

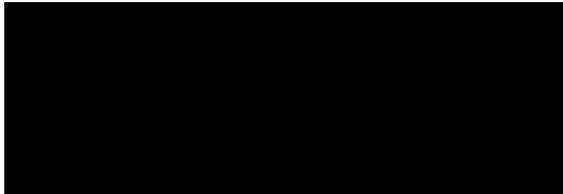


U.S. Citizenship
and Immigration
Services

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File: SRC-03-042-52229 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



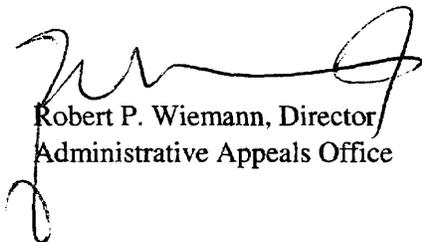
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

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/Purchasing 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 in the State of Florida that is engaged in the export of home and business security equipment. The petitioner claims that it is the branch of [REDACTED] located in Colombia. The beneficiary was initially granted a one-year period of stay in L-1A status 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 evidence of record shows that the beneficiary will be employed in a primarily managerial and executive capacity, in part due to the fact that she supervises newly hired contract employees. In support of this assertion, the petitioner submits a brief and 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 primary 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, on Form I-129 the petitioner indicated that the beneficiary will serve in the position of "Director/Purchasing Manager." In an attached support letter, the petitioner's former counsel described the beneficiary's responsibilities as follows:

[The beneficiary] will continue in the capacity of Director and Manager of [the petitioner]. [The petitioner] will give [the beneficiary] exclusive control and full decision making authority over all aspects of the company including product selection, purchases, and hiring and firing of individuals within [the petitioner].

[The beneficiary] has complete authority over all employees, including hiring and firing as well as making decisions concerning the day-to-day operations of [the petitioner].

* * *

- a. Exclusive control and full decision making authority over all aspects of the company including product selection and purchases
- b. Control and reduce obsolete inventory and initiate reduction via Sales and Marketing
- c. Manage and maintenance of product purchasing parameters to ensure maximizing inventory levels and turns
- d. Manage strategic vendors and suppliers
- e. Analyze market and delivery conditions to determine present and future material availability and prepare market analysis reports
- f. Managing workflow, monitoring Quality, Cost, and Delivery performance of supply base to ensure targets are met.
- g. Analyzing market conditions (ex: pricing, availability, lead-time, and capacity).
- h. Interface with product marketing on new and current product positioning and availability

The petitioner's former counsel described the duties of the beneficiary's subordinates as follows:

President and Manager in Chief

- a. Attend trade shows and Seminars in new security development
- b. Reports back to the parent company in Colombia and identify potential trading deals.

- c. Application of this expertise to the development of trade markets will assure the continued success of [the petitioner].
- d. Exclusive control and full decision making authority over all aspects of the company including product selection, purchases, and hiring and firing of individuals within the [petitioner].

Office Manager

- a. The Office Manager fills the essential role of keeping VIP's administrative functions running smoothly and efficiently, as well as keeping a record of the organization's on goings by taking minutes at meetings, keeping track of hours, and organizing and collecting director monthly reports.
- b. Handle employee payroll, accounts payable, accounts receivable and other financial data
- c. Office systems, writing, and event logistics.
- d. Record daily sales and sales tax payables.
- e. Pending purchase orders on all orders placed and Purchase orders: enter in computer, secure PO number, and call in orders.
- f. Maintain customer and vendor files on MYOB system.
- g. Determine weekly gross profit of each shipment.
- h. With aid of computer, value out the food and packaging cost of each shipment and determine the gross profit of each product.
- i. Make sure all terms are correct on Vendors and all Invoices.
- j. All monthly taxes paid by end of Month.
- k. All tax reports completed and accurate on time.

On January 21, 2003, the director requested additional evidence. In part, the director requested: (1) an indication of the percentage of time the beneficiary spends on each stated job duty; and (2) a list of employees that report directly to the beneficiary, including an indication of whether they are part-time or full-time.

In a response dated March 13, 2003, the petitioner submitted: (1) 2002 IRS Forms W-2, Wage and Tax Statement, for its three employees; (2) the beneficiary's 2002 IRS Form 1040, U.S. Individual Income Tax Return; and (3) a letter from counsel addressing the requested information as follows:

[The beneficiary] spends 100 percent of her time directing the management of the department. She is involved primarily in executive duties and the supervision of [the President and Manager in Chief] and [the Office Manager], who relieve her from performing the services of the business and day-to-day operations.

The Beneficiary only performs the executive duties on record.

* * *

[The beneficiary] is involved in the supervision and control of the work of the following full-time employees. These employees report directly to her and perform the day-to-day operations of the business:

[the President and Manager in Chief] is a Full time employee
[the Office Manager] is a Full time employee

On April 17, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated that:

The petitioner has not demonstrated the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization. The petitioner has not established the beneficiary will be involved in the supervision and control of the work of other supervisory, professional or managerial employees who will relieve [her] from performing the services of the business The majority of [her] work time would be spent in the nonmanagerial, day-to-day operations of the business.

On appeal, the petitioner asserts that the evidence of record shows that the beneficiary will be employed in a primarily managerial and executive capacity. The petitioner reiterates that the beneficiary "[s]pends 100% percent [sic] of her time directing the management of the department. She is involved primarily in executive duties and by the supervision of [the President and Manager in Chief]." The petitioner further states that it now utilizes the services of two individuals on a contract basis, both of who work on marketing and promotion and are under the supervision of the beneficiary. The petitioner further notes that it is not a new office, and that the director misstated its gross annual income. In support of these assertions, the petitioner submits a brief and additional evidence, in part including: (1) a letter from an accountant, dated May 8, 2003, attesting that the petitioner employs two individuals on a contract basis; and (2) an amendment to the petitioner's articles of incorporation, dated November 30, 2000, reflecting that the beneficiary is listed as one of two directors.

Upon review, 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant case, the petitioner states that the beneficiary will act in an executive capacity. Yet, the petitioner frequently references the beneficiary's managerial duties and supervisory responsibility over subordinate employees. Thus, it appears that the petitioner intends to represent that the beneficiary will be primarily engaged in both managerial duties and executive duties. Therefore, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. In response to the director's request to specify the percentage of time the beneficiary devotes to each task, the petitioner merely stated that "[the beneficiary] spends 100 percent of her time directing the management of the department." This statement does not address the director's clear request for the petitioner to "list the approximate percentages of time the beneficiary spends *on each* job duty stated in the record." (emphasis added). The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). This failure of documentation is important because several of the beneficiary's daily tasks, such as "[analyzing] market and delivery conditions" and performing marketing tasks, do not fall directly under traditional managerial or executive duties as defined in the statute. Thus, the AAO cannot determine whether the beneficiary will be employed in a primarily managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act.

Further, the petitioner indicates that the beneficiary exercises supervisory authority over two full-time employees, namely the President and Manager in Chief and the Office Manager. The petitioner's documentation is inconsistent with this assertion. In describing the duties of the President and Manager in Chief, the petitioner states that he exercises "[e]xclusive control and full decision making authority over all aspects of the company including product selection, purchases, and hiring and firing of individuals within the [petitioner]." Yet, the petitioner attributes that same authority to the beneficiary by stating that she exercises "[e]xclusive control and full decision making authority over all aspects of the company including product

selection and purchases," and she "has complete authority over all employees, including hiring and firing." Thus, the petitioner's statements are contradictory regarding who has ultimate authority in the company.

Additionally, as the beneficiary's title is Director/Purchasing Manager, it is questionable whether she exercises managerial authority over the President of the company as claimed. Based on common notions of the meaning of the title "President," it appears more likely that the petitioner's President and Manager in Chief exercises supervisory authority over the beneficiary.¹ It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The beneficiary's supervisory authority and control over the petitioner's operations are material issues in this proceeding, and the petitioner has failed to resolve the substantial inconsistency discussed above. This inconsistency calls into question the veracity of the remaining portions of the job description, such as the petitioner's claim that the beneficiary supervises an Office Manager. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. Accordingly, the beneficiary's job description is insufficient evidence to show that she will function in a primarily managerial and executive capacity.

The petitioner states that it now utilizes the services of two individuals on a contract basis, both of who work on marketing and promotion and are under the supervision of the beneficiary. As evidence of this assertion, the petitioner submits a letter from an accountant, dated May 8, 2003, attesting that the petitioner employs two individuals on a contract basis. However, as this letter is dated after the filing date of the petition, it appears that the petitioner engaged the services of these individuals after the filing date. 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). Thus, the fact that the petitioner engaged the services of new individuals after the date of filing is not probative of the petitioner's eligibility as of the filing date.

The petitioner asserts that the director misstated its gross annual income. In the decision, the director provided that the petitioner's gross annual income is \$153,000. Upon examining the petitioner's Form I-129, the AAO notes that the petitioner indicated on the form that its gross annual income is \$153,000. Thus, the director correctly quoted information provided by the petitioner. The petitioner states that \$153,000 was its gross annual income in 2000, and that its gross annual income increased in both 2001 and 2002. However, as the petitioner's gross annual income was not a basis for the director's decision, nor will it be a basis for the decision of the AAO, it is not at issue in this proceeding.

The petitioner further notes that it is not a new office, despite the director's comments. The record reflects that, on December 5, 2001, CIS initially approved the beneficiary for L-1A status, valid from December 5,

¹ Black's Law Dictionary defines "President" as "One placed in authority over others; a chief officer; a presiding or managing officer; a governor, ruler, or director." *Black's Law Dictionary* 821 (6th ed., West 1991).

2001 to December 5, 2002. The record is inconclusive regarding whether the initial petition was filed in order to allow the beneficiary to open a new office in the United States. The AAO notes that, although the director referred to the initial petition as a "new office" petition, such alleged fact had no bearing on the director's analysis or denial of the present petition.

Based on the foregoing, the record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, as stated above the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it has a qualifying corporate relationship with the beneficiary's foreign employer. See 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) requires the petitioner to submit "[e]vidence that the United States and foreign entities are still qualifying organizations." Although counsel has indicated that the petitioner is a branch office of the foreign entity, the petitioner has provided no evidence of any kind to show its current ownership.² Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity. As the petitioner has provided none of the above-listed documents, the record is insufficient to show a qualifying corporate relationship. For this additional reason, 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 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.

ORDER: The appeal is dismissed.

² The AAO notes that the petitioner failed to submit Form I-129 Supplement E/L, which requires information regarding the petitioner's corporate relationship with the beneficiary's foreign employer.