

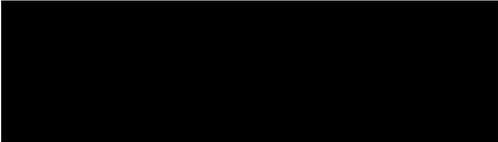
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U.S. Citizenship
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Services

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DA



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 07 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:



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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). In the alternative, the petitioner seeks to classify the beneficiary as an L-1B nonimmigrant intracompany transferee possessing specialized knowledge. The petitioner is a corporation organized in the State of California and claims to be an importer and exporter of car fasteners. The petitioner states that it is an affiliate of R.J. Auto Industries, located in India. The petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes the director's findings and requests that the AAO grant the petition to classify the beneficiary as an L-1B intracompany transferee who possesses specialized knowledge.

However, since the petition clearly indicates that the beneficiary would continue his previous employment, which was initially deemed managerial or executive, counsel's request to consider the beneficiary for classification as an L-1B intracompany transferee possessing specialized knowledge is synonymous with requesting AAO to amend the petition on appeal. As a matter of jurisdiction, such a request is not properly before the AAO.

8 C.F.R. 214.2(l)(7)(i)(C) states:

The petitioner shall file an amended petition, with fee, at the Service Center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

Therefore, the request to reconsider the original petition on appeal as a petition for L-1B classification is rejected.

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 regulations at 8 C.F.R. § 214.2(l)(3) state 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.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a 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.

In the petition, the petitioner stated that the beneficiary would be responsible for the general management of the petitioner's import and export operations; and developing the "new" office in the United States, including its operations, client development, and hiring staff. The petitioner also submitted a number of 2003 invoices signed by the beneficiary, as well as a number of purchase orders addressed to the attention of the beneficiary.

On March 10, 2003, CIS issued a request for additional evidence. The petitioner was asked to provide a copy of its organizational chart naming all of its employees and pointing out those employees that are directly under the beneficiary's supervision. The petitioner was also asked to provide a detailed description of the beneficiary's proposed duties in the United States, as well as several of its quarterly wage reports, and its employees' W-2 statements.

The petitioner's response included the following breakdown of the beneficiary's proposed duties:

- 25% Customer development
- 20% Negotiate settlements between RJ Auto Industries and domestic customers
- 10% Examine invoices and shipping manifests for conformity to tariff and customs regulations
- 15% supervise documentation of shipments to make sure they are as per procedures and regulations and as per customer satisfaction
- 10% Expedite import-export arrangements and maintain current information on import-export tariffs, licenses and restrictions
- 20% Visit customers for any negotiations or deals

The petitioner also submitted two organizational charts, one reflecting the changes in the petitioner's personnel structure as a result of selling the sales component of its business. The organization as of the date the petition was filed shows the beneficiary as the company president, a chief financial officer, an import manager, an export manager, and a secretary. In a separate description of the employees' duties, the petitioner indicated that the import manager is also the office secretary. It is further noted that even though the petitioner submitted a number of its wage statements, as well as a number of its employees' W-2

statements, such documents do not account for four out of the five positions named on the organizational chart.

On June 13, 2003, the director denied the petition noting the absence of documentation substantiating the employment of four of the employees named in the petitioner's organizational chart. The director concluded that the petitioner lacks sufficient support staff to relieve the beneficiary from having to perform non-qualifying tasks.

On appeal, counsel submits a brief statement claiming that the beneficiary fits the definitions of both the L-1A and L-1B intracompany transferee. Counsel states that during his employment abroad, the beneficiary "acquired both a deep familiarity" of the foreign entity's management processes and procedures, as well as an expert knowledge of the company's product and the techniques required to produce the product. Counsel further claims that the beneficiary is the petitioner's "primary negotiator and business developer" and indicates that the beneficiary's duties include dealing with customers and reviewing technical drawings to determine cost and feasibility. Although counsel repeatedly makes note of the beneficiary's claimed specialized knowledge, he fails to address or even acknowledge the director's valid concern regarding the petitioner's lack of supporting evidence to establish that the petitioner has a sufficient support staff to relieve the beneficiary from having to directly engage in performing non-qualifying duties.

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. 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). While the petitioner in the instant case provided a breakdown of the beneficiary's proposed list of duties, the descriptions are entirely too broad to convey to the AAO a sense of what the beneficiary would actually be doing on a daily basis in the context of the petitioner's import and export business. 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). The petitioner has indicated that one fourth of the beneficiary's time would be consumed with customer development. Without providing the specific duties that the beneficiary would actually perform, this portion of the job description suggests that the beneficiary would assist in soliciting clientele, which is primarily a sales-related function. The same list of duties indicates that the beneficiary would spend 20% of his time meeting with customers and another 20% of his time negotiating business deals with customers, both of which are duties associated with customer service personnel. Thus, the breakdown of duties indicates that 65% of the beneficiary's job requires him to perform either sales or customer service-related tasks. It is noted that 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).

In light of the petitioner's failure to provide documentary proof of its personnel structure, the AAO can only base its decision on the evidence of record, which suggests that after the petitioner sold the sales component of its business it was left with virtually no support staff to assist the beneficiary. Regardless of the claims made in the petitioner's organizational chart, 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). Since the petitioner has failed to submit any evidence to

establish who actually worked for the company at the time the petition was filed, the AAO cannot assume that individuals listed in the organizational chart are actually employed by the petitioner.

Furthermore, all of the submitted shipping documents and pro forma sales invoices are signed by the beneficiary, thereby pointing to his direct involvement with each order placed with the petitioner. If the petitioner employs both an import and an export manager as claimed, it is entirely unclear why the beneficiary is involved in such daily operational tasks as reviewing purchase orders. Neither the description of the beneficiary's proposed duties nor the documentary evidence on record support the claim that the beneficiary primarily performs managerial or executive duties. To the contrary, the record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he would otherwise be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that she operates at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record suggests that the petitioner does not have a qualifying relationship with a foreign entity. In the petition the petitioner claims to have an affiliate relationship with the foreign entity. According to the petitioner, the breakdown of ownership is such that the beneficiary owns 55% of the foreign entity and 50% of the petitioning entity. The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, in pertinent part:

Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Based on the regulatory definition, the petitioner does not fit the definition of an affiliate, as the petitioner and the foreign entities are not similarly owned and controlled. While the beneficiary clearly owns a controlling interest in the foreign entity, he owns an equal share in the U.S. entity with one other person. The petitioner has not provided any evidence to suggest that the beneficiary, in fact, controls the petitioning entity. Therefore, the record lacks evidence to establish that the beneficiary controls both entities. Where the two entities are not controlled by the same person or group of people, they cannot be deemed affiliates.

It is noted that 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. 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). As such, due to the additional grounds discussed in this paragraph, this petition cannot 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.