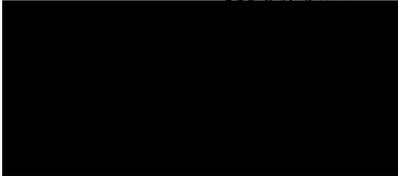


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U.S. Citizenship
and Immigration
Services

Administrative Review
of Decision



FEB 13 2005

File: SRC-01-087-53283 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.

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 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 Florida that operates a dry cleaning service. The petitioner claims that it is the subsidiary of Semavenca Semaforos de Venezuela C.A., located in Venezuela. 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 petitioner filed the petition on January 26, 2001. On June 19, 2001, the director issued a request for additional evidence. The petitioner filed a response to the request for evidence, which was received by the Texas Service Center on September 18, 2001. On November 19, 2001, the director denied the petition, erroneously noting that the petitioner failed to respond to the request for evidence. On November 26, 2001, the petitioner filed a Motion to Reconsider, together with evidence reflecting that it did respond to the request for evidence. The director granted the motion, and considered the petitioner's evidence in response to the request for evidence. The director again 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 evidence shows that the beneficiary will be employed in a primarily managerial or executive capacity. In support of this assertion, counsel submits a brief and 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.

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, on Form I-129 the petitioner indicated that the beneficiary's job duties entail the "overall management of the business." The petitioner provided no further description of the beneficiary's duties.

In the request for additional evidence dated June 19, 2001, the director requested: (1) an organizational chart for the petitioner; (2) an organizational chart for the foreign entity; (3) evidence of who is managing the foreign entity; and (4) evidence of the petitioner's staffing level in the United States, including the position titles and duties of all employees, as well as an indication of who the beneficiary is managing.

In response, the petitioner submitted: (1) a letter from counsel describing the petitioner's staffing and the management of the foreign entity; (2) a list of employees of the foreign entity; (3) an organizational chart for the foreign entity; (4) a two-year business plan for the petitioner; (5) a 2000 internal balance sheet and income statement for the petitioner; and (6) a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return. In the letter, counsel described the petitioner's staffing as follows:

As to the staffing of the [petitioner], the beneficiary is the President of the company. At this time they have one other employee who works in the sales and production area and are currently considering persons for a second position in sales and production so that it may free the beneficiary to aggressively pursue expansion plans for the business. The petitioner is currently planning to purchase additional vans to offer pick up and delivery service county-

wide and to open new stores. The [sic] expect to hire two drivers and additional sales, production persons to reach a payroll of 7 persons.

On July 8, 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 that the petitioner did not submit evidence of the beneficiary's duties with the petition. The director pointed out that the petitioner only paid its second employee \$2,000 in 2000, and stated that "[w]ith only one other employee, it is logical to conclude that the beneficiary is performing most of the day to day duties of the business." The director highlighted that the petitioner's Form I-129 indicates that it is an import and export company, while the included documentation reflects that it is operating as a dry cleaner. The director further stated that "the petitioner has not demonstrated that the beneficiary's primary assignment will be directing the management of the organization nor that the beneficiary will be primarily directing or supervising a subordinate staff of professional, managerial, or supervisory personnel, who relieve him from performing non-qualifying duties. Nor has the petitioner established that the beneficiary will primarily manage an essential function within the organization."

On appeal, counsel for the petitioner asserts that the evidence shows that the beneficiary will be employed in a primarily managerial or executive capacity. In support of this assertion, counsel submits: (1) a brief; (2) an organizational chart for the petitioner; (3) 2001 and 2002 internal balance sheets for the petitioner; (4) a mission statement for the petitioner; and (5) a document listing the petitioner's current employees and identifying their backgrounds. In the brief, counsel recites the procedural history of the present petition. Counsel asserts that "[Citizenship and Immigration Services (CIS)] incorrectly assessed the beneficiary's position as nonexecutive in nature."

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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant case, the petitioner does not clearly state whether the beneficiary will perform managerial or executive tasks. In the brief counsel refers to the position as an executive position, yet on Form 290B counsel states that the "majority of [the beneficiary's] duties are policy management oriented." Counsel further indicates that the beneficiary has supervisory authority over other employees. Thus, it appears that counsel intends to represent that the beneficiary will be primarily engaged in both managerial duties and executive duties. Therefore, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act.

Despite the director's request, the petitioner failed to provide a complete job description for the beneficiary. On appeal, the petitioner provides no clear indication as to the beneficiary's duties in the United States. 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). Further, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As provided above, the regulation at 8 C.F.R. § 214.2(1)(14)(ii)(C) requires the petitioner to submit "[a] statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition." The petitioner's failure to provide a job description for the beneficiary precludes the material line of inquiry of whether his duties are primarily managerial or executive in nature.

As evidence of the beneficiary's role within the petitioner's company, the petitioner submits an organizational chart for the U.S. entity on appeal. However, though requested by the director, the petitioner did not submit an organizational chart for the U.S. entity in response to the request for evidence. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the organizational chart for the U.S. entity to be considered, it should have submitted the document in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the organizational chart for the U.S. entity submitted on appeal.

On appeal, the petitioner further submitted 2001 and 2002 internal balance sheets, reflecting its operations in those years. The petitioner submitted a document listing its current employees that indicates that it hired two new employees since the date of filing the petition. In response to the director's request for evidence, the petitioner's prior counsel discussed the petitioner's plans for future hiring and expansion. 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). As the present petition was filed on January 26, 2001, the petitioner's 2002 internal balance sheet is not probative of the petitioner's eligibility as of the date of filing. As the 2001 internal balance sheet addresses combined financial figures for all of 2001, without separating out January, it, too, is not probative of the petitioner's eligibility on January 26, 2001. The petitioner's employee list suggests that the beneficiary supervises two new employees. However, as these employees began after the petition was filed, their employment with the petitioner does not support a finding that the beneficiary was engaged in managerial or executive duties at the time of filing the petition.

Further, the record contains a substantial inconsistency regarding the nature of the petitioner's operations. The petitioner indicated on Form I-129 that it is an import/export company. However, the petitioner submitted evidence to show that it is operating a dry cleaning service. The record contains no explanation or documentation to reflect that the petitioner is engaged in the import or export of goods. 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). Though the director noted this inconsistency, on appeal counsel has failed to address this issue. Thus, from the evidence submitted the AAO is unable to determine the exact nature of the petitioner's business, such that it can understand the true scope of the beneficiary's duties.

The record suggests that, at the time of filing the petition, the beneficiary supervised one subordinate employee. Although the beneficiary is not required to supervise personnel, if it is claimed that his 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.

Despite the director's request, the petitioner did not provide a job description for its second employee, beyond the statement that this individual "works in the sales and production area." Thus, the record lacks sufficient information for the AAO to determine whether this employee manages a department or function of the petitioner's operation, such that the employee could be deemed managerial. Further, as the record implies that this employee has no subordinates, his duties are not deemed supervisory.

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). As the petitioner has not identified the duties of its second employee, the AAO cannot determine whether his tasks require an advanced degree, such that he could be deemed a professional.

Accordingly, the petitioner has not established that the beneficiary's subordinates would be supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

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. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it has a qualifying corporate relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate

stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. The single document submitted that indicates the ownership of the petitioner is its 2000 Form 1120. This tax form reflects that the petitioner is 51% owned by the foreign entity. However, as this document is dated July 11, 2001, approximately six months after the present petition was filed, it is of limited probative value of whether the petitioner and the foreign entity possessed a qualifying relationship on the date of filing. As the petitioner provided no further documentation to show its ownership and control, the petitioner has not met its burden to show a qualifying relationship. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). Again, 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).

Further, the petitioner has not established that the foreign entity is currently doing business. The regulation at 8 C.F.R. § 214.2(l)(ii)(G)(2) reflects that, in order for an entity to be considered a qualifying organization, the petitioner must show that it:

Is or will be doing business (engaging in international trade is not required) as an employer in the United States and at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee

The regulation at 8 C.F.R. § 214.2(l)(ii)(H) defines the term "doing business" as:

[T]he 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.

The petitioner submitted numerous untranslated documents pertaining to the foreign company. If translated, these documents may shed light on the operation of the foreign company. However, because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *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. Thus, the record is insufficient to show that the foreign entity is doing business, such that it can be deemed a qualifying organization.

Therefore, the petitioner has not established that it possesses a qualifying corporate relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). 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.