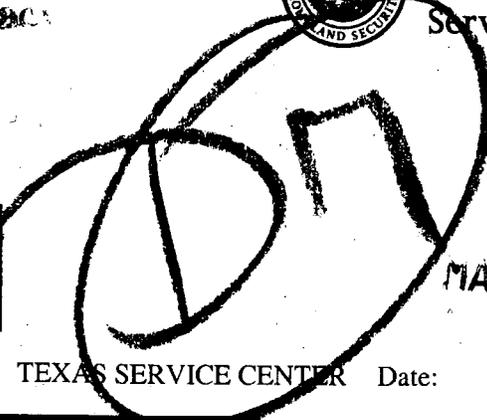


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U.S. Citizenship
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Services

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MAY 20 2005

File: SRC 03 235 50354 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

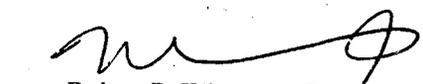
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 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 vice-president/executive 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 graphic design and printing business. The petitioner claims that it is the affiliate of [REDACTED], located in Harare, Zimbabwe. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and was subsequently granted a two-year extension of status. 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, counsel for the petitioner asserts that the petitioner had indicated in the initial petition that it planned to hire additional personnel and has filled three of the four positions as of April 1, 2004. Counsel submits a brief and additional evidence in support of the appeal.

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 an attachment to the initial petition, the petitioner provided the following description of the beneficiary's duties:

He is responsible for day-to-day operations, including, front office, machine and software maintenance, customer service, and safety/security. He is also responsible for the financial statements, maintenance and processing of invoices, payroll services, and weekly accounting. [The beneficiary] is directly involved in marketing of the company to attract new clients. He has the full authority to hire, train, and fire any employee.

* * *

[The beneficiary] shall be responsible for the day-to-day management of the company (15%); Finance and Accounting (10%); Marketing of the company [sic] services (20%); Employment and Training of the company [sic] employees and managers (15%); Management of the production, design and quality (30%); and monitoring of technical and creative aspects of the company (10%).

The petitioner also submitted a letter dated August 3, 2003, in which it provided the following description of the beneficiary's job duties:

Day-to-Day Administration and Operations 15%

Day-to-Day management of operations including front office, machine and software maintenance, customer service, human resources, safety and security.

Finance and Accounting 10%

Coordinate and maintain processing of invoices, the generation of accounts payable checks, the compilation of financial data for monthly financial statements and complete range of payroll services. Establish yearly budgeting and capital plans and volume purchasing discount programs.

Marketing 20%

Develop existing and new customers. Conduct comprehensive market study to map potential customer bases and increase gross annual sales. Investigate new business opportunities to insure optimal operation and strategic market position. Implement aggressive marketing programs with annual marketing plans updated every quarter; sales strategies targeting all segments of the market.

Employment and Training 15%

Coordinate employment of skilled and professional personnel for the company. Implement yield management program; preventive maintenance program; quality service training for all staff positions; and training of staff.

Management 30%

Management and implementation of [the petitioner's] "end-to-end" custom approach:

- **Proactive Marketing** – the firm will actively seek new business relationships through a proactive sales and marketing effort. The objective of this task will be to acquire long to medium term retainers.
- **Product Design** – this would include design solutions for everything from business cards to corporate communications literature to web site development
- **Proof Management** – design and store proofs that customers will leave with [the petitioner] so to reuse them for repetitive printing jobs
- **Production** – management and deliver of “end-to-end” production process
- **Quality Assurance** – adding final touches to the product and making changes as required

Technical 10%

Monitor and oversee the technical and creative functions of the operations of [the petitioner] including product design and development.

As Vice President/Executive Manager, [the beneficiary] oversees all essential professional and support staff.

On Form I-129, the petitioner indicated its number of employees as “5+,” however, the submitted Forms 941, Employer’s Quarterly Federal Tax Return, indicate that the petitioner consistently reported one employee between the second quarter of 2001 and the first quarter of 2003.

On October 22, 2003, the director requested additional evidence. In part, the director requested: (1) copies of the petitioner’s Employer’s Quarterly Tax Returns for the years 2002 and 2003; (2) copies of Quarterly Wage Reports from January 2003 to the present; and (3) an organizational chart for the United States entity.

In a response dated January 19, 2004, the petitioner submitted the requested Forms 941, Employer Quarterly Tax Return since 2001 and Florida Forms FL UCT-8, Employer’s Quarterly Report, for the first three quarters of 2003. Based on these records, the beneficiary was the petitioner’s only employee until September 2003, when a second employee was hired. This individual was paid \$300 in September 2003. The petitioner also submitted an organizational chart for the petitioner which depicted the beneficiary and the company president, [REDACTED] at the top of the chart, sharing supervision of four departments and eleven employees including two salespersons, two graphic designers and a graphic design supervisor, two customer service representatives and a customer service supervisor, two production assistants and a production supervisor.

On March 29, 2004, the director denied the petition, determining that the beneficiary would not be employed in a primarily managerial or executive capacity under the extended petition. The director noted that the petitioner had hired only one part-time employee and that based on the evidence provided, the beneficiary is directly performing the day-to-day operations of the business.

On appeal, counsel for the petitioner asserts that the petitioner had initially indicated that it had four additional positions to be staffed “upon further establishment of the Petitioner’s business,” and that it has filled three of these positions as of April 1, 2004. Counsel provides brief job descriptions for the purported new employees, identified as sales and marketing manager, production supervisor and graphic design/pre-

press/office manager. Counsel also submits copies of their Forms W-4, Employee's Withholding and Allowance Certificate, and Forms I-9, Employment Eligibility Verification. Counsel reiterates the job description provided for the beneficiary in the petitioner's initial letter and states that the submitted evidence establishes that the beneficiary is employed in a managerial or executive capacity.

Upon review, counsel's assertions are not persuasive. It must be noted that the instant petition was submitted on August 27, 2003 and it is undisputed that the petitioner reported one payroll employee, the beneficiary, at the time of filing. It appears that the petitioner also had an individual employed as president, although his role in the business and source of remuneration is uncertain. On appeal, counsel submits minimal evidence that the petitioner hired additional staff in March and April 2004. The person purportedly hired as the petitioner's "graphic design/pre-press/office manager" is the same individual previously identified as the petitioner's president, which casts serious doubt on counsel's claim that he is serving in a position subordinate to the beneficiary. More importantly, 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Under the circumstances, the evidence submitted on appeal carries no evidentiary weight in this proceeding. The AAO will review the petition based on the evidence in the record of proceeding at the time of the director's decision.

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 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 submitted a lengthy and sufficiently detailed description of the beneficiary's job duties; however, the description does not establish that the beneficiary performs duties which are primarily managerial or executive in nature. The petitioner indicates that the petitioner devotes 20 percent of his time to marketing, including performing market studies, implementing marketing programs and developing sales strategies. Since the beneficiary was the petitioner's only employee, it is evident that he was also performing all non-qualifying duties related to sales and marketing and this duty will not be considered managerial in nature. The petitioner further states that the beneficiary devotes 30 percent of his time to "management" and describes the beneficiary's responsibility for product design, proof management, production and quality assurance. Again, based on the record of proceeding and the lack of subordinates to relieve the beneficiary from performing non-qualifying duties, it is evident that the beneficiary is responsible for directly performing the petitioner's graphic design work, printing production and quality assurance functions. The beneficiary purportedly devotes an additional 10 percent of his time to "technical" management, including oversight of product design and development. Since the petitioner did not claim to have any employees who were performing product design duties, it is assumed that the beneficiary actually performed these duties. These

duties, which account for 60 percent of the beneficiary's time, have not been established as managerial or executive in nature. The petitioner further stated that the beneficiary devotes 15 percent of his time to "employment and training functions," yet, the evidence on record indicates that the beneficiary has been the petitioner's only employee for the two years preceding the filing of the petition. Therefore, the petitioner has not adequately explained how the beneficiary spends 15 percent of his time to staff supervision functions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the above, the beneficiary is primarily performing tasks necessary to provide the petitioner's graphic design and printing services. 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).

In this matter, although the petitioner places the beneficiary at a senior level on the organizational chart, the record does not substantiate that the beneficiary primarily performs duties associated with the high-level responsibilities identified in the statutory definitions rather than spending the majority of his time carrying out the daily operational tasks of providing the petitioner's service. Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial 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 is a qualifying organization doing business in the United States and at least one foreign country, or that it has a qualifying relationship with a foreign entity. See 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner claims throughout the record that the beneficiary owns 50 percent of the foreign entity and 50 percent of the petitioner. The petitioner submitted minimal evidence to establish that the beneficiary and [REDACTED] equally owned the foreign entity at the time it was established, but no documentation to show the current ownership of the foreign entity. In addition, the petitioner has not submitted consistent evidence regarding the ownership of the petitioning organization. The petitioner's articles of incorporation indicate that the company is authorized to issue 1,000 shares of stock at no par value. A subsequent resolution by the petitioner's board of director's dated June 7, 2000 indicates that 500 shares were issued to the beneficiary and 500 shares were issued to [REDACTED] and that each shareholder paid a purchase price of \$500.00. The petitioner's stock certificates number 1 and 2 indicate issuance of stock in these proportions on June 7, 2000. However, the petitioner's Form 1120, U.S. Corporation Income Tax Return for the year 2000 and its Forms 1120S, U.S. Income Tax Return for an S Corporation for the years 2001 and 2002, indicate that [REDACTED] owns 81 percent of the petitioner while the beneficiary owns only 19 percent of the shares. Both of these documents also indicate the value of the petitioner's common stock as \$100.00. 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). In addition, the petitioner has not submitted sufficient evidence that the foreign organization continues to do business as defined at 8 C.F.R. § 214.2(l)(1)(ii)(H). For these additional reasons, the petition may not be approved.

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, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.