

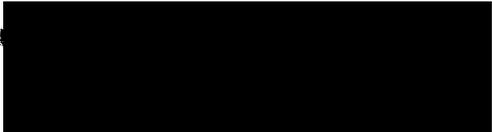
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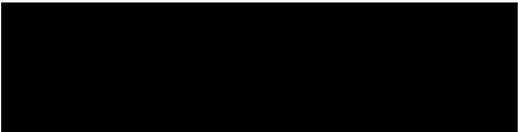


File: SRC 03 226 51713 Office: TEXAS SERVICE CENTER Date: **MAY 11 2005**

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

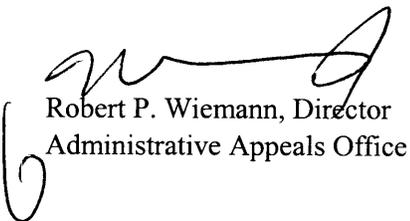
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida that is engaged in the export and sale of diesel injection parts and equipment and the provision of kitchen exhaust system cleaning services. The petitioner claims that it is the subsidiary of T.R. Diesel Inyeccion, C.A., located in Valencia, Venezuela. The beneficiary was initially granted a one-year period of stay and subsequently granted a two-year extension. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

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, the petitioner alleges that the beneficiary's duties are in fact managerial in nature, and in support of this contention, the petitioner submits a brief and additional evidence.

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 primary issue in this 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.

With the initial petition, counsel for the petitioner submitted the following description of the beneficiary's job duties:

- a. Made the sales contracts with the customers.
- b. Coordinate date and time of each service.
- c. Give instruction to supervisor.
- d. Buy supplies.
- e. Report to Vice- president.

The director found this list to be insufficient to establish that the beneficiary was acting in a primarily managerial or executive capacity. Consequently, the director issued a request for additional evidence on September 18, 2003. In the request, the director requested a definitive statement regarding the U.S. employment of the beneficiary, including the percentage of time he spent on each duty, a description of duties for the beneficiary’s co-workers and subordinates, and the qualifications for such positions.

In a response dated December 11, 2003, counsel submitted a letter from the petitioner dated December 4, 2003, which presented the following description of the beneficiary’s position.

<b>LIST OF DUTIES &amp; PERCENTAGE OF TIME IN EACH DUTY</b>		<b>HRS/WEEK</b>	<b>%</b>
1-	PLANNING THE SALES AND CREDIT POLICY STRATEGIES.	04	10
2-	DIRECT THE SALES PROMOTIONS AND COLLECTIONS.	10	25
3-	MANAGES & DIRECTS CUSTOMER SERVICE ACTIVITIES.	10	25
4-	MANAGING & PLANNING OF ALL PRODUCTIVE MATERIAL.	02	5
5-	MANAGES ALL IMPORT & EXPORT PURCHASES.	08	20
6-	MANAGES THE OFFICE ADMINISTRATION AND ACCOUNTING	04	10
7-	REVIEW OF SERVICE CONTRACTS BETWEEN COMPANIES AND LIABILITY & WORKERS COMP INSURANCE WITH OUR LEGAL ADVISOR.	02	5
8-	ANALIZE [sic] AND DISCUSS ALL THE ACCOUNTING FIGURES INCLUDING PROFIT LOSS STATEMENTS [sic] AND TAXES WITH OUR ACCOUNTING OFFICE.	02	5
		<u>40</u>	<u>100</u>

In addition, counsel indicated that three employees reported to the beneficiary; namely, a sales and service supervisor and two service technicians. Neither position required a bachelor's degree as a prerequisite to holding the position.

On March 19, 2004 the director denied the petition. The director determined that the evidence in the record, despite the petitioner’s detailed response to the request for evidence, failed to establish that the beneficiary functioned at a senior level within the organization. Specifically, the director concluded that the evidence was insufficient to show that the beneficiary supervised professional managerial or supervisory employees or that he was primarily engaged in managerial or executive activities. Finally, the director concluded that based on the evidence presented, the beneficiary was not supervising professional, supervisory, or managerial employees.

On appeal, the petitioner submits a lengthy statement, which addresses the regulatory definitions individually in relation to the beneficiary's qualifications. In addition, the petitioner submits an entirely new breakdown of the beneficiary's proposed duties, which dramatically differs from the one submitted in response to the request for evidence.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the organizational structure under which he was intended to function, it appears that the beneficiary will not be acting in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Whether the beneficiary is a manager 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 claims that the beneficiary's duties are exclusively managerial and executive, yet the list of duties provided in response to the director's request for evidence includes a significant number of non-executive tasks. For example, the petitioner states that the beneficiary spends the majority of his time "directing the sales promotions and collections" of the company (25%) and "manag[ing] & direct[ing] customer service activities" (25%). In addition, the beneficiary's duties also included buying supplies, coordinating the date and time of each service, and making sales contracts with customers. Furthermore, the beneficiary is also charged with "manag[ing] all import and export purchases" (20%), and the AAO notes that no other employee is delegated with this task. Clearly, the beneficiary is performing client-related services that will create a basis for marketing the petitioner's product in the United States. 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).

In the appeal brief, the petitioner summarizes the regulatory definition of both managerial and executive capacity in an attempt to demonstrate the executive nature of the beneficiary's duties. The petitioner concludes that the beneficiary's duties are qualifying, and refers to a newly submitted statement of duties. There are two problems with these assertions. First, although the petitioner concludes that the beneficiary is employed in a capacity that is primarily managerial and executive, there is no independent evidence to support this claim. In fact, the petitioner's statements regarding the beneficiary's duties on appeal appear to heavily paraphrase the regulatory definition of "executive capacity." 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.). The actual duties themselves reveal the true nature of the employment. *Fedin Bros.*, 724 F. Supp. at 1108.

Second, the new statement of duties for the beneficiary which is submitted with the appeal brief is almost completely different than the statement submitted in response to the request for evidence. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must

establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). For this reason, the newly submitted evidence will not be considered.

Since by definition, it does not appear the statement of duties provided qualifies the beneficiary for the benefit sought, the AAO will alternatively look for the beneficiary's qualifications as a supervisor in a managerial capacity. The petitioner claims that the beneficiary supervises the other employees in the U.S. company. Although the beneficiary is not required to supervise personnel, if it is claimed that his 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.

The qualifications of each position were provided by the petitioner in response to the request for evidence. With regard to the service technicians, a minimum of three years of experience in the field was required. The sales and service supervisor position required knowledge of industrial safety equipment usage and regulations. However, no baccalaureate-level educational degrees were listed as requirements for the positions of the beneficiary's subordinates, such that they could be classified as professionals. 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.

Finally on appeal, counsel alleges that the director erred by evaluating the size and operational status of the petitioner in determining whether the beneficiary was employed in a capacity that was primarily managerial or executive. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, 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). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

The AAO notes that the petitioner relies heavily on *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D. Ga. 1988), in support of the premise that the director erred in examining the size of the petitioning entity in reaching the decision. However, counsel fails to recognize or discuss the subsequent holding in *Systronics*, which, as discussed above, permits CIS to examine an entity's size in relation to the reasonable needs of the entity. Consequently, counsel's reliance on *Mars Jewelers* is misplaced and will not be considered for purposes of this analysis. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the

reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. For this 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 director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.