

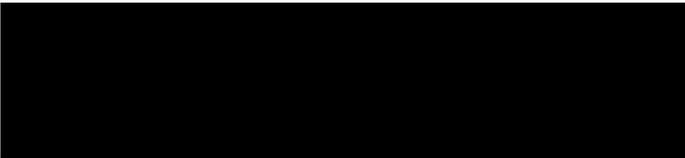
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U.S. Citizenship
and Immigration
Services

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File: SRC 03 223 50187 Office: TEXAS SERVICE CENTER Date: APR 28 2005

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

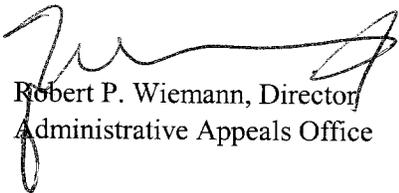
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 president 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 Texas that is engaged in the distribution and manufacture of dental equipment. The petitioner claims that it is the subsidiary of [REDACTED] located in Carmiel, Israel. 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 petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the denial was erroneous, and that the beneficiary, at the very least, qualifies as an executive based on his specified duties. Counsel further contends that the beneficiary's involvement in day-to-day duties of the petitioner is essential to the petitioner's continued success. In support of these contentions, counsel for the petitioner submits a brief and new evidence for consideration.

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 primary issue in this 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, counsel submitted a letter dated July 31, 2003 from the petitioner detailing the nature of the beneficiary's duties. Specifically, the petitioner stated:

[The beneficiary] is an important factor in the success of our companies, here in the U.S. and in Israel. His executive skills are key to our future growth. [The beneficiary] continues to actively serve as President of our parent company in Israel. He travels between both offices on a regular basis, and will continue to do so.

On August 18, 2003, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business, including a detailed list of the beneficiary's duties as well as the duties and position titles of the petitioner's other employees. In addition, the director requested that the petitioner provide copies of its quarterly income tax returns for the previous year, an organizational chart for the U.S. entity, and photos of the business location. In a response dated October 16, 2003, the petitioner, through counsel, submitted copies of the petitioner's quarterly tax returns for the previous year, an organizational chart for the U.S. entity, photographs of the petitioner's office space, and a statement regarding the current employees of the petitioner and their duties and position titles.

On October 31, 2003, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, found that the beneficiary's stated duties were not primarily managerial, and furthermore concluded that the beneficiary was not supervising a staff of professional, supervisory, or managerial employees. Finally, the director found that the beneficiary, despite the title of president, would be required to perform many of the day-to-day duties essential to the operation of the business.

On appeal, counsel asserts that the director erroneously concluded that the beneficiary's proposed duties did not meet the regulatory definitions of managerial or executive capacity. Counsel contends that the beneficiary is in fact an executive, and that the documentation submitted in support of the petition establishes such. Counsel, however, fails to address the director's specific reasons for the denial, and instead repeatedly asserts that the beneficiary is qualified for the benefit sought. In support of his contentions, counsel submits a brief and additional evidence, namely, bank statements and a letter from the foreign entity.

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.*

As previously stated, the initial description of the beneficiary's duties was insufficient. Consequently, the director requested additional details in the request for evidence. The petitioner's response further clarified the beneficiary's proposed duties, and explained that the beneficiary would devote 70% of his time to the U.S. entity with the remaining 30% devoted to his duties as president of the foreign entity. Specifically, the petitioner stated:

The duties of the Beneficiary and the percentage of time spent on each are as follows: The Beneficiary serves as President of the U.S. entity and the Israel parent company. He has spent 70% of the past year performing his duties with the U.S. company. These duties include the establishment of the company in the U.S., meeting with potential customers of the company, and attending trade shows and conferences. Much of his time is spent educating potential customers about the product, especially since it is new to the U.S. market. He supervises all other staff. He also hires and fires all employees and oversees the financial aspects of the business.

Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Both counsel and the petitioner, in separate letters, allege that the beneficiary is an executive by virtue of his position as president of both the U.S. and foreign entities. However, the stated duties identified in the record do not substantiate the claims of the petitioner and counsel for two reasons. First, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial and non-executive. Although the petitioner states that 70% of the beneficiary's time will be devoted to the U.S. entity, it is impossible to determine, based on the current record, how much time the beneficiary will allocate to executive or managerial duties as opposed to the non-qualifying duties. This failure of documentation is important because several of the beneficiary's daily tasks, such as "attending trade shows and conferences," and "meeting with potential customers" 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 the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Additionally, it appears that the beneficiary is directly responsible for generating the services of the business, since both counsel and the petitioner assert that the

beneficiary will personally meet with potential clients and will strive to educate these potential customers about the petitioner's product. This statement leads to the conclusion, absent evidence to the contrary, that the beneficiary is directly responsible for generating the petitioner's business and sales, and thus is personally ensuring that the petitioner's product and/or services penetrate the U.S. market. 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).

Second, the record contains no additional independent evidence or explanation establishing that the beneficiary is truly working as an executive and/or a manager. Merely claiming that the beneficiary is a manager or an executive, as the petitioner does in this matter, is insufficient to establish eligibility. 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). In addition, counsel's statements on appeal are likewise unsupported by independent evidence. 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. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, upon review of the record, it is further evident that the beneficiary is not acting in a primarily managerial capacity based on the flawed contention that he supervises a subordinate staff. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In response to the request for evidence, the petitioner, through counsel, submitted an organizational chart showing that the beneficiary supervised a vice president, an office manager, and an office assistant. In the description of duties for each of these employees, the petitioner indicates that these positions are non-technical in that they entail representing the petitioner at trade shows (the vice president), arranging attendance at trade shows and preparing documents (the office manager), and serving as receptionist and secretary (the office assistant). The petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The AAO further notes that the record suggests that a subordinate staff of two or three employees reports to the beneficiary. In extension requests that involved the opening of a new office, as here, the petitioner is required under 8 C.F.R. § 214.2(l)(14)(ii)(D) to submit 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. Although specifically requested by the director in the request for evidence, the petitioner failed to submit evidence regarding the payment of wages to the beneficiary and the alleged vice president, [REDACTED]

Although counsel for the petitioner contends that the beneficiary and Mr. Muler are both employed by and paid by the foreign entity, there is no documentation, such as payroll records or cancelled paychecks, which confirms this contention. 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). Although counsel on appeal submits excerpts from the petitioner's bank statements, these documents merely show the deposit of funds into the petitioner's account, but fail to document the manner in which these funds were allocated. As stated previously, 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, without documentary evidence to support counsel's claims on appeal, his assertions will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Finally, the AAO notes that in the petitioner's letter accompanying the petition, dated July 31, 2003, the beneficiary, in his capacity as president, acknowledges the presence of only two other office employees, and never mentions a vice president. This conflicting evidence has not been resolved in this matter. 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).

Finally, upon review of the director's conclusion that the beneficiary must be performing the day-to-day tasks of the business, the AAO concurs with the director's findings. Although a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C); see, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Systronics Corp. v. INS*, 153 F. Supp. 2d at 15. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties, such as performing marketing duties and attending conferences and demonstrations. 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, 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. Again, since the petitioner has failed to provide a concise and detailed description of the beneficiary's

duties, the AAO cannot conclude that he will be engaged in primarily managerial or executive tasks. Furthermore, counsel on appeal asserts that "it is expected and reasonable that an executive of a small company would be heavily involved in day-to-day matters. Based on this assertion, the AAO finds that the beneficiary must in fact be engaging primarily in non-qualifying duties in order to maintain the operation of the petitioner's business.

The petitioner has failed to establish that the beneficiary has been and will continue to be employed in a managerial or executive capacity, as required by 8 C.F.R. §214.2(l)(3)(iv). 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. 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

Beyond the findings in the previous decision, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship still exists between the petitioning entity and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has not demonstrated that a qualifying relationship still exists with a foreign entity and has not persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. Specifically, the only evidence alluding to a qualifying relationship is the allegation set forth in the petition that the foreign entity is the sole owner of the petitioner. As general evidence of a petitioner's claimed qualifying relationship, stock certificates supported by the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. As the previous decision will be affirmed, this issue need not be examined further.

In addition, while not directly addressed by the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. In this case, the petitioner submitted copies of three distributorship agreements. Two are dated June 18, 2003 and one is dated July 1, 2003. Finally, a copy of an "Insertion Order," dated July 16, 2003, is also enclosed. No further documentation is presented to support a finding that the petitioner has been doing business as defined by the regulations. However, the initial new office petition was approved in November 2002. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it had been doing business from November 2002 through July 2003. Again, as the appeal will be dismissed on other grounds, this issue need not be examined further.

SRC 03 223 50187

Page 9

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.