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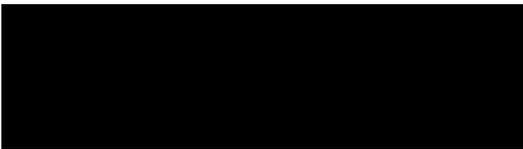
AUG 17 2005

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 general 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 primarily engaged in freight forwarding. The petitioner claims that it is the subsidiary of [REDACTED] [REDACTED] located in Cali, Colombia. The beneficiary was initially granted a three-year period of stay in the United States and the petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would 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 director erred in her finding that the beneficiary is not serving in a managerial capacity and contends that the petitioner has met its burden of proof in establishing the beneficiary's eligibility for the benefit sought. In support of this assertion, counsel submits 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.

At 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 a letter dated October 6, 2003, submitted with the initial petition, the petitioner's president describes the beneficiary's job duties as follows:

As a General Manager his services were required to institute star-up [sic] operations and business plan of our newly established U.S. subsidiary. It is critical to the success of our business plan that [the beneficiary] has the opportunity to establish the goals and standards of our U.S. subsidiary corporation Pan Express, Inc., in terms of strategic associations to create internal procedures and select qualified managerial and non-managerial personnel to coordinate the day-to-day operations of the business.

The position of General Manger of our U.S. subsidiary corporation, Pan Express, Inc., is a key position because [the beneficiary] is responsible for establishment of the standards of the corporation and perform [sic] a managerial function within the organization, direct and coordinate the corporate policies for our subsidiary company in the U.S., he also establishes the goals and policies of the company in all areas and exercises wide latitude with regard to discretionary decision. He devotes one hundred (100%) percent of his time to managerial duties.

On Form I-129, the petitioner indicated that it has four employees. The petitioner also submitted an organizational chart which depicts the beneficiary as supervising an operations manager who in turn supervises a "supervisor." The chart shows that the beneficiary reports to the petitioner's president.

On October 21, 2003, CIS issued a notice of intent to deny the petition and requested additional evidence from the petitioner. Specifically, the petitioner was asked to provide information regarding the duties and educational background of all of its other employees, if any. The petitioner was also requested to explain how the beneficiary would not engage in the day-to-day operations of the business. CIS noted that the petitioner must establish that the beneficiary will primarily be engaged in managerial or executive duties.

In response, the petitioner submitted an organizational chart, which includes a secretary position not included on the company's previous chart. The organizational chart also depicts five employees of a different company, [REDACTED] who also ultimately report to the petitioner's president. These employees include a customs broker, financial manager, operations manager, import manager and export manager, as well as a secretary who is shown to report to both companies. The chart does not, however, show that the beneficiary directly or indirectly supervises any employees of [REDACTED]

In addition to the organizational chart, the petitioner's president submitted a letter dated November 17, 2003, which identifies three other employees and their educational backgrounds. The duties of the employees were described as follows:

Operations Manager: Inspects premises of assigned area stores to ensure that adequate security exists and that physical facilities comply with safety and environmental codes and ordinances. Reviews operational records and reports, provide quote to customer, negotiates with clients. In charge of coordinating and supervise local transport in Miami such as: Bill of lading, subcontractor transports. Submit the reports required to effectively manager [sic] the research function. Supervised by the General Manager. Background: 15 years of experience in the Managerial fields.

Supervisor – Supervise and responsible for receiving merchandise loads in warehouse, report shipment conditions, deliver shipment to each land transport co. Background: 16 years of experience in the field of Administration.

Secretary – Perform secretarial duties such as: schedules appointments, gives information to callers, take dictation, relieves officials of clerical work and minor administrative and business detail. Compiles and maintains customer lists, records receipts. Background: 2 years of experience in the secretarial field.

In response to CIS's request that the petitioner explain how the beneficiary will not engage in the day-to-day operations of the business, the petitioner submitted the following statement regarding the beneficiary's duties:

As General Manager [the beneficiary] is acting as liaison between [REDACTED] and [REDACTED] Supervising other managers and professionals. Responsible for coordination and direction of activities and operations of the corporation. Responsible for implementing administrative and operational policies and procedures. Direct expansion of U.S. operations including devise plans. Coordinate with managers of other export and import departments to satisfy customer specifications. Coordinate Logistics support functions.

Kelly Freight Systems Inc. is an [sic] U.S. Corporation engaged in freight forwarding and customs brokers activities.

[The petitioner] is a subsidiary U.S. Corporation in charge of Logistics and import and export transportation in U.S. and Latinamerica [sic].

On December 3, 2003, the director denied the petition. The director determined that the petitioner had failed to establish that the beneficiary was primarily performing in a managerial or executive capacity at the time of filing. The director specifically noted that the beneficiary was not managing other professionals or managers and that, based on the current structure of the company, the record indicates that the beneficiary would be engaged in the day to day business activities of the company.

On appeal, counsel for the petitioner asserts that the petitioner submitted sufficient evidence to establish that the beneficiary supervises professionals, referring to the petitioner's letter dated November 17, 2003. Counsel also resubmits the organizational chart presented in response to CIS's notice of intent to deny the petition. On appeal, counsel asserts that the beneficiary supervises the employees of both the petitioner and [REDACTED] including an import manager, export manager, two operations managers and a supervisor, and submits the resumes of four of these employees. On appeal, the petitioner submits a letter from its president which states that the petitioner is engaged in logistics and import and export transportation in the U.S. and Latin America, which "works in connection with" [REDACTED], a company engaged in freight forwarding and customs broker activities. The letter includes a job description for the beneficiary which is nearly identical to those previously submitted, although the petitioner has added that the beneficiary "supervises and controls the work and coordinates with the Import Manager, Export Manager, Operation

Manager, Supervisor and coordinates Logistics support functions of the corporation and he has the authority to hire and fire personnel.”

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.* However, rather than providing a specific description of the beneficiary's duties, the petitioner, in its letters dated October 6, November 17 and December 15, 2003, has 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 “establishing the goals and policies of the company in all areas” and “exercising wide latitude with regard to discretionary decision.” 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. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Furthermore, the AAO notes that the petitioner also employs a president, to whom the beneficiary, as general manager, must report. Most of the duties assigned to the beneficiary appear to be those of an executive who occupies the highest position within an organization. CIS' notice of intent to deny requested that the petitioner provide a description of the duties of all of its employees; however, the petitioner did not include a description of the president's duties in its response. Accordingly, the AAO cannot determine whether the described duties are credible, or whether the petitioner has supplemented the beneficiary's job description with duties that are actually performed by its president. Doubt case on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The other duties listed in the petitioner's letters are too broad and nonspecific to convey an understanding of the beneficiary's proposed daily responsibilities. For instance, the beneficiary is described as being “responsible for coordination, direction and operations of activities of the corporation” and “directing expansion of US corporation operations including devise plans,” however, the petitioner has not provided any concrete, quantifiable examples of what specific duties are involved in “direction and operations of activities” or any specific plans devised by the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Additionally, specifics are 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*, *supra*. In this case, the petitioner has not even consistently described its business activities, which were listed as freight forwarding and customs brokering on the initial petition and on the petitioner's 2002 Form 1120, and subsequently changed to import, export and transportation in the petitioner's response to CIS' notice of intent to deny. On appeal, counsel asserts the

petitioner is a freight forwarder and the petitioner indicates that it is engaged in logistics, import and export transportation. These inconsistencies further obscure the beneficiary's already vague job description, making it impossible to even speculate as to what his responsibilities are on a daily basis. 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, supra*.

Moreover, contrary to counsel's assertions, the petitioner has not demonstrated that the beneficiary will primarily supervise a subordinate staff of professional, managerial or supervisory personnel who can relieve him from performing non-qualifying duties. See section 101(a)(44)(A)(ii) of the Act. In particular, section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics 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 a 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).

Before turning to the question of whether the beneficiary will manage a staff of professionals, the AAO must first determine who the beneficiary will actually supervise. The petitioner claimed that it had four employees at the time of filing, and the initial organizational chart submitted in October 2003 depicts the company president, the beneficiary, an operations manager and a "supervisor." The petitioner's June 30, 2003 IRS Form 941, Employer's Quarterly Federal Tax Return indicates that the company had three employees at the end of the second quarter of 2003, but does not identify them by name. In its response to the notice of intent to deny the petition, the petitioner identifies a secretary position and notes for the first time that the beneficiary liaises between the petitioner and [REDACTED] and "supervises other managers and professionals." On appeal, the petitioner states that the beneficiary actually supervises and controls the work of [REDACTED] logistics manager, export manager and operations manager, as well as the petitioner's operations manager and supervisor. However, the petitioner submits the same organizational chart, which shows no reporting lines between the beneficiary and the employees of the other organization. Although both companies appear to have the same president, there is no documentary evidence to support the petitioner's claim on appeal that the beneficiary supervises the staff of the related company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Accordingly, based upon review of the evidence provided, the AAO finds that the beneficiary supervised only two employees at the time of filing: the operations manager and the supervisor, neither of who have a

bachelor's degree. Based upon a review of the duties performed by these employees, it does not appear that either performs tasks that would require the attainment of at least a baccalaureate degree. *Matter of Sea*, 19 I&N Dec. 87 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). In addition, notwithstanding the job titles assigned to the employees, the record does not establish that either employee was acting in a managerial or supervisory capacity. Although the organizational chart shows the supervisor as reporting to the operations manager, the operations manager's job description does not include any supervisory job duties. Accordingly, the AAO cannot conclude that the beneficiary will manage professional, managerial or supervisory employees. See § 101(a)(44)(A)(ii) of the Act.

Finally, upon review of the job descriptions for the beneficiary's subordinates, the AAO cannot concur with the petitioner's assertion that the beneficiary devotes 100% of his time to managerial duties. The petitioner has not described any non-managerial duties to be performed by the beneficiary. However, it is not plausible that the operations manager and supervisor perform all of the non-qualifying operational and administrative tasks required for the company to function, thereby allowing the beneficiary to perform exclusively managerial tasks. As already discussed, the petitioner has not identified any specific duties to be performed by the beneficiary, nor has it consistently described the nature of its business. Since the AAO cannot determine what the beneficiary actually does on a daily basis, the record provides no foundation for a conclusion that he is engaged *primarily* in managerial or executive duties, much less that he is engaged exclusively in qualifying duties.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity, as required by 8 C.F.R. § 214.2(I)(3).

Beyond the decision of the director, the record does not establish that the petitioner and the foreign entity currently have a qualifying relationship pursuant to 8 C.F.R. § 214.2(I)(1)(ii)(G). The petitioner indicated on the initial petition that 51% of its stock is owned by the beneficiary's foreign employer. With the initial petition, it submitted its articles of incorporation, dated February 23, 1999, which indicate that the company is authorized to issue and have outstanding at any one time an aggregate number of 500 shares of common stock having a par value of 1.00. The petitioner also submitted its stock certificates, numbered one and two, both dated February 24, 1999. The first certificate shows that 510 shares were issued to the petitioner's claimed majority shareholder, while the second shows that 255 were issued to the same company. Both certificates indicate that the company is authorized to issue only 500 shares. Clearly, the company must have more than 500 shares of stock, but there is no documentary evidence to establish how many shares are actually authorized, how many have been issued, or who holds the remaining shares. Furthermore, the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return, indicates that no individual or corporation directly or indirectly owns more than 50% of the corporation's voting stock, which suggests that the company has no majority shareholder and therefore is not a 51%-owned subsidiary, as claimed on the petition. Finally, on appeal, counsel for the petitioner states that [REDACTED] the company president, is the owner and majority shareholder of the petitioner. As stated above, 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*, *supra*. Based on the conflicting documentation and statements, the AAO cannot

conclude that the U.S. entity maintains a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(I)(1)(ii)(G). For this additional reason, the petition will be denied.

An application or petitioner 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. 2d 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 decision of the director will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.