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



U.S. Citizenship
and Immigration
Services

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DA



FILE: SRC 04 011 51015 Office: TEXAS SERVICE CENTER Date: **AUG 15 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)

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

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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 2002 and claims to be an importer/exporter and marketer/distributor of wholesale products. The petitioner claims to be a subsidiary of [REDACTED] S.A., located in Venezuela. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for an additional three years, at an annual salary of \$28,000.00. The director determined that the petitioner had not submitted sufficient evidence to demonstrate 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 to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

On appeal, the self-petitioner disagrees with the director's decision and asserts that it has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity in a managerial or executive capacity.

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- 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 managerial or executive capacity; and
- E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity.

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.

Initially, the petitioner described the beneficiary's proposed job duties as: "To plan, manage and supervise the company in the U.S. Establishing the company's corporate structure, developing the company's financing and marketing strategies and for managing and overseeing the company's day to day operations. Also make contacts, buy products, and establishing the Florida subsidiary as General Manager Corporations."

The petitioner submitted a list of the beneficiary's job duties and percentage of time allotted to each as:

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|---|------|
| 1. Attend and head weekly supervisors and staff meeting | 3.0 |
| 2. Review corporate, financial, and operating reports for the Venezuelan and U.S. corporations | 4.0 |
| 3. Review, coordinate, assign, and supervise the work and Procedures conducted by the Venezuelan and the U.S. corporation | 10.5 |

- | | | |
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| 4. | Prepare and submit all sales and import tax returns to Venezuelan Government for shipments received. | 3.0 |
| 5. | Coordinate, authorize, and supervise all jobs both national and International | 4.0 |
| 6. | Attend weekly Chamber of Commerce business meeting for local Business owners. | 4.5 |
| 7. | Review and authorize all corporate expenditures submitted by manager | 4.5 |
| 8. | Review and authorize international orders submitted by U.S. Corporation. | 5.5 |
| 9. | Direct and manager [sic] all miscellaneous aspects of company Administration. | 5.0 |
| 10. | Review weekly corporate expense reports and bank reconciliation statements. | 4.0 |

The petitioner submitted a chart depicting the organizational hierarchy of the U.S. entity. The chart showed that the company's general manager had an assistant and driver/dispatch under his direction.

In response to the director's Notice of Intent to Deny, the petitioner described the beneficiary's job duties in part as:

[The beneficiary's] responsibilities as president are to plan, manage and supervise the company in the United States. He will hold primary responsibility for establishing the company's corporate structure, developing the company's financing and for managing and overseeing the company's day-to-day operations (financial investments, human resources, and the assets to the company). [The beneficiary] will make contracts, buy product, and most importantly, prepare the groundwork and establish the Florida subsidiary. Also he manages at an executive level and supervises everything related with the import and export and sales department. As for the other areas like warehouse, dispatch, administration, invoicing and reception, local employees handle these....[The beneficiary] has a group of 3 employees (including [the beneficiary]) directly reporting to him. They include one assistant, one telemarketing [sic], who keeps the president's, accountants, agenda, and records in order, also they prepares [sic] forms and serves as an intermediary between the management and the clients, three international sales person[s], (by sub-contract and dependent of the Venezuelan company but report directly to [the beneficiary] who are in charge of the international commercialization of wholesale products. In addition, the managers and staff of our Venezuelan subsidiaries report to [the beneficiary]. The time percentage with the company is 60% management and 40% supervisor.

...

Functioning autonomously, [the beneficiary] establishes and promotes the standardization of technical support and service based upon our corporate model. He meets regularly with various development units to review current policies and procedures and develops appropriate plans necessary to ensure consistency of the company's development in accordance with corporate standards.

The petitioner stated that the assistant possessed a high school diploma and described her job duties as:

She is responsible for a variety of administrative and clerical duties necessary to run the organization efficiently. In addition, she serves as an information manager for the office, schedules meetings, appointments, organizes and maintains paper, and electronic files, manage projects, conducts researches, and proved information via telephone, postal mail, and e-mail. In addition, she prepares correspondence and handles travel arrangements.

The petitioner stated that the telemarketer possessed an associate degree in administration and described his job duties as: "He determines the demand of products and services offered by the firm and its competitors. In addition, he identifies potential markets...."

The petitioner submitted as evidence copies of the U.S. entity's payroll analysis covering the second, third, and fourth quarters of 2003, and IRS Form 941, Employer's Quarterly Federal Tax Return for the first and second quarters of 2003.

The director subsequently denied the petition. The director noted that the evidence failed to demonstrate that the beneficiary was managing other professionals or managers at the time the petition was filed. The director also noted that given the current structure of the U.S. entity, it appeared that the beneficiary would have to be engaged in the organization's day-to-day business activities.

On appeal, the petitioner argues that the beneficiary has two subordinates located in the United States as well as managers and staff of the foreign subsidiaries who report directly to him. The petitioner further argues that the beneficiary has autonomous control over the organization and exercises wide latitude and discretionary decision-making. On appeal, the petitioner resubmits copies of its employee job duty descriptions, company payroll analysis, and IRS Form 941, Employer's Quarterly Federal Tax Return.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been employed in a managerial or executive capacity. 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. In the instant matter, the petitioner asserts that the beneficiary spends 60 percent of his time performing management duties and 40 percent of his time supervising. The petitioner also asserts that the beneficiary manages at an executive level and supervises the import/export and sales departments. However, the petitioner has failed to provide detailed evidence to establish which percentage of the 60/40 split is actually spent performing executive duties.

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 supervising everything related with the import and export and sales departments. The petitioner did not, however, clarify who actually conducts the company sales or explain what personnel and/or activities are related to the import and export aspects of the business. 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. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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, having wide latitude over the company business decisions, 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.*, 724 F. Supp. at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner describes the beneficiary as preparing and submitting all sales and import tax returns. Since the beneficiary actually performs the bookkeeping and accounting function he is performing a task necessary to provide a service or product and this duty 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).

Although the petitioner asserts that the beneficiary is managing a subordinate staff, 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. The evidence, at best, demonstrates that the petitioner has hired two part-time non-professional subordinates to work under the beneficiary's direction. Further, there has been no evidence submitted to establish that the employees employed abroad are professional, managerial, or supervisory personnel or that they are directly supervised by the beneficiary. 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.

The petitioner has failed to reconcile the inconsistencies found in the record. For example, the U.S. entity's organization chart lists a general manager, assistant, and driver-dispatch as the company employees. However, in response to the director's notice of intent to deny the petitioner described the beneficiary not as general manager but as president, and the driver-dispatcher as a telemarketer. 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).

The petitioner indicates that it plans to hire additional managers and 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). Furthermore, 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 shown that it can employ the beneficiary in a predominantly managerial or executive position. Therefore, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that it is eligible for an extension of the initial one-year "new office" validity period. As previously noted, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not satisfied all of the enumerated evidentiary requirements. The petitioner has failed to establish that it has secured sufficient physical premises to house its office. The petitioner submitted a copy of a commercial lease agreement, which states that the agreement commences August 1, 2002 and terminates August 1, 2003. It is noted by the AAO that the petition in the instant case was filed October 15, 2003. There is nothing in the record to show that the petitioner had entered into a valid lease agreement at the time the petition was filed. In addition, the minimal documentation submitted of the U.S. entity's recent business operations raises the issue of whether the U.S. entity has been and will continue to be engaged in the regular, systematic, and continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). For these additional reasons, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp.2nd 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

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.