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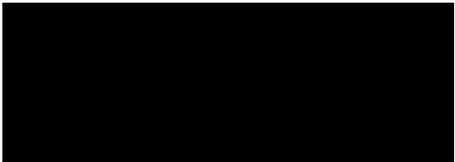
U.S. Department of Homeland Security
20 Mass. Ave, N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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File: SRC 03 030 50386 Office: TEXAS SERVICE CENTER Date: APR 28 2005

IN RE: Petitioner:
Beneficiary:



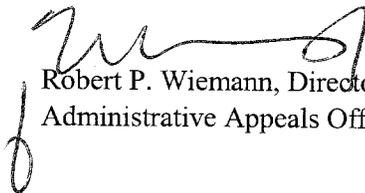
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 president/operations 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 sale of automobiles. The petitioner claims that it is the subsidiary of Ingenieria de Construccion Indeco, C.A., located in Valencia, Venezuela. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and subsequently received a two-year extension. 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 extensive documentary evidence submitted in response to the director's request for additional evidence clearly established that the beneficiary was employed in a primarily managerial or executive capacity as defined by the regulations. In support of this assertion, 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(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and

- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, the petitioner stated that the beneficiary would be acting as the president/operations manager for the U.S. entity, and stated that the beneficiary's duties would require him to "continue managing, directing, and promoting U.S. business and other related business ventures for profitability, negotiate all contracts, [and] direct advertising plans for business."

On December 16, 2002, the director requested additional evidence establishing that the beneficiary was qualified for the benefit sought. Specifically, the director requested a statement describing the staffing of the U.S. company, which clearly stated the number of employees, the exact position and education level held by each employee, a statement describing each of their job duties, and evidence of wages paid to each employee. In addition, the director requested details regarding the operation of the business, including business hours, and requested an overview of the day-to-day duties of the business supported by evidence showing who actually performed such duties.

In a response dated February 20, 2003, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. Counsel's response included a document entitled "Dealership Information," which provided the address and hours of the business as well as a list of its contractors, their educational backgrounds, their position titles, and a brief description of their duties. Counsel described the beneficiary's duties on this document as "internet duties, management, [and] customer operations." In addition, counsel provided an organizational chart for the U.S. entity as well as copies of cancelled checks evidencing the payment of miscellaneous income to its contractors.¹

On June 19, 2003 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be relieved of the everyday tasks of the organization by the other contractors hired by the petitioner. Specifically, the director noted the work schedules of each contractor, and concluded that aside from the beneficiary, there were only two other full time employees. In comparing the hours of operation of the business to the work schedules of the contractors, the director determined that it was impossible to conclude that the beneficiary would be relieved from performing everyday tasks essential to the business. Specifically, the director cited the minimal full time staff as a factor critical to this determination.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous, and that the beneficiary had been and would continue to be acting in a primarily managerial and/or executive capacity. Counsel for the petitioner also introduces new evidence establishing the petitioner's business plan for 2003-2004, and introduces an updated organizational chart with a more detailed description of the contractors' duties within the organization. Finally, counsel alleges that the petitioner now employs eight

¹ Although counsel alleges that it "employed" seven employees at the time of the petition, the record reflects that these persons were compensated as independent contractors, not employees, as evidenced by counsel's submission of each person's Form 1099-Miscellaneous Income for the year 2002.

full-time employees, which thereby warrants a conclusion that the beneficiary's services are rendered in a capacity that is primarily managerial or executive.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties, the brief statement of duties of his subordinate employees, and the payroll records which illustrate the nature of the company's staffing, it appears that the beneficiary is merely a first line supervisor. The beneficiary does not appear to be supervising other professional or supervisory employees.

Although the beneficiary is not required to supervise personnel, if it is claimed that his 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 evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that an advanced degree is actually necessary to perform the duties of the other employees listed on the organizational chart. It is presumed, however, that an advanced degree is not required for these positions in light of the minimal salary paid to these employees. In addition, the stated duties of these employees, which included washing and detailing automobiles, picking up automobiles from auction sites, and answering phones does not support a finding that these employees are professional. Since the record does not establish that the beneficiary will be supervising professional, supervisory, or managerial employees, the beneficiary has not met the definition of manager or executive under the regulatory definitions.

The director found that the small number of full time employees of the beneficiary warranted a finding that the beneficiary was obligated to perform daily, non-managerial tasks essential to the operation of the business. Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigrations Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a three-year-old company which had been doing business as an automobile dealership for approximately 11 months. The company retained three full-time contractors, namely, the beneficiary as president, a sales person, and a car detailer. It claimed to have gross sales in excess of \$464,000.00 for the seven months ended on July 31, 2002. It also employed five part-time contractors. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, administrative operations of the company. Although a car detailer and a sales person worked full-time, there is no evidence that confirms that the crucial administrative functions, such as answering telephones and providing clerical assistance, were handled by any persons on a continuous basis. There is no explanation as to the manner in which multiple customers were assisted in the event that the sole salesperson was occupied with another customer. Although it is undisputed that five part-time employees were also retained by the company, their combined schedules did not cover the operational hours of the business, and therefore indicate that the beneficiary himself was required to participate in many of the routine tasks necessary to operate the business. 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). Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

In addition, the actual description of the beneficiary's duties is vague and non-specific. Counsel on appeal states that the beneficiary's duties include "internet duties, management, and customer operations." Without providing further details, it is virtually impossible to determine the exact nature of the beneficiary's daily obligations. 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Finally, on appeal, counsel for the petitioner introduces an updated organizational chart and additional documentation which provides a more thorough description of the duties of the beneficiary and his subordinates. In addition, counsel claims that the petitioner has since hired additional full-time contractors, and thus now has a staff of eight full-time contractors to carry out the general functions of the petitioner's business. This evidence is not persuasive, because it attempts to establish that the petitioner has subsequently satisfied the regulatory requirements after the filing of the 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, an additional issue not addressed prior to adjudication was whether the petitioner and the foreign entity maintained a qualifying relationship as required by the regulations. The petitioner submitted one stock certificate, dated April 10, 1999, evidencing that the foreign entity owned 100 shares in the U.S. entity. An additional document, entitled "Stock Subscription," states that the ownership interests of the U.S. entity are held by the beneficiary and Jose Nichols. This document is dated April 8, 1999. Furthermore, Schedule K of the petitioner's 1999 and 2000 Forms 1120, U.S. Corporation Income Tax Return show that the beneficiary is the company's sole shareholder. It is uncertain, therefore, whether the foreign entity is in fact the owner. 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). For this additional reason, the petition may not be approved.

While not directly addressed by the director, the documentation of the petitioner's business operations raises the issue of whether the petitioner has been engaged in the regular, systematic, and continuous provision of goods or services in the United States as required by 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). The company apparently operated a restaurant from August 1999 to December 1999. In May 2000, the petitioner established a subsidiary to operate a flower business, which was subsequently sold in November 2001. The petitioner does not appear to have been directly doing business between January 2000 and January 2002, when it commenced operations as a car dealership. The petitioner paid wages of \$1,992 in 2000. In 2001, the petitioner reported gross sales of \$1,512 and paid no wages. In addition, the petitioner's subsidiary paid less than \$5,000 in wages in 2000 and 2001. In the absence of persuasive evidence, it cannot be concluded that the petitioner has been continuously doing business in the United States. For this additional reason, the petition may not be approved.

Finally, the petitioner noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision

of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.