

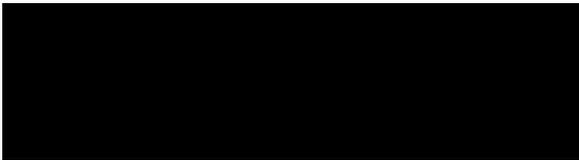
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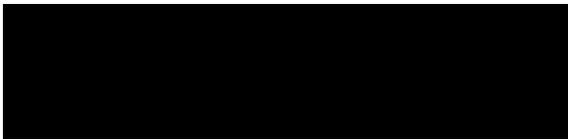


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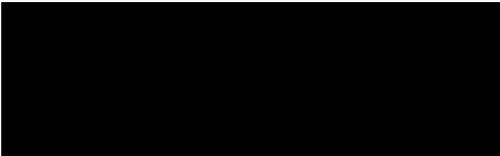
File: SRC 03 211 52453 Office: TEXAS SERVICE CENTER Date:

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:



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 chief executive officer 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 limited liability company organized in the State of Georgia that is engaged in the provision of management consulting services. The petitioner claims that it is the subsidiary of [REDACTED] located in India. 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 director also noted that the petitioner did not submit sufficient evidence to establish that it had secured physical premises for an office, or that it was doing business as a consulting business.

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 director's decision was based on an incorrect application of the law and Citizenship and Immigration Services (CIS) policy, as it placed undue emphasis on the size of the petitioning company. Counsel contends that the beneficiary performs primarily managerial or executive duties and is thus qualified for the benefit sought. Counsel also submits evidence to refute the director's conclusions that the petitioner had not established that it is doing business. In support of these assertions, counsel 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(1)(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.

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 first 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.

On the L Classification Supplement to Form I-129, submitted with the initial petition, the petitioner indicated that the beneficiary would perform the following duties as chief executive officer: "Time/Material management; Administrative management; Recruitment; Marketing; Financial Activities, such as collection payments, expenses, accounting, auditing and taxation." In a letter appended to the initial petition, the petitioner described the following job duties:

[The beneficiary] has been managing [the petitioning organization] over the past year, working with [REDACTED] for such management and consulting services, and is securing new contracts with other clients.

* * *

[The beneficiary's] skill and expertise is thus essential to [the petitioner], that seeks to profit from his expertise in management both broadly, and as applied to consulting on plastics issues faced by US companies. His personal experience and knowledge is crucial, as [the beneficiary's] experience is the primary capital of the US branch. He uses his knowledge in advising and consulting local businesses.

* * *

[The beneficiary] has been establishing contacts with clients as well as managing the day-to-day business of the entire business. As the executive manager he has been negotiating contracts with new clients. He directs and coordinates activities of future personnel in the office, prepares reports to clients, and offers concrete and practical assistance in his clients' managerial and business activities.

The petitioner indicated on Form I-129 that it employed two individuals at the time the petition was filed.

On September 26, 2003, the director issued a request for additional evidence, which included, in part, a request for copies of the petitioner's last two Forms 941 and copies of the last three pay stubs of all employees.

In response, the petitioner submitted its Forms 941, Employer's Federal Quarterly Tax Return for the first three quarters of 2003; pay stubs for the beneficiary for July, August and September 2003; and pay stubs for the petitioner's other employee for July and August 2003.

On December 22, 2003, the director denied the petition determining that the beneficiary would not be employed in a qualifying managerial or executive capacity under the extended petition. The director specifically noted that the beneficiary would be the person performing the necessary tasks for the ongoing operation of the company, rather than primarily directing or managing those functions through the work of others. The director further noted that "there is no corporate structure isolating him from the day-to-day tasks of the consultant work."

On appeal, counsel for the petitioner asserts that the beneficiary performs primarily managerial duties although he also provides services, and states that the director erred in emphasizing the small size of the petitioning company. Counsel cites several unpublished AAO decisions in support of his assertions that a small organization can support a managerial position as long as the beneficiary is engaged in primarily qualifying duties. Counsel also provides additional job duties for the beneficiary, including: control of financial matters, establishing goals and policies, signing checks and contracts, and "administering all other functions" of the business, and states that the beneficiary directs the organization, supervises the work of the other employee, has the authority to take personnel actions and is the only employee with discretion over day-to-day operations. Counsel concludes that the beneficiary's primary activity is negotiating deals, not providing services, and that hiring another employee has allowed the beneficiary more time to focus on the executive and managerial functions.

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.* A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of

the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

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 goals and policies," "time/material management," and "administrative management." The petitioner did not, however, define the beneficiary's goals, policies, or clarify the specific duties entailed by "time/material management" or "administrative management." The AAO accept a vague job description and speculate as to the related managerial or executive job duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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). 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. *Id.* at 1103.

In addition, the petitioner describes the beneficiary as preparing reports for clients, "offer[ing] concrete and practical assistance in his clients' managerial and business activities," and "advising and consulting local businesses." Since the petitioner is a consulting company, and the beneficiary is clearly performing the consulting services, 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). The petitioner also describes the beneficiary as performing a number of other non-managerial operational and administrative duties, such as the company's marketing, and all of its routine financial activities, including, collection of payments, expenses, accounting, auditing and taxation matters.

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 managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because many of the beneficiary's duties, as mentioned above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing managerial or executive duties. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d, 22, 24 (D.D.C. 1999). While counsel states on appeal that the beneficiary is primarily engaged in negotiating deals and business development, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 503, 506 (BIA 1980). Based on the record, the petitioner has a single contract to provide "advise [sic] on management, business relations, commerce, bookkeeping and accounting" for a client that operates a dry cleaning business. No additional contracts were signed during the petitioner's first year of operations, which raises doubts regarding counsel's claim that the beneficiary is primarily engaged in business development activities. Overall, the job description provided by

the petitioner does not establish that the beneficiary will primarily perform in a managerial or executive capacity.

On appeal, counsel asserts that the director erred by emphasizing the small size of the petitioning company in determining that the beneficiary would not be employed in a qualifying managerial or executive capacity. Counsel cites several unpublished AAO decisions in support of this assertion. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the cited cases. 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). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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). At the time of filing, the petitioner employed the beneficiary as chief executive officer and a part-time employee whose job title and job duties have not been identified. Therefore, the petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company, and, as noted above, the beneficiary is providing the consulting services and performing routine finance and accounting functions.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Finally, counsel suggests on appeal that the beneficiary qualifies as a "function manager" under current Citizenship and Immigration Services regulations and interpretations. 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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job description that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing

Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. The regulation at 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 order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's duties and the staff of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. There is no provision in CIS 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.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire employees in the future. However, 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 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 or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has established that it has been doing business in the United States as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). In her decision, the director referred to two issues which raised doubts regarding the petitioner business operations: (1) the petitioner did not submit evidence that it had paid rent according to the terms of its submitted lease agreement; and (2) the petitioner's only client is its landlord, [REDACTED], and this company appears to be the beneficiary's employer.

On appeal, counsel states that the petitioner did not submit evidence of rent payments because the rent payment was not due until the end of 2003 according to the terms of the lease between the petitioner and its landlord, [REDACTED]. The petitioner submits evidence of the rent payment on appeal.

The AAO notes, however, that the record contains two lease agreements for the same address. The lease agreement submitted with the initial petition was signed on July 20, 2003 and is for a term of two years from August 21, 2003 to August 20, 2005. Under the terms of this agreement, the petitioner is required to pay the landlord \$600.00 on the first day of each month. Also submitted with the initial petition was the beneficiary's Internal Revenue Service (IRS) Form 1040, Individual Income Tax Return and Form 8829, Expenses for Business Use of Your Home, for 2002. According to the tax documentation, all profit reported by the beneficiary as the petitioner's sole owner was claimed to be derived from the business use of his home.

In the request for evidence dated September 26, 2003, the director specifically asked whether the petitioner had been doing business out of his home exclusively during the past year. The petitioner responded that it had always had a commercial lease for the property indicated in the above-mentioned lease. The petitioner attributed the Form 8829 to an accounting error, and also submitted a statement from its accountant asserting that the beneficiary did not operate from a home office. Finally, the petitioner submitted a different lease agreement with the same landlord and for the same location. The lease agreement submitted in response to the request for evidence and on appeal, signed on August 20, 2002, is for a period beginning on August 20, 2002 and terminating on August 20, 2006. Under the terms of this lease agreement, the petitioner is required to pay a lump sum payment of \$10,200 on December 31, 2003 and annual payments of \$7,200 in subsequent years.

The petitioner has provided no explanation regarding the lease agreement submitted with the initial petition. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the preparation of the Form 8829 was a clerical error does not qualify as independent and objective evidence. 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). Furthermore, evidence that the petitioner submits for the first time after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

Based on the conflicting documentation submitted, the AAO cannot determine whether the petitioner had signed a commercial lease during the first year of business. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. In the present matter, either the petitioner did not comply with this requirement, misrepresented that they had complied, or the director committed gross error in approving the petition without evidence of the petitioner's physical premises. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(l)(9)(iii).

With respect to the petitioner's close business relationship with its landlord, [REDACTED], counsel for the petitioner states that "the landlord/tenant relationship and the consultant/client relationship between the two businesses is evidence only of the close personal ties that often result in the growth of new businesses" like the petitioner. While counsel is correct that there is "no authority for denying a petition merely on the ground that it rents office space from its primary client," the fact that the petitioner has only one client and derives its income solely from [REDACTED] raises questions as to whether the petitioner has been doing business pursuant to the regulations at 8 C.F.R. § 214.2(l)(ii)(H):

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

At the time the petition was filed, the petitioner had a single contract to provide consulting services to [REDACTED] Cleaning, which is evidently owned and/or operated by [REDACTED], at an hourly fee of \$50 to \$75. The petitioner received payments of \$14,010 from [REDACTED] in 2002, as evidenced by the submitted Form 1099-MISC, Miscellaneous Income. The petitioner has submitted no other evidence, such as copies of invoices or evidence of payments received for services rendered, to establish that it has been doing business for the entire first year of operations, and all of the financial statements submitted show only projected income. From the minimal documentation of the petitioner's business operations, the AAO cannot conclude that the petitioner has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO further cannot conclude that the petitioner has submitted sufficient evidence of the financial status of the U.S. entity as required by 8 C.F.R. § 214.2(l)(14)(ii)(E). For these additional reasons 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. 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.