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U.S. Citizenship
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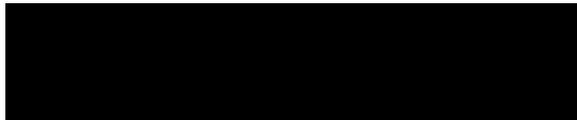
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FILE: SRC 04 036 52993 Office: TEXAS SERVICE CENTER Date: AUG 01 2005

IN RE: Petitioner:
Beneficiary:



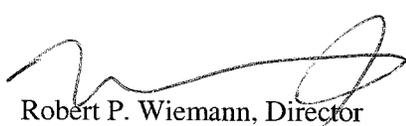
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established in 2001 and claims to be an importer and exporter of commercial painting equipment and electronic equipment. The petitioner claims to be a subsidiary of Electrogens S.A., located in Surco, Peru. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as a general manager for two years, at an annual salary of \$25,000.00. The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The beneficiary was initially granted a one-year period of stay in L-1A classification in the United States and the petitioner now seeks to extend the beneficiary's stay for another two years.

On appeal, the petitioner disagrees with the director's decision and asserts that the beneficiary's duties will be managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means 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), provides:

The term “executive capacity” means 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.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The petitioner initially stated in the petition that the petitioning entity currently employed four employees and described the beneficiary's proposed duties as:

General manager [U.S. entity]. Continue organizing the new office, direct and supervise the daily activities of the company, supervise and contract the work of the two (2) managers and two (2) employees, elaborate and develop the im[p]ort and export policies, appoint, evaluate and dismiss the employees.

In a letter dated October 11, 2003, the petitioner described the beneficiary's duties as:

Directs the management of the organization. Direct the daily activities of the company. Supervise the work of the personnel. Receives reports and supervises the work of the three departments, evaluating the performance of the divisions. (68% of his time)

Establishes the goals and policies of the organization. Supervises the operations of the International Commerce and the productions for local sales and services. (22% of his time)

Exercises wide latitude in discretionary decision making. To interpret the financial statements and appreciate the measurement of internal control. Informs the board of shareholders. Maintains the directors of the departments motivated. Other similar and complementary activities. [sic] (9% of his time)

The petitioner also stated that the beneficiary worked 40 hours and further described his job duties as general manager as: "Elaborate international marketing policies, salaries and services also, elaborate the operative budget and goals. Appoints the personnel, control and supervises the daily activities. Report the Board of Directors (Stockholders)." The letter also contained salary information and a brief job description of a company sales manager, import/export manager, executive secretary, and warehouse supervisor.

The petitioner submitted as evidence, a copy of the beneficiary's resume, the U.S. entity's organizational chart, payroll records for the period September 1, 2003 through September 5, 2003, and a company list which contained the names, salaries, titles, and duty descriptions of 13 employees. The petitioner also submitted copies of the U.S. entity's IRS Form 1120, U.S. Corporation Income Tax Return for 2002, and the first page of the U.S. entity's Form 941, Employer's Quarterly Federal Tax Return for the quarters ending March 2003, June 2003, and September 2003.

In the request for evidence, dated December 1, 2003, the director requested that the petitioner submit additional evidence by stating in part:

- If there are other employees explain what their duties are and their education background.
- Explain how the beneficiary will not engage in the day [-] to [-] day operations of the business, and he will primarily be engaged in managerial or executive duties.
- Submit copies of the Employer's State Quarterly Tax Return with all the attachments for the past two quarters. Submit proof that payments have been made to the [U.S. entity] (submit all pages)

In response to the director's request for evidence, the petitioner submitted copies of the U.S. entity's Form 941 for the quarters ending September 2003 and December 2003, which were accompanied by company checks numbered 646 and 749 respectively, and made out to the Department of the Treasury. The petitioner also submitted an employee list consisting of eight employee names along with their educational status, job description, position title, and start date. The petitioner resubmitted a list of thirteen employees along with their salaries, position titles, and job descriptions. The petitioner also resubmitted a copy of the U.S. entity's organizational chart, which listed fifteen employees.

The director determined that the record did not support a finding that the beneficiary was managing other professionals. The director also determined that the beneficiary had been and would be engaged in the day-to-day business activities of the business rather than primarily performing in a managerial or executive capacity. The director noted that the petitioner had failed to comply with the request for evidence in that the company tax records were not accompanied by any attachments. The director also noted that the petitioner had not clearly established that the employees it listed were full-time and professional employees.

On appeal, the petitioner argues that the beneficiary qualifies as a general manager and describes his job duties as:

1. The beneficiary fully manages the ... [U.S. entity]. Responsibility was granted directly by the Board of Stockholders of the company, based [on] [the beneficiary's] experience as general manager.
2. The beneficiary directly supervises the general operations manager and the international manager, and also he is in charge of evaluate, analyze and fully fulfilling the mission and vision of the company; based on the business plan of [the U.S. entity]. This demonstrate [sic] that [the beneficiary] manage[s] professional workers which is demonstrated with evidence No. 1.
3. The beneficiary ... is the only authorized person inside the company ... to take [sic] decision about the employees once the international manger has submitted the report of activities of each area of the company to him.
4. The beneficiary is considered from the point of view of general manager, since he has the capacity of taking [sic] investment decisions of the company based on the presented studies of inferior levels he manages, which are occupied by professional employees duly capacitated to carry out their jobs.

The petitioner stated in the brief that it was submitting "attachments" that were previously requested by the director. As evidence, the petitioner submitted copies of the U.S. entity's IRS Form 1096, Annual Summary and Transmittal of U.S. Information Returns for 2003, IRS Form 1099, Miscellaneous Income for 2003, and IRS Forms W-2 and W-3 for 2003.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. The petitioner stated that the beneficiary would spend 68 percent of his time directing the management of the organization. However, it fails to demonstrate in detail which of the job duties will be managerial and which will be executive. The actual duties themselves 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). The petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions, and that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Although the petitioner describes the beneficiary's duties as being managerial or executive in nature, a review of the record demonstrates that the beneficiary will continue at best to supervise non-professional employees and perform the day-to-day business activities of the organization rather than primarily performing the high-level responsibilities that are specified in the definitions.

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 directing the management of the organization, establishing goals and policies, and supervising the operations of the international commerce. The petitioner did not, however, define the beneficiary's goals, policies, or clarify what the operations of the international commerce consist of. 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). 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.* at 1103.

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as directing the entire operation of the organization, establishing goals and policies of the organization, and exercising sole discretionary decision making. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd.* at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner submits copies of the organization's Forms W-2 and W-3 and Forms 1099 for 2003 on appeal. The petitioner admits to submitting the documents as "attachments" on appeal although the director had requested the evidence in the request for evidence. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request

for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The petitioner asserts that the beneficiary is managing a subordinate staff, however, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

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 the 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, for example, to perform the clerical and administrative work of the sales manager, warehouse supervisor, and executive secretary, who are among the beneficiary's subordinates.

Further, the record contains many inconsistencies in the number of persons employed by the U.S. entity at the time the petition was filed that have not been explained by the petitioner. For example, the petitioner stated in the petition that it employed four individuals, the letter in support of the petition lists five employees, the employee list submitted by the petitioner lists thirteen employees, the company payroll records indicate that the U.S. entity employs six employees, and the quarterly reports for the quarters ending March 2003 and June 2003 indicate that the petitioner employed one employee during those periods. 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). As the

petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity, the petition may not be approved.

Beyond the decision of the director, the record reflects that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's authorized period of stay expired on August 20, 2003. However, the petition for an extension of the beneficiary's L-1A status was filed on November 20, 2003, nearly three months following the expiration of the validity of the original petition.

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary's stay in the United States is temporary. Generally, the petitioner for an L-1 nonimmigrant classification need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovich*, 18 I&N Dec. 361 (Comm. 1982). The petitioner claims that the beneficiary is a majority owner of the U.S. and foreign entities. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States. For this additional reason, 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.