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U.S. Citizenship
and Immigration
Services

D7



File: SRC 03 168 50169 Office: TEXAS SERVICE CENTER Date: JUN 28 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

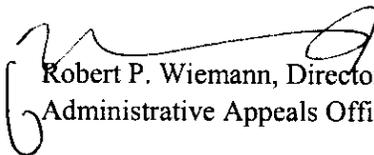
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 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 petitioner is a corporation organized in the State of Florida that is engaged in the business of exporting construction, building, and swimming pool supplies. The petitioner claims that it is the wholly owned subsidiary of [REDACTED] located in Fusagasuga, Colombia. 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 failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director erred in her decision as a matter of law as well as in her review of the job duties of the beneficiary.

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 issue in the present matter is whether the beneficiary would 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 a letter dated May 27, 2003 accompanying the Form I-129, Petition for a Nonimmigrant Worker, counsel for the petitioner described the beneficiary's job duties as follows:

The Beneficiary's job duties in the United States for the Petitioner continue to be managerial. The Beneficiary maintains overall responsibility over the marketing, billing, services, and customer relations for the Petitioner's product. She oversees contract negotiations with commercial enterprises and independent contractors who provide products and shipping; she oversees all advertising in the U.S., and is generally responsible for the all [sic] functions of the Petitioner's business. The Beneficiary has the authority to disburse funds. The Beneficiary basically manages functions of the Petitioner critical to its success.

On July 12, 2003, the director requested additional evidence. Specifically, the director requested an explanation of how the beneficiary would not engage in the day-to-day operation of the business and how she would meet the regulatory requirements for being employed in a managerial or executive capacity. The director also requested copies of the petitioner's (1) Employer's State Quarterly Tax Return for the most recent two quarters, (2) Form 940 EZ Employer's Annual Federal Unemployment Tax Return, and (3) proof that payments to the Internal Revenue Service have been made. A description of the duties and educational background of employees other than the beneficiary was also requested.

In response, counsel for the petitioner submitted its state and federal quarterly tax returns for the first two quarters of 2003, evidence showing that federal tax payments for 2003 were made, and a sworn affidavit from the beneficiary. The beneficiary stated in the "affidavit"¹ that her "primary functions are to manage the

¹ Although the beneficiary signed the "affidavit," she did not do so before a notary public. According to the Florida Supreme Court, as the "affidavit was not notarized and as it does not contain the phrase "[u]nder penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true,"

enterprise, implement the strategic goals and objectives of the company by preparing the budget, raising working capital, as well as negotiate contracts, oversee design, marketing, promotion and delivery of the company's products and services." The beneficiary also described the following as her job duties:

- Oversee and supervise the accountants, attorneys and building consultants.
- Prepare contracts, budgets, and building plans for specific projects; discuss, review, and finalize these matters with the input and advice from each professional.
- Review payroll and process the information for filing by the accountant.
- Review accounts payable to ensure timely payment to vendors and review the company's budget to set credit limits with vendors.
- Research strategies to approach additional investors.
- Hire and fire employees and set employment and personnel policies and procedures.
- Directly supervise the three subordinate employees in their roles in management, as well as supervise independent contractors performing pool maintenance and weekly service.

The beneficiary stated in the "affidavit" that she has three employees under her direction and control: (1) a business administrator whose function is to manage and coordinate the everyday activities; (2) a bookkeeper whose job is to open the mail, make bank deposits, reconcile the bank account, and ensure the computers are functioning; and (3) a purchasing manager whose role is to plan, manage, organize, coordinate, supervise and evaluate the programs of the purchasing division.

On October 27, 2003, the director denied the petition. The director determined that the petitioner has not established that at the time of filing, the beneficiary is primarily performing in a managerial or executive capacity. The director noted that the beneficiary is not managing other professionals or managers. The director further noted that while the petitioner claims that it employs private contractors, it has not been established that the beneficiary uses contractors to perform the majority of the day-to-day activities of the company. Therefore, the director concluded that given the current structure of the company, the beneficiary would have to engage in non-qualifying day-to-day business activities of the company.

On appeal, counsel for the petitioner argues that the director's decision is "overly restrictive" in its interpretation of the regulations. Counsel reiterates at length the applicable statutory provisions relating to the terms "executive," "managerial," and "specialized knowledge," and cites to various unpublished AAO decisions. Counsel asserts that the beneficiary's duties are managerial and/or executive in nature, and that the director erred as a matter of law as well as in her review of the beneficiary's job duties.

Upon review, counsel's assertions are not persuasive. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial and what proportion would be non-managerial. The description of the beneficiary's duties, as provided by the petitioner and the beneficiary,

it cannot be considered to be a proper affidavit or sworn and verified document. See *State v. Shearer*, 617 So. 2d (Fla. App. 5 Dist. 1993).

include both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "prepar[ing] contracts, budgets, and building plans for specific projects," and "research strategies to approach additional investors" do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is *primarily* performing the duties of a manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel claims on appeal that the beneficiary does not "primarily perform the [day-to-day] tasks" of the company, but instead, "oversees the essential functions" of the petitioner. Similarly, the beneficiary stated in her "affidavit" that she "oversee[s] design, marketing, promotion and delivery of the company's products and services." However, the evidence submitted does not indicate that the beneficiary's three subordinate employees, or any other persons, actually perform the functions that the beneficiary claims to oversee. Thus, either the beneficiary herself is performing the "design, marketing, promotion and delivery of the company's products and services" or she does not actually manage these functions as claimed. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary herself is performing the design, marketing, promotion and delivery of the company's products and services, the AAO notes that 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 of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel also claims that the petitioner uses independent contractors to perform the routine services of the company. However, as the director noted, while the petitioner claims that it employs independent contractors, the petitioner has not presented evidence to document the existence of these employees. Additionally, the petitioner has not documented how the services of the independent contractors obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel refers to an unpublished decision involving an employee of [REDACTED] where the AAO determined that the beneficiary met the requirements of serving in a managerial or executive capacity for L-1 classification as a sole employee who directs and controls the petitioner's major functions through independent contractors. Counsel also cites to other unpublished decisions of the AAO relating to the size of an organization's staff and asserts that the director's statements are "violative of established case law." The AAO notes that while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all employees of the Citizenship and Immigration Services (CIS) in the administration of the Act, unpublished decisions are not similarly binding. Moreover, it is noted that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the [REDACTED] matter, or any of the other unpublished decisions referenced in counsel's brief. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

The AAO also concurs with the director that the petitioner has not established that the beneficiary's subordinate employees are supervisory, professional, or managerial. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not provided sufficient details relating to the positions of the beneficiary's subordinates to establish that an advanced degree is actually necessary to perform their duties.² Nor has the petitioner shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The AAO notes that in its letter accompanying the Form I-129, the petitioner indicates that it plans to hire additional employees in the future. 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.

² The AAO notes that the petitioner did submit a copy of the job description for the purchasing manager in response to the director's request for further evidence. However, that document does not indicate that an advanced degree is necessary for the performance of that job. There is no information in the record relating to the job requirements and job duties for the positions of business administrator and bookkeeper other than the brief descriptions in the beneficiary's "affidavit," which do not indicate any educational requirements for those positions.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity, as required by 8 C.F.R. § 214.2(1)(3).

Beyond the decision of the director, the record contains insufficient evidence to establish a qualifying relationship between the foreign entity and the U.S. entity. Significantly, there appears to be conflicting information in the record regarding the foreign entity's ownership of shares in the U.S. entity. The petitioner stated on the Form I-129, filed on May 29, 2003, that the foreign entity owns 80,000 shares of common stock, constituting 100% of the outstanding shares, in the U.S. entity. However, a letter signed by the beneficiary as acting general manager of the foreign entity, dated April 25, 2003, indicated that the foreign entity holds "100,000 shares (100% of the outstanding shares)" of the U.S. entity. 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. at 591-92. Absent sufficient consistent information regarding the ownership of the U.S. entity, the AAO cannot conclude that there is a qualifying relationship between the foreign entity and the U.S. entity. 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 to deny the petition will be affirmed and the appeal will be dismissed.

ORDER: The appeal is dismissed.