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U.S. Citizenship  
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File: SRC 04 068 50097

Office: TEXAS SERVICE CENTER

Date: JUL 11 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 production 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 under the laws of the State of Florida and is engaged in providing oil change and car wash services. The petitioner claims that it is the subsidiary of [REDACTED] located in La Plata, Argentina. 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.

Upon initial review of the matter, the director sent the petitioner a request for additional evidence on January 15, 2004. Specifically, the director requested the following: (1) the duties and educational backgrounds of the petitioner's employees; (2) an explanation on how the beneficiary will primarily be performing managerial or executive duties and how he will not be engaged in the day-to-day business operations of the petitioner; (3) copies of the last two quarters of the petitioner's State Quarterly Tax Returns with all attachments; (4) the petitioner's 940 EZ Employers Annual Federal Unemployment Tax Return; (5) the petitioner's 2001 and 2002 U.S. Corporate Federal Income Tax Returns; (6) as proof of ownership, stock certificates issued for the petitioner's 1,000 shares; (7) the foreign entity's 2002 Argentinean Corporate Federal Income Tax Return; (8) current utility bills for the foreign entity; (9) the foreign entity's current sales invoices and purchase agreements; and (10) other evidence of the qualifying relationship between the petitioner and the foreign entity.

In response, the petitioner submitted the following: (1) a list of the petitioner's current employees, including their job titles and educational backgrounds; (2) brief job descriptions for the petitioner's three alleged managerial employees, including the beneficiary; (3) copies of the previously submitted State and Federal Quarterly Tax Returns for quarters ending June 30, 2003 and September 30, 2003; (4) the petitioner's 2001 U.S. Income Tax Return for an S Corporation; (5) the petitioner's 2001 Florida Corporate Income Tax Return; (6) a 2000 statement of assets and liabilities for the petitioner; (7) a stock certificate showing 800 shares issued to the foreign entity; (8) Spanish language documents, which appear to be the foreign entity's 2002 financial statement as well as a few of its utility bills and invoices from 2003.

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 beneficiary "is not involved in the actual day[-]to[-]day work of the car wash[h]" and that he "direct[s] all the functions of the business." Besides a one page brief, the petitioner did not submit any additional evidence in support of this assertion.

Upon review and for the reasons discussed herein, counsel's assertions are not persuasive and, thus, the AAO will dismiss the appeal.

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 managerial 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.

On reviewing the petition and the evidence, the petitioner has not established 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). 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.

On review, the petitioner has provided vague and nonspecific descriptions of the beneficiary's duties that fail to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "managing, organiz[ing], coordinat[ing], and executi[ng] all the production functions," "assisting the [g]eneral [m]anager in all matters pertaining to production," and "[d]esign[ing] and implement[ing] the production and control system." The petitioner did not, however, define or provide any detailed specifics on what production functions or control systems the beneficiary will manage. 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)). 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).

In addition, the petitioner describes the beneficiary as being responsible for "[m]aintain[ing] an updated and effective system of records," ensuring "the quality control of every vehicle," "schedul[ing] the orders of all sup[p]lies and materials [and for] maintain[ing] the products supply inventory levels," and "[s]urvey[ing] customers and their needs to later assist with advertising campaign[s] and all marketing efforts." As the beneficiary actually maintains records, performs quality control checks, orders supplies, checks inventory, and assists with advertising and marketing, he is performing tasks necessary to provide a service or product and these duties will not be considered managerial or executive in nature. 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).

While performing tasks necessary to produce a product or service in itself will not disqualify the beneficiary from being eligible for L-1A status, the petitioner still has the burden of establishing that the beneficiary spends the majority of his time performing managerial or executive duties and not non-qualifying duties. In this case, however, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial or non-executive. As discussed above, the petitioner lists some of the beneficiary's duties, albeit vague and unspecific, as being managerial, but it fails to quantify the time the beneficiary spends on them. Absent a breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Moreover, while the petitioner asserts that the beneficiary is managing subordinate personnel, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. In this case, although the petitioner claims in its letter dated January 31, 2004 that two managers, the lube manager<sup>1</sup> and detailing manager, report directly to the beneficiary, beyond the managerial titles given to these two positions, it does not appear that either position is managerial or supervisory. Specifically, in describing the job duties of the lube manager and the detailing manager, the petitioner never states that either position supervises or manages any subordinate personnel. In addition, the petitioner's January 31, 2004 list of employees does not indicate any type of management structure or hierarchy that would place these two "managerial" positions above any others. Thus, absent evidence of any actual subordinate supervisory or managerial employees, the beneficiary can only be regarded as being a first-line supervisor, which will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Furthermore, as the beneficiary appears to be primarily supervising a staff of non-professional employees, i.e., automotive technicians and car washers with at most a high school education, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

It should be noted that, counsel for the petitioner claims on appeal that the beneficiary "is not involved in the actual day[-]to[-]day work of the car wash[h]" and that he "direct[s] all the functions of the business." However, these statements contradict those made previously by the petitioner. Specifically, on the Supplement to Form I-129, the petitioner states that the beneficiary will "[a]ssist[] the [g]eneral [m]anager in all matters pertaining [to] production" and will "report to the [g]eneral [m]anager." In addition, as discussed above, many of the beneficiary's duties appear to be tasks necessary to provide a service or product. Thus, based on these earlier statements by the petitioner, it appears the beneficiary *will* be involved in the day-to-day operations of the car wash but, as he will be under the direct supervision of the general manager, it appears he will not direct all the functions of the business. To complicate the issue further, however, the list of employees, dated January 31, 2004, does not include any general manager position. Regardless, 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).

Finally, it should also be noted for the record that, according to the quarterly tax documents for the period ending September 30, 2003, the beneficiary was only paid between \$521.46 and \$1600.08 for the entire 13-week period. First, the petitioner has failed to explain why there are two quarterly tax documents for the same period, which give different salary amounts. Second, even if the \$1600.08 salary is deemed credible, it would appear the beneficiary's services were only required on a part-time basis; otherwise, he would have

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<sup>1</sup> While it is possible that the lube manager named in the January 31, 2004 list of employees was hired shortly before the petition was filed, the petitioner did not submit any evidence that it ever employed this individual. Again, 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

been paid at most \$3.08 per hour, well below the federal and state minimum wage of \$5.15 at that time. Therefore, despite the petitioner's claims on Form I-129 that the beneficiary would be needed on a full-time basis and be paid \$550.00 per week, the AAO is left to further question the petitioner's ability to support a managerial or executive capacity position. *See also* 8 C.F.R. § 214.2(l)(3)(v)(C).

Overall, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Previous counsel for the petitioner states in its letter dated January 6, 2004 that "[the petitioner] needs additional time to further develop its corporate, organizational and financial objectives, expand its staff, and achieve targeted market penetration and profitability." 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). 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 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).

Beyond the decision of the director, the petitioner did not establish that it had a qualifying relationship with the foreign entity at the time the petition was filed on January 8, 2004. Specifically, in response to the director's request for evidence regarding the foreign entity's business operations, the petitioner only submitted some Spanish language documents, which appear to be the foreign entity's 2002 financial statement as well as a few of its utility bills and invoices from 2003. Due to the petitioner's failure to submit certified translations of these documents, the AAO cannot determine whether the evidence supports the petitioner's claims regarding the business activities of the foreign entity. *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. This evidence is critical, as it may have established that the foreign entity continued to do business, which is an essential element of the qualifying relationship test. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested, translated evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). For this additional reason, the petition will not be approved.

Moreover, with regard to the ownership of the U.S. entity, the petitioner asserts that it is a subsidiary of the foreign company, which owns 80% of its stock. In support of this assertion and in response to the director's request, the petitioner submitted a stock certificate that indicates that 800 of the 1,000 authorized shares were issued to the foreign entity on January 4, 2001. As part of its supporting evidence, however, the petitioner also submitted a copy of its 2001 U.S. Income Tax Return for an S Corporation (Form 1120S). To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See Internal*

Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation owns it in any part.

In addition, the petitioner indicated on Form 1120S that 100% of its shares are owned by [REDACTED]. While it is possible that Ms. [REDACTED] indirectly owned 100% of the petitioner, Schedule K-1 clearly requests information on the company's shareholders and not indirect owners. This conflicting information regarding the ownership of the shares of the U.S. entity has not been resolved. Again, 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). Accordingly, as the AAO cannot determine the ownership of the U.S. entity based on the evidence of record, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity. For this additional reason, the petition may not be approved.

Furthermore, the petitioner has also failed to provide evidence that it has been doing business for one year prior to the date the petition was filed on January 8, 2004. *See* 8 C.F.R. § 214.2(I)(14)(ii)(B). In particular, the petitioner only submitted invoices that date back to March 21, 2003, not January 2003. In addition, according to the documents submitted, it appears that a major part of the petitioner's business operations, its oil change services, did not commence until November 2003, less than three months prior to when the present petition was filed. As previously discussed, 8 C.F.R. § 214.2(I)(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. For this additional reason, the petition may not be approved.

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

**ORDER:** The appeal is dismissed.