

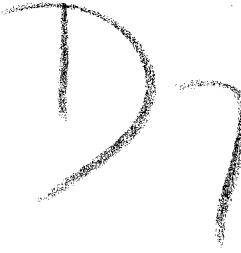
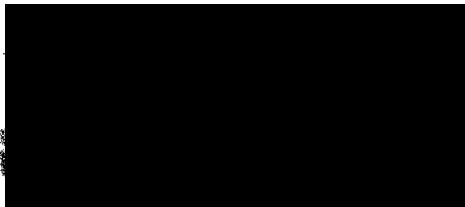
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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



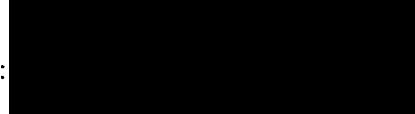
**U.S. Citizenship
and Immigration
Services**

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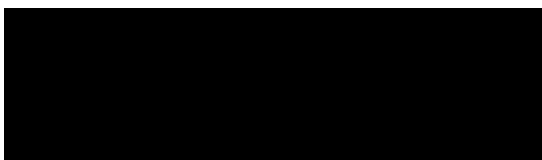
FILE: WAC 03 240 50144 Office: CALIFORNIA SERVICE CENTER Date: AUG 01 2005

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)

ON 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.

A handwritten signature in cursive ink, appearing to read "Robert P. Wiemann".
f Robert P. Wiemann, Director
Administrative Appeals Office

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

According to the documentary evidence contained in the record, the petitioner was established in 1997 and claims to be a cleaning products manufacturing and distribution company. The petitioner claims to be an affiliate of Safisa Servicios Inmobiliarios, located in Buenos Aires, Argentina. The petitioner's previous petition was approved allowing the beneficiary to enter the United States in an L-1A classification. The petitioner now seeks to extend its authorization to employ the beneficiary temporarily in the United States as its quality control manager for three years, at an annual salary of \$42,000.00. The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will be managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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.

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—

- (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), provides:

The term "executive capacity" means 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.

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The petitioner initially described the beneficiary's job duties as:

[The beneficiary] [is] in charge of property quality control with the US company ... [The beneficiary] will continue to carry similar responsibilities and oversee all quality control on services performed by the employees. She also designs maintenance manuals, procedures and logistics for company. [The beneficiary] [has a] long history in personnel management and service industry, experience in supervising quality control, handling international contracts, and extensive experience in operations and management.

In a letter dated July 25, 2003, the petitioner described the beneficiary's duties as:

The job position which [the beneficiary] will continue holding entails the function in a managerial capacity above two supervisors and many personnel. She will maintain her supervisory authority on over 6 employees of CDL. Further, the nature of the job itself will clearly demand her active involvement in the company's overall policy making related to the allocation and distribution of manpower to the scheduled cleaning services as well as special projects.

In a letter dated April 16, 2003, the petitioner described the beneficiary's duties as:

- A. To inspect work sites and advice [sic] as to required man hours to accomplish specific work to be done. Look at type of flooring and recommend type of coating to be used, procedures to be followed, amount of man hours needed and equipment to be utilized Percentage of workday: 50%
- B. To provide [REDACTED] with operations cost analysis as they refer materials and equipment needed to accomplish tasks [The beneficiary] reports total figures as it relates to each specific job: total dollars to be utilized for man hours, materials, equipment, tools and transportation. Percentage of workday: 10%
- C. To confer with supervisor in scheduling each specific job. Once [the beneficiary] determines amount of material, man-hours and equipment [the beneficiary] coordinates with supervisor so that job is scheduled and all logistics provided, equipment and supplies provided. Percentage of workday: 20%
- D. To report to office in Argentina matter of general accounting. Makes available to home office a Performa evaluation for every job so that the home office in Argentina is well informed as to profitability of every job performed. Percentage of workday: 10%
- E. Miscellaneous office work. Turns in payroll reports, general expense reports, equipment status reports, transportation reports, etc. Percentage of workday: 10%

NOTES: [The beneficiary] is an expert on floor coating and procedures particularly as it relates to certain types of imported marbles used in show rooms in shopping malls, car dealers and lobbies.

The petitioner submitted as evidence, copies of the U.S. entity's payroll records and IRS Form 1120, U.S. Corporation Income Tax Return for 2001 in which it is indicated that the petitioning entity is a "cleaning service."

In the request for evidence, dated November 4, 2003, the director requested in part:

- U.S. Company's Organizational Chart: Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current names of all executives, managers, supervisors, and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also, include a brief description of job duties, educational level and annual salaries for all employees under the beneficiary's supervision.
- Form DE-6, Quarterly Wage Report
- Form 941, Quarterly Wage Report
- Federal Income Taxes
- State Income Taxes

In response to the director's request for evidence, the petitioner submitted an organizational chart and a description of the U.S. entity's employee job descriptions to include:

- ██████████ - Operations/Policy Manager: Pr[o]cedures and general work policy, quality control, safety and compliance. Education: high school, 2 years trade school. Annual salary \$42,000.00.
- ██████████ - Operations Supervisor: Scheduling. Education: Bachelors Degree, Art and Interior Design. Annual salary \$32,400.00.
- ██████████ - Service Technician: Marble flooring. Education: high school. Annual salary \$16,800.00
- ██████████ Service Technician: Carpet Specialist. Education: high school. Annual salary \$16,900.00.
- ██████████ Service Technician: Floor coatings. Education: high school. Annual salary \$16,800.00.
- ██████████ Service Technician: General help. Education: high school. Annual salary \$15,900.00.
- ██████████ Service Technician: General help. Education: high school. Annual salary \$15,800.00.

The petitioner submitted copies of the U.S. entity's Form DE-6, and Form 941, Quarterly Wage Report, for the quarters ending March 31, 2003, June 30, 2003, and September 30, 2003. The petitioner also submitted copies of the U.S. entity's federal and state income tax returns for 2002.

The director determined that the beneficiary would be a supervisor, supervising skilled and semi-skilled contractor workers rather than performing managerial or executive duties. The director stated that although the petitioner listed thirteen U.S. entity employees in its organizational chart, five which were listed as corporate officers, the company's IRS Form 1120 for 2002 showed that none of the officers had been compensated in that year. The director further stated that the other eight employees were also contractors since the entity's Form 1120 did not demonstrate that any salaries or wages had been paid in 2002. The director stated that with the number of managerial and executive staff and the fact that the organization has no salaried employees, it was questionable as to whether the officers and/or the beneficiary engaged in primarily managerial or executive duties. The director concluded by stating that with the current executive staff, the petitioner had failed to demonstrate the need to fill another position involving primarily managerial or executive responsibilities.

On appeal, counsel argues that a mistake was made in the preparation of the U.S. entity's organizational chart submitted in response to the director's request for evidence. Counsel argues that managerial and officer's positions within the foreign entity were intertwined with that of the U.S. entity because the beneficiary reports directly to the foreign entity the progress being made by the U.S. organization. On appeal, the petitioner submits a revised organizational chart and IRS Form 1120 for 2003 as evidence. The organizational chart depicts Luis Salazar as company CEO, Jorge Podboj as marketing manager, and the beneficiary as service manager with Miguel Martinez as service dispatcher, and seven semi-skilled workers under her direction.

Counsel's argument is 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 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 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 prove 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). The petitioner asserts that the beneficiary is employed by the U.S. entity in a managerial capacity in that she spends 50 percent of her time inspecting work sites and advising potential clients of the man-hours and materials needed to complete the cleaning assignments. The petitioner also asserts that the beneficiary spends 20 percent of her time coordinating work assignments with supervisors. It appears from the record that the beneficiary spends more than half her time performing non-managerial duties. The evidence demonstrates that the beneficiary will, at best, continue to supervise skilled and semi-skilled contract workers and continue to perform non-qualifying day-to-day business activities associated with operating a cleaning company rather than performing the high-level responsibilities of a manager or executive. Further, it does not appear that the U.S. entity has reached a level of complexity sufficient to support a managerial or executive position.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include establishing policies and supervising quality control. The petitioner did not, however, define the policies, or clarify the quality control procedure. 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). 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 describes the beneficiary as being involved in the negotiating process, marketing the petitioner's product, preparing business reports, accounting, and scheduling. Since the beneficiary actually performs administrative work, sells the product, negotiates the contracts, and markets the petitioner's product, she is performing tasks 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).

Although the petitioner asserts that the beneficiary is managing a subordinate staff, 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. 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 primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity. For this reason, the petition may 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.