

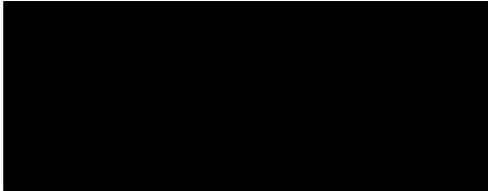
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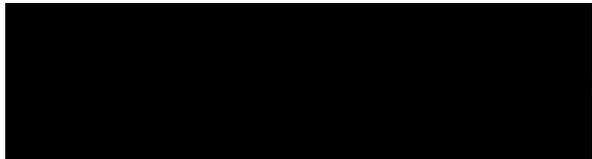


File: EAC-02-220-51827 Office: VERMONT SERVICE CENTER Date: JUN 16 2005

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, Vermont Service Center, denied the petition for a nonimmigrant visa. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the director's decision to deny the petition. The matter is now before the AAO on motion to reconsider. The motion will be granted, and the AAO's previous decision will be affirmed.

The petitioner, a Brazilian company, filed this nonimmigrant petition seeking to extend the employment of its U.S. subsidiary's Chief Executive Officer 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 U.S. entity is a corporation organized in the State of New Jersey that indicates it is a manufacturer's representative and wholesale retail business. The beneficiary was initially approved for L-1 status in the United States to open a new office from June 16, 1999 to May 28, 2000. Citizenship and Immigration Services (CIS) subsequently approved a petition for an extension of the beneficiary's status from May 28, 2000 to May 28, 2002. The petitioner now seeks to extend the beneficiary's stay for an additional two-year period.

On November 19, 2002, 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. On December 20, 2002, the petitioner filed a motion to reconsider, asserting that the director erroneously faulted the petitioner for not fully responding to a prior request for evidence. Also on December 20, 2002, the petitioner filed a Form I-290B appeal, asserting that it fully complied with the director's request for evidence, and that the petition should be approved. On April 4, 2003, the director granted the motion to reconsider, and again denied the petition. On September 10, 2003, the AAO dismissed the appeal, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner now submits a motion to reconsider the AAO's dismissal, asserting that the AAO applied an erroneous interpretation of law. In support of this assertion, counsel for the petitioner submits a brief and copies of documents previously entered into the record.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In dismissing the appeal, the AAO discussed the petitioner's burden regarding the beneficiary's employment capacity as follows:

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner 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.* In this instance, counsel's January 16, 2003 brief asserts that the beneficiary will be serving as a manager and an executive; therefore, the petitioner

must demonstrate that the beneficiary's responsibilities will meet the requirements of each capacity.

(Emphasis in original.) In discussing the beneficiary's claimed subordinates, the AAO stated that "the staff whom the beneficiary oversees fails to qualify as managerial. In turn, the lack of supervised managerial staff precludes CIS from classifying the beneficiary as a manager."

On motion, counsel for the petitioner asserts that "[t]he AAO erred in imposing a requirement in this case that the petitioner demonstrate that the beneficiary's responsibilities will meet the requirements of both the executive *and* the managerial capacity." (Emphasis in original.) Counsel stated that:

The petitioner has the burden of proof that the beneficiary's duties are of a managerial or executive capacity. [The regulation at 8 C.F.R. § 214.2(l)(3)(ii)] does *not* place upon a petitioner the burden of *indicating* whether the duties are of a managerial or executive nature as those terms are defined in the Immigration and Nationality Act.

\* \* \*

[N]owhere is [CIS] authorized to require the petitioner to "demonstrate that the beneficiary's responsibilities will meet the requirements of *each* capacity."

\* \* \*

[CIS] must consider the evidence presented concerning [the beneficiary's] duties against both the statutory "managerial capacity" requirements of section 101(a)(44)(A) of the Act and the "executive capacity" requirements [of] section 101(a)(44)(B) of the Act and grant the petition if the evidence submitted meets either standard.

(Emphasis in original.) Counsel further asserts that the AAO overlooked evidence of the beneficiary's job duties, particularly a letter from the petitioner, dated January 13, 2003. Counsel states that the petitioner submitted "each and every item requested" in the director's prior request for evidence. Counsel provides that the AAO erred in finding that the beneficiary does not supervise managerial staff.

Upon review, counsel's assertions regarding the AAO's prior application of law are persuasive. 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. In part, the beneficiary must seek to enter the United States temporarily to assume employment in a managerial, executive, or specialized knowledge 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.

To establish that the beneficiary is employed in a managerial capacity, the petitioner must show that the beneficiary's duties meet each of the four criteria listed in sections 101(a)(44)(A)(i), (ii), (iii), and (iv) of the Act. The petitioner must further establish that the beneficiary will be primarily engaged with such duties. Section 101(a)(44)(A) of the Act. That is, the petitioner must show that more than 50 percent of the beneficiary's time will be devoted to managerial tasks. *Id.* Further, to establish that the beneficiary is employed in an executive capacity, the petitioner must show that the beneficiary's duties meet each of the four criteria listed in sections 101(a)(44)(B)(i), (ii), (iii), and (iv) of the Act. The petitioner must further establish that the beneficiary will be primarily engaged with such duties. Section 101(a)(44)(B) of the Act. That is, the petitioner must show that more than 50 percent of the beneficiary's time will be devoted to executive tasks. *Id.*

Contrary to the AAO's statement of law in dismissing the appeal, the petitioner may employ the beneficiary in both a managerial and executive capacity. However, the Act does not permit the petitioner to claim that the beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. As noted by the AAO, the petitioner claims that the beneficiary will be employed in both a

managerial and executive capacity. To sustain such an assertion, 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. The plain meaning of the Act cannot be interpreted otherwise. Yet, contrary to the AAO's prior suggestion, the petitioner may still establish eligibility for L-1A classification even if it fails to show that the beneficiary satisfies the requirements of both section 101(a)(44)(A) and (B) of the Act, so long as the petitioner shows that the beneficiary will be primarily employed in one or the other capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The AAO further suggested that the beneficiary must supervise other managers in order to be deemed a managerial employee. However, the beneficiary is not required to supervise personnel in order to establish that he will be employed in a managerial capacity. *See* section 101(a)(44)(A)(iii) of the Act. Yet, if it is claimed that a portion of his time is devoted to supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial in order to qualify the time spent overseeing them as acting in a managerial capacity. *See* § 101(a)(44)(A)(ii) of the Act. If the petitioner fails to show that the beneficiary's subordinates are supervisory, professional, or managerial, the time the beneficiary invests in supervising them will not be deemed time devoted to managerial duties under section 101(a)(44)(A) of the Act.

Based on the foregoing, counsel has established that the AAO's decision included an incorrect application of law, and the motion to reconsider will be granted. The petition will be reconsidered, as discussed below.

Upon review, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel claims that the petitioner responded fully to the director's request for evidence of August 1, 2002. In the request, in part the director instructed the petitioner to "[s]ubmit a more detailed description of the beneficiary's duties in the U.S." and to "indicate [the] percentage of time spent in each of the listed duties." In the petitioner's response dated October 22, 2002, the petitioner provided a job description for the beneficiary and merely stated that "[o]ne hundred percent of the time was devoted to his executive and managerial duties." Thus, the petitioner failed to provide a complete response to the director's request. Yet, in a subsequent letter dated January 13, 2003, provided on motion and on appeal, the petitioner submitted a breakdown of the percentage of time the beneficiary will devote to his respective duties. Additionally, in the present motion counsel provides a breakdown of the beneficiary's duties in his brief, and asserts that the director and AAO erroneously disregarded the petitioner's January 13, 2003 letter.

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 Obaigbena*, 19 I&N Dec.

533 (BIA 1988). If the petitioner had wanted the breakdown of the beneficiary's duties to be considered, it should have submitted it in response to the director's request for evidence. *Id.* Though the AAO previously considered the detailed breakdown of the beneficiary's duties in dismissing the appeal, it need not have done so. Under the circumstances, the AAO need not and does not consider the sufficiency of the detailed job description in the present proceeding. The instant motion will be adjudicated based on the record of proceeding before the director.

As noted above, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but failed to quantify the time the beneficiary would spend on them. This failure of documentation is important because many of the beneficiary's stated duties are too vague to determine whether they fall under traditional managerial duties as defined in the statute. For example, the petitioner states that the beneficiary will "[p]lan business objectives," "[e]stablish responsibilities and procedures for attaining objectives," and "[g]enerate a number of different approaches to problems." Yet, these general statements do not provide an understanding of what actual tasks the beneficiary will perform on a daily basis. Thus, while some of the beneficiary's duties appear to be managerial, the AAO cannot determine whether managerial or executive responsibilities would occupy the majority of the beneficiary's time.

Counsel asserts that the AAO failed to consider the entirety of the petitioner's statements when finding that the beneficiary's subordinate, Carla Oliveria, is not a managerial employee. However, in the initial petition the petitioner clearly stated that it employed the beneficiary, two salesmen, and a secretary at the time of filing. The petitioner's New Jersey State Quarterly filing for the first quarter of 2002 does not show that Carla Oliveria was an employee during the covered period. Accordingly, the petitioner's evidence shows that Carla Oliveria was hired as general manager after the date of filing. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The fact that a general manager was hired after the petition was filed is not probative of the petitioner's eligibility or the beneficiary's employment capacity as of the filing date.

In the petitioner's letter of January 13, 2003, it indicated that its secretary previously performed some of the duties of the general manager, including supervising the two salesmen. However, the petitioner failed to adequately explain what duties the secretary performed. The evidence of record is unclear as to whether she devoted the majority of her time to supervisory duties, such that she can be deemed a supervisory employee. Therefore, the AAO's prior determination regarding the employment capacity of the beneficiary's subordinates will not be disturbed.

Nevertheless, even if the petitioner had established that the beneficiary will supervise a managerial or supervisory subordinate, the petitioner has failed to show that such supervisory responsibility will consume the majority of the beneficiary's time.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the prior decision of the AAO will not be disturbed and the appeal will be dismissed.

Beyond the decision of the director, the petitioner has submitted inconsistent documentation regarding whether it has a qualifying relationship with the beneficiary's foreign employer. On the initial petition, the petitioner indicated that it is the subsidiary of the beneficiary's foreign employer, as the foreign entity owns 100 percent of the petitioner's outstanding stock. The petitioner submitted copies of a stock certificate, a company resolution, and a stock transfer ledger that reflect that the foreign entity acquired 200 shares of the petitioner's stock on April 20, 1999. Yet, the petitioner's 2001 IRS Form 1120, U.S. Corporate Income Tax Return, and the petitioner's 2001 New Jersey State tax return both state 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). The petitioner has not explained whether its 2001 tax returns contain errors, or whether the beneficiary acquired the petitioner's stock on some date after April 20, 1999. 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).

Finally, it should be noted for the record that, unless CIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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. The petitioner has not met this burden. Accordingly, the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The decision of the AAO dated September 10, 2003 is affirmed.