



U.S. Citizenship
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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: JUN 01 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

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DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED], endeavors to classify the beneficiary as a nonimmigrant manager or executive 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 claims to be an affiliate of [REDACTED] located in Egypt. The petitioner is engaged in the used car sales and services business. The initial petition was approved to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's president. The petitioner was incorporated in the State of Louisiana on June 18, 2001 and claims to have seven employees.

On January 27, 2003, the director denied the petition and determined that the petitioner had not established that the beneficiary will be primarily performing duties in an executive or managerial capacity.

On appeal, the petitioner's counsel states that the beneficiary is "employed in a managerial and/or executive capacity."

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

In relevant part, 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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act 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 issue in this proceeding is whether the beneficiary will be primarily performing managerial or executive duties for the United States entity. 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.

On December 11, 2002, the petitioner filed Form I-129. In a December 2, 2002 supporting letter signed by the beneficiary, the beneficiary's duties are described as:

[D]irect the management of the entire organization which will include supervising the work of all other employees. [A]uthority over all personnel actions, including hiring and firing employees. [E]xercise discretion over the day-to-day operations of the entire organization and establish the goals and policies of the organization. [A]uthority to exercise wide latitude in discretionary decision-making.

On January 10, 2003, the director requested additional evidence. In particular, the director requested a list of all the U.S. entity's employees, their job titles, and their job responsibilities. The director also requested evidence of the petitioner's payroll and tax payments.

In response to the request for additional evidence, the petitioner submitted a description of the beneficiary's subordinates' duties, the U.S. entity's organizational chart, and a copy of the petitioner's 2001 U.S. Corporation Short-Form Income Tax Return. The beneficiary's subordinates were identified as a mechanic, sales man and office clerk, two painters, and three body men. The petitioner submitted copies of Form W-2, Wage and Tax Statement as evidence of wages paid to eight employees in 2002. Four of the employees, the mechanic, a painter, and two body men, received wages of less than \$500 for the year. In addition the petitioner further described the beneficiary's duties as:

[The beneficiary] serves as manager of both divisions. He has the authority to make all personnel decisions including the hiring and firing of the automotive maintenance and sales staff, and he exercises discretion over the day-to-day operations of the both divisions such as directing and coordinating activities relating to the acquisition of automobiles and automotive equipment.

* * *

As President and co-owner of a small company, [the beneficiary], also performs the duties of an executive. [The beneficiary] establishes the goals and policies of the company by analyzing financial and sales data for determinations of resource allocation and expansion and by reviewing and assessing other investment expansion opportunities. He has the authority to exercise wide latitude in these

and other discretionary decision-making areas, and receives little if any direction from the other co-owner. [The beneficiary] is able to spend a majority of his time performing these operational responsibilities because of the staff he has assembled.

On January 27, 2003, the director denied the petition. The director determined that the petitioner had not established that the beneficiary will be primarily performing duties in a managerial or executive capacity. The director found that the beneficiary is “not managing persons employed in a professional capacity” and that “he will be engaged in the day-to-day operations of the business.”

On appeal, counsel states that the beneficiary is “employed in a managerial and/or executive capacity,” that his job duties “fall directly in line with the definition of an executive,” and that he “manages an essential function within the organization.” Counsel also claims that the beneficiary manages a managerial employee and asserts that the fact that he doesn’t manage professional employees does not disqualify him from being classified as a manager or executive.

In examining the executive or managerial capacity of the beneficiary, the AAO will look to the description of the beneficiary’s U.S. job duties to determine whether the beneficiary is primarily acting in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). In this matter, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing that the beneficiary is both an executive and a manager.

On review, the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner has provided a vague and nonspecific description of the beneficiary’s duties that fails to establish what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary’s duties include “exercis[ing] discretion over the day-to-day operations of the entire organization” and “establish[ing] the goals and policies of the organization.” However, these duties are generalities that fail to enumerate any concrete goals or policies that the beneficiary will establish or how the beneficiary will exercise discretion. 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)).

Further, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B). For instance, the petitioner depicted the beneficiary as having the “authority to exercise wide latitude in discretionary decision-making.” However, conclusory assertions regarding the beneficiary’s employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y.

1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner claims the beneficiary's U.S. duties include tasks such as "analyzing financial and sales data." However, the record does not indicate who actually prepares the sales and financial data. Therefore, although the beneficiary claims to analyze this data, it must be evident from the record that the beneficiary does not perform the tasks that he has been assigned to analyze or oversee. 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).

Moreover, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel. On appeal, counsel claims that the director erred by claiming that "because [the beneficiary] is not managing persons employed in a professional capacity he must be engaged in the day-to-day operations of the business." Counsel states that the beneficiary "is not managing professional employees, the beneficiary is managing a managerial employee." The U.S. organizational chart indicates that the beneficiary is in charge of a mechanic and a salesman/office clerk. The mechanic has two painters and three body men under his supervision. Counsel in his January 20, 2003 letter claims that the mechanic "runs the service division" and is "the first-line supervisor." However, counsel also claims that the mechanic is "responsible for the general repairs of the automobiles" and that "several other employees assist [the mechanic], depending on the type and volume of work needed." This description indicates that the mechanic is not acting as a first-line supervisory employee but rather working in conjunction with the painters and body men on repairing automobiles. Furthermore, the employee identified as the mechanic received only \$350 in wages in 2002, significantly less than some of the employees he purportedly supervises. Overall, the evidence raises questions regarding the mechanic's supervisory authority and his actual contributions to the organization. Therefore, the beneficiary, at most, would be acting as a first-line supervisor. 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 professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Counsel concedes that none of the beneficiary's subordinates are professionals.

Additionally, counsel claims, "[E]ven if [the beneficiary] was not supervising a managerial employee, he still manages both divisions [service and sales divisions] of the organization so again, the provision of a first line supervisor does not apply to him because he manages an essential function within the organization." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In the instant matter, it is

unclear what the beneficiary's vital function is other than that the petitioner claims he will manage the sales and service divisions of the company. However, to allow the broad application of the term "essential function" to include such broad claims, without identifying a specific function, would render the term meaningless. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, counsel claims that the director failed to take into account the reasonable needs of the organization. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. Based on the wages paid to the petitioner's claimed employees, the U.S. company appears to have only two full-time employees which are the beneficiary and the salesman. Therefore, if the beneficiary and the salesman are the only full-time employees working for the company, the AAO is not persuaded that the beneficiary does not primarily perform non-qualifying duties for the company. Thus, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Finally, 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. At the time of filing, the petitioner had not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. After careful consideration of the evidence, the AAO must conclude that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Another issue in this proceeding, not raised by the director, is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner claims that it is an affiliate of the foreign entity and that both companies are owned and controlled by the beneficiary and [REDACTED] Attia in the same proportions." As evidence of the U.S. entity's ownership, the petitioner provided a copy of the minutes of the first meeting of the board of directors dated June 14, 2001, indicating that 500 shares of stock were issued to each of the above-named individuals. The only documentation provided regarding the ownership of the foreign company is a copy of the company's registration with the Egyptian Ministry of Trade and Supplies, on which the beneficiary and [REDACTED] are named as partners. These documents are insufficient to establish that the companies share common ownership and control by the same two individuals in

equal proportions. 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)). Furthermore, the petitioner's 2001 Form 1120-A, U.S. Corporation Short-Form Income Tax Return and 2001 Louisiana Income Tax Return indicate that the beneficiary owns 100 percent of the petitioner's stock. 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). In addition, the petitioner submitted no evidence to establish that the foreign entity will continue to do business during the beneficiary's stay in the United States. Based on the above, the petitioner has not established that it maintains a qualifying relationship with the foreign entity. For this additional reason, the appeal will be dismissed.

In addition, the petitioner indicates that the beneficiary is the sole owner of both companies. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

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). For this additional reason, the petition may not 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.