

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ORDER: The appeal is dismissed.

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