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**U.S. Citizenship
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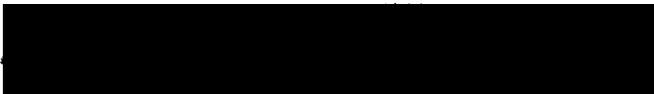
Administrative Review
INVESTIGATION SERVICE

DP
2009



File: SRC-03-193-50784 Office: TEXAS SERVICE CENTER Date:

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 Import 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 engaged in the freight forwarding business. The petitioner claims that it is the subsidiary of Ecuacargo, S.A., located in Arajuno, Ecuador. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will 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 evidence of record reflects that the beneficiary will be employed in a primarily managerial or executive capacity, particularly due to the fact that the petitioner hired two new employees since filing the petition. In support of this assertion, counsel submits a brief, additional evidence, and previously submitted documents.

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The primary 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 the initial petition submitted on July 2, 2003, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] directly supervises [the employee in charge of imports/bookings] who had University studies; In addition, [the beneficiary] also supervises outside assistance and is in charge of defining strategy, plans, and structure for her department. She is supervised directly by the General Manager. We expect to hire three more full time employees this year, two of which will be directly under [the beneficiary] [The beneficiary] is in charge of supervising the operations of the Import Department of the [petitioner].

On August 11, 2003, the director requested additional evidence. In part, the director requested: (1) a copy of the petitioner's organizational chart; (2) an explanation of how the beneficiary can act in a primarily managerial or executive capacity given the current structure of the company; (3) evidence of the petitioner's current staffing level, including position titles and duties of all employees; (4) an indication of the educational backgrounds of any professionals working for the petitioner; and (5) a description of the beneficiary's duties over the previous year, with an indication of the percentage of time she spends on each task.

In a response dated October 24, 2003, in part the petitioner submitted: (1) an organizational chart for the petitioner; (2) a statement discussing the duties of each of its employees; (3) a statement discussing the beneficiary's duties in greater detail; (4) evidence of the academic credentials of the beneficiary; and (5) evidence of the academic credentials of other employees of the petitioner, including the beneficiary's subordinates. In the statement regarding the beneficiary's duties, the petitioner provided the following:

[The beneficiary] is [r]esponsible for managing the relationship with the trade experts of outer clients. [The] [p]osition is part of [the] client integration team and responsible for timely delivery of trade content to the client. [The] [p]osition is also part of [the] content

validation team and ensures the client expectations regarding quality and compliance with international trade/customs law.

[The beneficiary] prepares import and export documents for transportation intermediary companies such as freight forwarders, steam ship lines, airlines or customs-house brokers, and commercial banks to ensure compliance with U.S. and foreign government regulations. She has knowledge of specialized legal regulations, a foreign language, international credit practices and business customs in other countries.

Duties and Responsibilities

- Manage client relationships, specifically with clients; trade experts. She spends one day a week in this matter.
- Involvement in definition of deliverables, responsible for on time delivery of trade content. Almost every day she spends one hour in this coordination.
- Responsible for validation of accuracy, completeness, and testing of trade data related to tariffs, compliance and documents.
- Identify new sources for trade data and interpret it.
- Maintenance of data integrity and implementation of processes to improve data validation and collection.
- Drive product for as far as it relates to trade features.
- Continuously demonstrating positive feedback on process involvement, product enhancements, and team interactions. She is permanently working in this matter.
- Supervises the imports and exports of the company.
- Delegate all duties, activities and responsibilities to [the employee in charge of imports/bookings], and [the employee in charge of warehousing and exports/bookings].

The percentage of time performing these duties is as follows:

- | | |
|--|-----|
| - Supervising the Import Department | 40% |
| - Supervising the Export Department | 40% |
| - Identifying new sources for trade | 10% |
| - Making plans, preparing documents | 5% |
| - Managing client/trade experts relationship, meetings | 5% |

The petitioner described the duties of the beneficiary's subordinates as follows:

General Assistant

In the accounting part of the company, she is in charge of the filing, does the invoices and sends all the payments to the suppliers. In the operational part, she does the bookings with the airlines and steamship lines, and receives the spaces for the cargo that the company

moves inside the United States. Reception of pre-alerts of cargoes coming into the States, and reports to the [beneficiary]. In charge of the reports, and statements to the customers.

Warehouse controller

Control of the warehouse. Reception of all cargo coming into the States, pre-cooling of the perishables [sic] goods if needed, labeling and inventory of the cargo. Segregation of the cargo that it will be delivered in the Miami area, and the one that it is going to be shipped to a different State. Coordination with all the trucking companies that the [petitioner] will use.

On November 26, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted apparent discrepancies in the petitioner's documentation regarding the number of individuals the petitioner employs. The director indicated that the petitioner's response to the request for evidence "states there are 6 employees while the petition states there are 4 employees." The director further noted that "the latest quarterly tax return submitted and dated 06/11/2003 shows only 1 employee." The director stated that "[t]his discrepancy leads to a lack of credibility as to the reliability of the other information contained in the file and creates doubt as to whether the beneficiary has been employed primarily in a managerial or executive capacity for the past year."

On appeal, counsel for the petitioner asserts that the evidence of record reflects that the beneficiary will be employed in a primarily managerial or executive capacity, particularly due to the fact that the petitioner hired two new employees since filing the petition. Counsel provides that "[w]hen the petition for the L-1 Visa was submitted in July 02, 2003, [the petitioner] had only four full time employees. It has since then contracted two more employees, making a total of six full time employees." Counsel further states that "[the beneficiary] is now supervising the two professionals in charge of the Import and Export Department." Counsel provides that "[t]he parent company is from Ecuador which unfortunately has had a bad political situation which made it impossible to fulfill the anticipated business that should have occurred between the foreign parent company and the [petitioner]." In support of these assertions, counsel submits a brief, educational documents for the petitioner's newly hired employees, and previously submitted documents.

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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

In the instant matter, the petitioner provides a lengthy description of the beneficiary's duties, including a general indication of the percentage of time the beneficiary devotes to five groups of tasks. The petitioner indicates that the beneficiary will spend a combined 80 percent of her time supervising the import and exports departments, each consisting of one subordinate employee. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must

establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

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 a 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 established that an advanced degree is actually necessary to perform the duties of the beneficiary's two subordinates.

The petitioner provides documentation to show that its General Assistant, who is in charge of imports/bookings, completed a bachelor's degree in business and accounting. Yet, the job description for the General Assistant shows that she performs primarily clerical tasks that do not appear to require an advanced degree absent greater explanation. For example, "she is in charge of the filing, does the invoices and sends all the payments to the suppliers. [S]he does the bookings with the airlines and steamship lines, and receives the spaces for the cargo that the company moves inside the United States." Thus, the petitioner's General Assistant is not deemed to be a professional as contemplated by section 101(a)(44)(A)(ii) of the Act. The petitioner provides documentation to show that its Warehouse Controller, who is in charge of exports/bookings, completed four semesters with a technical college. The description of the duties of the Warehouse Manager further suggests that his tasks do not require a bachelor's degree, such as receiving cargo and coordinating with trucking companies. Thus, the record reflects that he has not completed an advanced degree, and he is not a professional employee.

Nor has the petitioner shown that the beneficiary's two subordinates supervise other staff members, such that they could be deemed supervisory personnel. The petitioner has not established that the General Assistant or Warehouse Controller manage a clearly defined department or function of the petitioner, such that they could be classified as managers.

Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are supervisory, professional, or managerial. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the

beneficiary spends 80 percent of her time managing two employees that are not supervisory, professional, or managerial, the evidence of record reflects that she acts primarily as a first-line supervisor.

As provided above, the director noted apparent discrepancies in the petitioner's documentation regarding the number of individuals the petitioner employs. Upon review of the record, the AAO finds that the petitioner previously resolved the discrepancies in its documentation referenced by the director. The petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2003 indicates that the petitioner employed one individual on March 12, 2003. Yet, with the initial petition, the petitioner included IRS Form 941c, Support Statement to Correct Information, dated June 6, 2003, reflecting that it amended its Form 941 for the first quarter of 2003 to show that it employed four individuals during that period. Thus, the petitioner resolved the apparent contradiction between its Form I-129 petition and Form 941 by submitting appropriate documentation with the petition. Further, the petitioner's representation that it employs six employees was made after the date of filing the initial petition. The record reflects that the petitioner hired new employees after the filing date, thus the petitioner's statement that it employs six individuals is not in contradiction with its representation that it employed four individuals as of the date of filing. The director stated that "[t]his discrepancy leads to a lack of credibility as to the reliability of the other information contained in the file and creates doubt as to whether the beneficiary has been employed primarily in a managerial or executive capacity for the past year." The director's comment on this discrepancy and the credibility of the petitioner's representations will be withdrawn.

However, based on the foregoing, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it hired two new employees since the date of filing the petition, and it plans to hire additional employees in the future. Yet, 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). The fact that the petitioner hired two new employees since filing is not probative of whether the petitioner was eligible as of the filing date. 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 Citizenship and Immigration Services (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.

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

Beyond the decision of the director, the petitioner has failed to establish that it maintains a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(14)(ii)(A), due to the fact that it has failed to show that the foreign entity is a qualifying organization engaged in the regular, systematic, and continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). The petitioner provided numerous foreign language documents purportedly relating to the foreign entity's operations, yet the petitioner did not submit complete translations. Because the petitioner failed to submit certified translations

of the documents, the AAO cannot determine whether they support the petitioner's claim that the foreign entity is doing business. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. The petitioner provided bank statements and invoices for the foreign entity for the period from January to April 2003, yet this documentation is insufficient to establish that the foreign entity engaged in "the regular, systematic, and continuous provision of goods and/or services" for the previous year, or that the foreign entity was engaged in such business as of the time of filing the petition. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H). For this additional reason, the appeal will be dismissed.

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).

In visa 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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.