

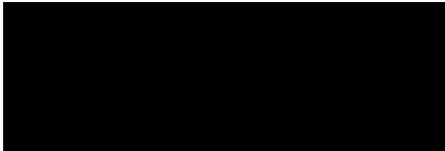
**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

D 7

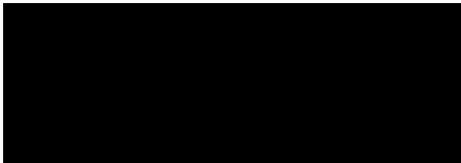


File: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUN 01 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

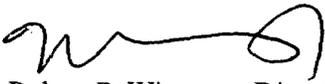
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 Texas that operates a poultry farm. The petitioner claims that it is the subsidiary of [REDACTED] located in Caracas, 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 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 will be employed in a primarily managerial or executive capacity, and that the director erroneously relied on the petitioner's small staff size in denying the petition. In support of these assertions, counsel submits a brief.

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 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 November 28, 2003, on Form I-129 the petitioner stated that the beneficiary will "[e]stablish and organize the business, purchase land, negotiate contracts, hire and train workers, [and] operate the [petitioner's] poultry farm profitably."

On January 14, 2004, the director requested additional evidence. In part, the director instructed the petitioner as follows:

If there are other employees explain what their duties are and their education background.

Explain how the beneficiary will not engage in the day to day operations of the business, and he will primarily be engaged in managerial or executive duties.

Submit copies of the Employer's State Quarterly Tax Return with all the attachments for the past two quarters

Submit 940 EZ Employers Annual Federal Unemployment Tax Return for [the petitioner].

In a response dated April 2, 2004, the petitioner indicated that it employs one individual in addition to the beneficiary in the position of "worker." The worker's duties include various tasks associated with operating the petitioner's poultry farm, such as adjusting water and feed lines, picking up dead chickens, and cleaning an incinerator. The petitioner further described the beneficiary's duties as follows:

[The beneficiary] is responsible for the management of the farm. This entails: (1) administrative duties, (2) supervising and coordinating the activities of farm laborers; (3) keeping farm functioning according to Pilgrims' standards; (4) and maintaining equipment and facilities on poultry farm.

Duties	Time %
1. Administration management duties. This includes: developing and monitoring budget, expenses, status of supplies and mortality control	19%
2. Training, coordinating, and supervising activities of farm workers	25%
3. Responsible for appropriate functioning of equipment and for maintenance of farm facilities. This includes causing the service provider to fix or adjust the equipment, monitoring the maintenance service company (Acker Poultry Supply)	16%
4. Meeting with Pilgrims' technical representative (three times a week)	13%
5. Meeting with the Dallas Complex Manager of Pilgrim's [sic] (twice a month)	5%
6. Meeting with the Poultry Association in Pittsburgh, TX (once a month)	3%
7. Adjust computers and equipment according to weather conditions	7%
8. Research weather forecast	1%
9. Researching on poultry issues and keeping aware of production trends and state-of-the-art production techniques	11%

On April 20, 2004, 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 stated that "[t]he petitioner has not established that the beneficiary will not engage in the day to day operations of the business." The director provided that "[t]he record does not support a finding that the [beneficiary] will be supervising [a] subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties."

On appeal, counsel asserts that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel provides that "because the [petitioner's] business is essentially automated, the day-to-day operations are run by computers and machines, not by the beneficiary." Counsel states that the director erroneously relied on the petitioner's small staff size in denying the petition. Counsel asserts that "the regulations do not require the beneficiary to manage other managers or professionals." Counsel states that "a beneficiary may qualify as an intracompany transferee in a managerial capacity if he or she supervises a function, and not necessary [sic] other people." Counsel states that the beneficiary satisfies the requirements of an executive, and that "implementation of corporate functions directed [by the beneficiary] may be carried out by agents and contractors." Counsel cites a memorandum from ██████████ Associate Commissioner of the former Immigration and Naturalization Service and an unpublished AAO decision to stand for the proposition that a beneficiary is not required to supervise subordinates in order to qualify as a manager or executive.

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, counsel asserts that the beneficiary qualifies as both a manager and an executive. To sustain an assertion that the beneficiary will be primarily employed in both capacities, 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. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The job descriptions provided for the beneficiary do not establish that he will be employed in a primarily managerial or executive capacity. The beneficiary's duties include many non-qualifying tasks. For example, the petitioner stated that the beneficiary will be "[r]esponsible for appropriate functioning of equipment and for maintenance of farm facilities." Though the petitioner indicated that the beneficiary will "caus[e] the service provider to fix or adjust the equipment" and "[monitor] the maintenance service company," the job description reflects that the beneficiary will personally inspect the equipment of the farm, which is a non-qualifying task. The petitioner provided that the beneficiary will "[a]djust computers and equipment according to weather conditions," which is not a managerial or executive duty. The petitioner stated that the beneficiary will "[r]esearch weather forecast[s]," yet this does not constitute a qualifying task. The petitioner indicated that the beneficiary will devote a combined 24 percent of his time to these non-managerial and non-executive duties.

The petitioner provided that the beneficiary will be responsible for "developing and monitoring budget, expenses, status of supplies and mortality control." However, these tasks are described with brief and vague language, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. 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). The actual duties themselves reveal the true nature of the employment. *Id.* While the petitioner stated that the beneficiary will devote 19 percent of his time to these duties, the provided descriptions do not allow the AAO to determine the actual tasks that the beneficiary will perform within this category, such that they can be classified as managerial or executive in nature.

The petitioner stated that the beneficiary will devote 25 percent of his time to "[t]raining, coordinating, and supervising activities of farm workers." However, the petitioner has failed to document that it employs any workers other than the beneficiary. The petitioner claims that it employs a worker. In her request for evidence, the director requested "copies of the [petitioner's] Employer's State Quarterly Tax Return with all the attachments for the past two quarters" and a copy of the petitioner's "[Form] 940 EZ Employers Annual Federal Unemployment Tax Return." Yet, the petitioner failed to submit these documents that would have reflected its staffing during the covered periods. 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). The petitioner has provided no other independent documentation to support that it employs additional workers. 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)). Thus, the petitioner has failed to show that the beneficiary in fact "[trains], coordinate[es], and supervise[es] activities of farm workers." Therefore, the petitioner's statement that the beneficiary devotes 25 percent of his time to these duties is not deemed an accurate account of his true tasks.

Accordingly, as much as 68 percent of the beneficiary's time has not been shown to be devoted to managerial or executive duties. Thus, the job descriptions fail to establish that the beneficiary will be primarily employed in a managerial or executive capacity. See 8 C.F.R. § 214.2(l)(3)(ii).

Counsel cites a memorandum from [REDACTED] Associate Commissioner of the former Immigration and Naturalization Service and an unpublished AAO decision to stand for the proposition that a beneficiary is not required to supervise subordinates in order to qualify as a manager or executive. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the cited matter. 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. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Yet, counsel correctly observes that a company's size alone may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). 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.

In the instant matter, the petitioner operates a poultry farm. Thus, it is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive tasks such as feeding chickens, cleaning chicken houses and disposing of waste, operating and cleaning an incinerator, preparing and administering medication to chickens, monitoring farm equipment, placing orders for goods, tracking the petitioner's inventory of supplies, managing a checking account and paying bills, receiving deliveries, and conducting purchase and sales transactions. As the beneficiary is the sole documented employee of the

petitioner, the evidence of record reflects that he must perform all of these non-qualifying tasks. While the petitioner states that machines and computers perform the day-to-day tasks of the farm, it has failed to adequately explain how the above duties do not require substantial human involvement. 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. Thus, the reasonable needs of the petitioner suggest that the beneficiary must spend a significant amount of time performing the tasks necessary to provide the petitioner's products. 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). The petitioner has failed to establish that these non-managerial and non-executive tasks do not constitute the majority of the beneficiary's time. See 8 C.F.R. § 214.2(l)(3)(ii).

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. As noted above, 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 established that it has 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)(ii). For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(1)(ii)(G), as the petitioner has failed to establish 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 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) requires the petitioner to submit "[e]vidence that the United States and foreign entities are still qualifying organizations." In her request for evidence, the director

requested "sale invoices, utility bills, etc... to show the foreign company is currently conducting business." The petitioner submitted invoices that were all dated after the date of filing the petition. 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 foreign entity's invoices dated after the date of filing are not probative of the petitioner's eligibility as of the filing date. The petitioner provided an untranslated document as evidence of the foreign entity's business activity. Because the petitioner failed to submit a certified translation of the document, 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.

The only evidence the petitioner submitted to show that the foreign entity continues to do business consists of an agreement, dated June 23, 2003, under which the American Embassy in Caracas sought to establish prices for various hardware to be purchased from the foreign entity. Yet, the agreement does not create contractual obligations for the Embassy to purchase from the foreign entity, and the petitioner submitted no documentation that hardware was actually purchased pursuant to the agreement. Thus, this document does not serve as sufficient evidence that the foreign entity was engaged in "the regular, systematic, and continuous provision of goods and/or services." See 8 C.F.R. § 214.2(l)(ii)(H). The petitioner has failed to show that the foreign entity is a qualifying organization. See 8 C.F.R. § 214.2(l)(ii)(G)(2).

It is further noted that counsel's statement that "the company ownership and relationships remain the same, so I have not submitted anything additional regarding those details" is not sufficient to establish the claimed parent-subsidiary relationship. The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) requires the petitioner to submit evidence to show that it and the foreign entity still qualifying organizations. The petitioner has failed to meet this burden. Accordingly, the petitioner has not established that it has a qualifying relationship with the foreign entity. See 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 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.