

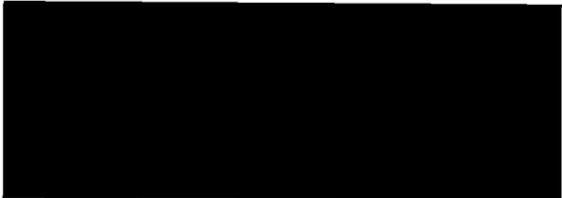
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U.S. Citizenship
and Immigration
Services

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File: SRC 04 110 51893 Office: TEXAS SERVICE CENTER Date: JUL 07 2006

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)

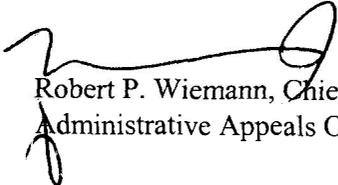
ON BEHALF OF PETITIONER: SELF-REPRESENTED

COURTESY COPY TO:



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, Chief
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 marketing 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 Florida corporation that claims to be engaged in the import and export of equipment, school clothing products, and computers. It operates a retail clothing store. The petitioner states that it is the subsidiary of [REDACTED] located in Caracas, Venezuela. The beneficiary was initially granted a one-year period of stay in L-1A status to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay for a three-year period.

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 has been performing duties "of a managerial/executive capacity" and is responsible for supervising and controlling the work of other supervisory and professional employees as the manager of the company's marketing department. The petitioner 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 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 petitioner established that 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.

The nonimmigrant petition was filed on March 8, 2004. In a March 3, 2004 letter submitted in support of the petition, the petitioner stated that as marketing manager, the beneficiary is "in charge of establishing and supervising the Marketing Department." The petitioner noted that the beneficiary "has full authority to hire and fire the necessary personnel in her department, and together with the Board of Directors of the parent company she sets policy, procedures and goals for our U.S. subsidiary." The petitioner stated that the beneficiary supervises three full-time employees, including university students.

The petitioner submitted its Florida Form UCT-6, Employer's Quarterly Report, for the fourth quarter of 2003, on which the petitioner reported three employees, including the beneficiary. Each employee received wages of \$412.00, for a total of \$1,236 paid in wages for the quarter. The petitioner also provided a copy of its 2003 IRS Form 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Return, indicating that the total amount paid in wages for the year was \$1,236.

The director issued a request for additional evidence on March 26, 2004, in part instructing the petitioner to submit: (1) an organizational chart which lists all positions in the U.S. entity; (2) a list of all employee positions, including requirements and job duties for each position; (3) a list of all of the beneficiary's duties and the percentage of time spent on each; and (4) copies of quarterly tax returns for the past year.

In a response dated June 15, 2004, the petitioner included a statement containing the following description of the beneficiary's duties as marketing manager:

- In charge of the operations of the Marketing Department.
- Creates and executes the sales and marketing plan.
- Develops the sales team and distribution network.
- Develop department policies, procedures, and training programs.
- Manage and handles all sales and marketing operations of the company.
- Supervises the personnel in her department.
- Responsible for providing diversified Marketing and Sales and facilities support. Coordinates Facility, and Support functions.

- supervises lower-level marketing and sales personnel as well as proveyors [sic] or contract employees
- plan, coordinate and supervise marketing and sales support services. Review all documentation of incoming merchandise for action and outgoing merchandise for proper inventory purposes.
- Maintain a reliable and effective inventory system.
- Review, process and archive merchandise clearances, and access database.
- Manages the marketing and sales functions.
- Is responsible for the acquisition of merchandise.
- Select, hire and train personnel.
- Designs and implements systems and internal controls. Makes recommendations in management on changes and improvements to inventory systems.
- Responsible for general administrative functions, including correspondence, coordination of vendors and maintenance of office equipment.
- Assists with maintaining, updating and reporting on all company inventory transactions.
- Responsible for schedule sensitive ordering of all products and maintaining inventory levels; acts as point of contact for vendors in resolving problems related to sales, shipping and delivery.
- Responsible for facilities management.
- Performs other duties as needed.
- Is responsible for the day-to-day marketing and sales operations of the corporation,
- Hires and supervises all the staff of this Department.
- Coordinates all sales workers,
- **Routinely handles unusual problems** under difficult circumstances in what is sometimes an unsettled environment.
- Acts as liaison between management level and clients and proveyors [sic],
- Maintains transactions in accordance with national standards and general manager's recommendations.
- Provides the General Manager and the board of trustees with marketing and sales information as required; identifies resources; prepares applications; assists the General Manager in campaigns; participates in the preparation and maintenance of the corporation's marketing budget; maintains inventory; maintains good business relationships with clients and proveyors [sic], institutions, credit card companies; and maintains good corporate relationships with companies doing business with.
- Secures and manages merchandise permits as required; Meets all reporting obligations and fills requests from individuals.

The percentage of time she has spent performing these duties are:

Supervising employees, 60%; Organizing the Marketing Department of the company; Preparing marketing plans and policies; direct the organizational marketing goals, objectives, and budgets, 10% of her time;

Controlling the marketing operations of the company; keeping record of the doings of the marketing department of the company, 10%;

Handling marketing management functions, preparing reports, overseeing Purchases, sales, and exports 10%;
Attending Trade Shows, Meeting with the General Manager and clients, 5%;
Reporting all operations, keeping the General Manager advised of the needs of the marketing department of the company, making recommendations, 5%.

The petitioner provided a lengthy job description for the beneficiary's immediate supervisor, the general manager, and noted the beneficiary supervises a marketing assistant and a sales supervisor. The petitioner indicated that the marketing assistant: maintains contact with the foreign parent company to supply them with the articles they need; looks for and contracts with suppliers; and is in charge of import and export documentation and customs. The petitioner stated that the sales supervisor is in charge of the day-to-day sales and daily control of inventory, and is responsible for contacting and assists clients.

Although the director requested that the petitioner submit quarterly wage reports for the previous three quarters, the petitioner re-submitted its Florida Form UCT-6 for the fourth quarter of 2003 only, and provided its IRS Form 941, Employer's Quarterly Federal Tax Return, for the same period, also showing total wages of \$1,236. The Form UCT-6 identifies the beneficiary, the marketing assistant and the sales supervisor, but no other employees as of December 31, 2003.

The petitioner also submitted an organizational chart depicting the beneficiary supervising the marketing assistant and sales supervisor, and reporting to the general manager, who in turn reports to the president and board of directors. The chart also depicts a legal advisor and an accountant subordinate to the president and general manager.

The director denied the petition on December 21, 2004, concluding that the petitioner did not establish that the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition. The director noted that no evidence was provided to show that the United States office employs "the staff required to support an L-1A manager." The director noted that although the petitioner listed seven positions on its organizational chart, the petitioner only submitted evidence that it employs two individuals in addition to the beneficiary. The director determined that the beneficiary would be engaged primarily in the day-to-day operations of the business without managing any professional or managerial subordinates.

On appeal, the petitioner asserts that the beneficiary performs "duties of a managerial/executive capacity," controls the work of professionals in the field, and manages the company's marketing department. The petitioner claims that the beneficiary manages a sales manager (the individual previously designated as a "marketing assistant"), a marketing manager (the individual previously identified as a "sales supervisor"), and one other employee, who was not identified in the petitioner's previous employee list. The petitioner noted that two of these employees attend community college and one possesses an associate's degree. The petitioner concludes that the beneficiary "supervises the employees who see the day-to-day operations of the activity or function for which the employee has authority and she has a [sic] professional and managerial subordinates."

The petitioner also submits letters from its accountant, its general manager, and the foreign entity's treasurer, all of whom confirm the beneficiary's position as marketing manager, and noting that she devotes 80 percent

of her time supervising personnel. The petitioner submits its Florida Form UCT-6, Employer's Quarterly Report, for the fourth quarter of 2004, which shows that the company employed four employees during the quarter and paid total wages of \$2,040, with each employee earning between \$480 and \$530 for the three-month period. The petitioner also provides a copy of its IRS Form 940, Employer's Annual Federal Unemployment Tax Return, showing \$2,040 paid in wages for the entire 2004 year.

Finally, the petitioner asserts that it recently invested in another business, [REDACTED], and submits a copy of the bill of sale, a stock certificate transferring shares to the petitioning company, and a copy of the lease for the business premises for the claimed acquired company. The bill of sale and stock transfer are dated January 3, 2005.

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in a primarily 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.*

While the petitioner provided a lengthy description of the beneficiary's duties in response to the request for evidence, the description is vague and repetitive, and includes a number of duties which are not managerial or executive in nature. For example, the petitioner states that the beneficiary is responsible for: designing implementing and maintaining inventory systems; reviewing, processing and archiving merchandise clearances; acquiring merchandise; coordinating facilities support functions and "facilities management"; assisting with updating and reporting all inventory transactions; performing "general administrative functions" including correspondence, routine interaction with vendors, and office equipment maintenance; "schedule sensitive ordering of all products"; and acting as a liaison between management and clients. This description suggests that the beneficiary is directly responsible for the company's day-to-day purchasing, administrative/clerical and inventory functions, and these duties cannot be considered managerial or executive in nature. It is unclear from the record how much time the beneficiary allocates to these non-qualifying duties.

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 provided a breakdown of the time the beneficiary would devote to various duties, but failed to include the majority of the listed duties, including all of the non-qualifying duties listed above, in its breakdown. Therefore, the petitioner has not provided a credible description of what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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 the administrative and operational tasks.

The remainder of the beneficiary's description includes duties associated with "managing" the company's sales and marketing activities through "lower-level" marketing and sales personnel. While it appears that the beneficiary may exercise discretion over the sales function, the record does not persuasively demonstrate that

the beneficiary regularly supervises lower-level employees who relieved her from performing the company's day-to-day sales and marketing tasks. The beneficiary was initially granted L-1A status to open the petitioner's new office in March 2003. The petitioner paid total wages of \$1,236 in 2003 and \$2,040 in 2004, and only paid wages during the last quarter of each year. There is no evidence that the petitioner paid wages to any employees during the first quarter of 2004, the quarter in which the petition was filed. The petitioner has not substantiated its claim that the beneficiary supervises three full-time subordinates, or its various claims that the beneficiary devotes 60 or 80 percent of her time to supervising professional and managerial personnel. 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)). Furthermore, 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. 582, 591 (BIA 1988).

Because there is no evidence that the petitioner employed other employees at the time the petition was filed, the AAO need not consider whether the beneficiary's claimed subordinates served in supervisory, professional or managerial positions. See section 101(a)(44)(A)(ii) of the Act. Nor is there evidence that the beneficiary primarily managed a function of the petitioning organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. As discussed above, the petitioner has not established this essential element of eligibility.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, 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.

To the extent that the petitioning company was doing business, there is no evidence of any employees to staff it at the time of filing other than the beneficiary and perhaps the other company officers, one of whom is identified as the company's general manager. Considering that the petitioner operates a retail store that appears to be open daily, it reasonably requires employees to order and stock merchandise, monitor and maintain inventory, receive deliveries, handle customer transactions, perform day-to-day administrative and

financial tasks such as banking and record keeping, and other routine operational duties associated with the retail business. It does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as a marketing manager and a general manager. Based on the record of proceeding, it must be assumed, and has not been shown to be otherwise, that the beneficiary's duties are primarily composed of non-qualifying sales and marketing duties, other operational duties, and administrative tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO acknowledges the submission of documentation on appeal related to the petitioner's purchase of a 50 percent interest in another company that currently operates a retail store. Based on the evidence submitted, the transaction took place approximately nine months subsequent to the filing of this petition. 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).

In sum, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. As noted above, 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. For this reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains solely 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.