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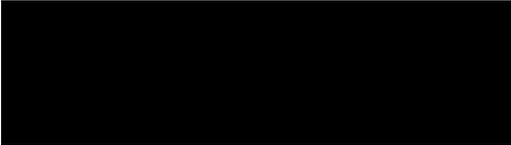
Petitioner:

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:



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). The petitioner is a corporation organized in the State of California and claims to be engaged in the sale and distribution of decorative stones. The petitioner states that it is an affiliate of ~~Ebenezer Industria Comercio, Importacao e Exportacao Ltda.~~, located in Brazil. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that: (1) the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity; and (2) the petitioner is not doing business in the United States.

On appeal, the petitioner disputes the director's findings and submits a brief along with additional documents to support the appeal.

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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) 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 (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (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 first issue in this proceeding is whether the petitioner has established that the beneficiary would 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 support of the petition, the petitioner provided the following description of the beneficiary's job duties:

As [p]resident, the applicant will be chief administrative and executive officer and shall be charged with the general supervision and management of the office and business affairs of new U.S. operations. Responsible for hiring and firing all employees and supervising managers for the respective accounting and sales departments, including fixing their duties

and compensation. Responsible for oversight of domestic and international sales, financial and administrative directors, who manage the financing, quality control and logistical aspects of sales of granite and decorative stones.

On August 29, 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. The petitioner was also asked to provide a separate list of those employees that are directly under the beneficiary's supervision and to include these employees' job titles, job duties, educational levels, and salaries or wages. Further, the director instructed the petitioner to provide its quarterly wage reports for all four quarters of 2002.

In response, the petitioner submitted a letter dated September 9, 2003 stating that the beneficiary has relied on "a network of sales agents and representatives of retail establishments" in an effort to sell the petitioner's product. The petitioner also stated that it has a commissioned sales staff that is composed of three individuals all of whom are listed on the petitioner's organizational chart and are paid on a commission basis. The petitioner indicated that it did not have sufficient funds in 2002 to pay most of its employees, but claims that its financial condition has significantly improved. The petitioner provided a number of employee pay stubs and a quarterly wage statement for the third quarter of 2003 to corroborate its claimed improvement of financial status.

On September 17, 2003, the director denied the petition noting that the evidence does not indicate that the beneficiary would manage a staff of professional, supervisory, or managerial employees and concluded that the record lacks sufficient evidence establishing that the beneficiary would primarily perform managerial or executive duties under an approved petition.

On appeal, counsel submits a brief in which he introduces the expert opinion of a Pace University professor, who expressed his belief that the beneficiary's described duties fall under the category of "managerial capacity" as statutorily defined. While the AAO acknowledges the professor's credentials and overall knowledge of marketing and business administration, the fact remains that he is neither a colleague of the beneficiary nor an employee of the petitioner. The professor's opinion is not based on first hand knowledge of the beneficiary's actual duties or the petitioner's wage statements, which indicate that as of the third quarter of 2003 only one of the three named commissioned sales representatives were being paid by the petitioner. The fact that the professor is knowledgeable in the subject of business is not indicative of his familiarity with the petitioner's organization. Therefore, the professor's opinion bears no evidentiary weight in this proceeding. 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).

Counsel also asserts that the beneficiary supervises the petitioner's international financial analyst, three sales people, and the administrative clerk. However, based on the petitioner's third quarter wage statement for 2003, the petitioner only paid wages to one out of the three sales representatives it listed in its organizational chart. While counsel further indicated that the beneficiary manages the petitioner's "outsourced relationships," such as accounting and warehousing, these employees cannot be deemed contract employees of the petitioner. Rather, the individuals that perform the required accounting and warehousing services are employed by RC Business Services and Film Logic Customs Broker, Inc., respectively. These are the two companies that actually employ the individuals who provide the desired services. The petitioner is merely the purchaser of these various services and cannot be deemed as the employer of the individuals who perform

them. Therefore, the petitioner's documentation suggests that at the time the petition was filed there were only three paid employees who could have been directly under the beneficiary's supervision and of those three individuals, only one had the educational level sufficient to be considered professional.¹

Additionally, the petitioner claims that the beneficiary "is responsible for overseeing capital investment opportunities." As an example of this task counsel states that the beneficiary proposed the purchase of an expensive piece of equipment that is used for cutting granite. However, this purchase of equipment is merely indicative of the beneficiary's use of discretionary authority to invest in equipment that will be used for the business. There is no indication that this type of investment has taken place or would take place on a regular basis such that capital investment oversight would be one of the beneficiary's daily tasks. While the petitioner has indicated that its continued financial success would lead to hiring additional personnel, 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, the regulation at 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 reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

On review, the record does not establish that a majority of the beneficiary's duties would be primarily directing the management of the organization. The petitioner has not demonstrated that the beneficiary would 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 record does not indicate that the petitioner has reached 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. While the AAO acknowledges the beneficiary's leadership role at the top of the organizational hierarchy, the record suggests that his direct involvement in the petitioner's daily operation is necessary for the organization's success. It is noted, however, 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). Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

The second issue in this proceeding is whether the petitioner has established that the U.S. entity has been doing business in the year preceding submission of the petition.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

¹ Section 101(a)(32) of the Act states that the term "profession" includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teacher of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In the supporting statement, the petitioner described itself as a seller and distributor of Brazilian granite throughout North America. In support of its claim, the petitioner submitted sales invoices from May 30, 2003 and June 2003. The petitioner also submitted a copy of its lease, and photographs of its warehouse and showroom.

In his decision, the director concluded that the petitioner is merely maintaining the presence of an office or is acting as an agent of the foreign company. The director noted that this conclusion is supported by the petitioner's 2002 tax return, which shows that the petitioner is not conducting business in the United States.

The petitioner failed to address this issue on appeal focusing, instead, on the issue of the beneficiary's duties. Based on the evidence of record at the time of the appeal, the AAO concludes that the petitioner failed to submit sufficient evidence to establish that it had been doing business for the relevant time period. Even though the essence of the petitioner's business is selling granite that has been shipped from the petitioner's foreign affiliate, the petitioner has only submitted sales invoices from May 30, 2003 and June 2003. While this clearly suggests that the petitioner was doing business in May and June of 2003, this documentation is insufficient to determine that the petitioner had been doing business for an entire year prior to filing the petition in August 2003. The AAO acknowledges the petitioner's submission of various shipping invoices, which indicate that the petitioner purchased various products from its foreign affiliate as far back as December of 2002. However, this documentation is merely an indication of the petitioner's purchase of inventory in an effort to commence doing business; the purchase of inventory does not necessarily indicate that the petitioner would immediately begin selling such inventory. Furthermore, even if the AAO were to accept the petitioner's shipping documents as conclusive proof of its doing business, the earliest shipping documents were dated December 2002. In order to establish that the petitioner had been doing business for a full year prior to filing the instant petition to extend the beneficiary's employment the petitioner would need to submit documentation dating back to August of 2002. The current evidence on record is insufficient to establish that the petitioner had been doing business for the full year prior to filing this petition. For this additional reason, 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.