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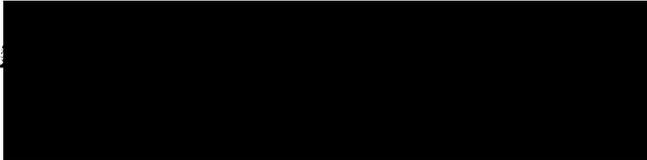
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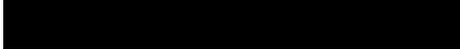


U.S. Citizenship
and Immigration
Services

D 7



File: SRC 03 097 51650 Office: TEXAS SERVICE CENTER Date: **MAY 11 2005**

IN RE: Petitioner: 
Beneficiary: 

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 Georgia that is engaged in the sale and distribution of farm equipment parts, as well as construction and renovation services. The petitioner claims that it is the subsidiary of Agropecuaria Comercial Nebraska, Ltda., located in Tolima, 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 did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the director erred in law and fact, and that the beneficiary was in fact acting in a primarily managerial or executive capacity. Furthermore, counsel infers that the denial was erroneously based on the number of employees retained by the petitioner. In support of these contentions, counsel submits a brief and additional evidence for consideration.

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 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.

In the initial petition, counsel submitted a letter dated February 13, 2003 from the petitioner detailing the nature of the beneficiary's duties. Specifically, the petitioner stated:

[The beneficiary] will continue to perform in a managerial capacity similar in level to the positions she was responsible for carrying out in Colombia, exercising wide authority over the day-to-day financial activities of the U.S. business. Specifically, [the beneficiary] will continue to be responsible for duties at an even more senior level as General Manager, reporting only to the Executive Board of the U.S. company. Her duties include hiring and firing, training and evaluation of staff, development of new business, and the negotiation of contracts with suppliers and purchasers.

In this managerial assignment, [the beneficiary] will also continue to be responsible for investigating new business opportunities in the Atlanta market, and will report to the Board. She will look at financial projections, due diligence reports, and other applicable documents prior to advising the company members about investment in new business or in joint ventures. Correspondingly, [the beneficiary] will manage the renovation and construction contracts from the referral stage through to project completion. The company presently has several sub-contractors with [REDACTED] which she manages in addition to coordinating scheduling to meet deadlines.

Furthermore, she will continue to direct the distribution process from the U.S. side, from the time that an order comes in to the time that it is shipped to the customer, and she will continue to manage all customer service issues, including adjustments, credit, and returns. Finally, [the beneficiary] will perform the management duties associated with implementing

the company's marketing plan, including advertising by print and internet media, to ensure the continued success of the company in the U.S. market.

On May 21, 2003, the director requested additional evidence pertaining to the nature of the beneficiary's position. In addition, the director requested documentation in support of the fact that the petitioner was doing business as defined by the regulations.

In a response dated August 18, 2003, the petitioner, through counsel, submitted a detailed response to all of the points raised by the director, and provided extensive documentary evidence in support thereof. With respect to the organizational structure of the U.S. entity, counsel stated that the beneficiary, as general manager, supervised one subordinate employee, namely, the marketing manager. Counsel further stated that the marketing manager in turn supervised a marketing assistant. In total, counsel asserted, the petitioner employed three persons, including the beneficiary, in addition to eight to eleven contractors. Next, counsel stated that the beneficiary "directs the activities of two or three supervisors, who in turn each have a team of up to three laborers." Finally, counsel stated that since the U.S. petitioner is not currently distributing goods, the beneficiary is in charge of directing customer service activities.

On September 12, 2003, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, found that the beneficiary's stated duties were not those of a bona fide executive, and thus were not primarily managerial or executive in nature. Given the current structure of the petitioner's staff, the director concluded that the beneficiary was performing the necessary day-to-day activities essential to the continued operation of the business.

On appeal, counsel asserts that the director erroneously concluded that the beneficiary's proposed duties did not meet the regulatory definitions of managerial or executive capacity. Specifically, counsel contends that "[CIS] has erroneously assumed that simply because a Manager could engage in the day-to-day operations that the beneficiary will engage in such activities, though there is no evidence to suggest that the beneficiary does in fact do so." Counsel continues by setting forth four distinct arguments: (1) the number of employees the beneficiary manages is not dispositive of whether or not the position is managerial; (2) the director provided an erroneous standard for adjudicating the petition by confusing the definitions of managerial and executive capacity; (3) the director overlooked the continued growth and overall mission of the U.S. company; and (4) the director's conclusion that the beneficiary would engage in day-to-day activities is unsupported by evidence. The AAO will address each of these points in the discussion below.

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(1)(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 burden is on the petitioner to specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

As previously stated, the initial description of the beneficiary's duties was insufficient. Consequently, the director requested additional details regarding the beneficiary's duties and the percentage of time spent on

each duty. The petitioner's response further clarified the beneficiary's proposed duties, and explained that the beneficiary would devote a large portion of her time overseeing the other employees of the company. The response further indicated that the beneficiary would be performing customer service duties since the petitioner was not currently distributing goods. The petitioner failed to provide a breakdown in terms of the percentage of time she would devote to each duty.

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. In this case, counsel alleges that the beneficiary is a manager by virtue of her position title and associated duties. However, the stated duties identified in the record do not substantiate the claims of the petitioner and counsel for two reasons. First, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial and non-executive. Although the petitioner provided an updated overview of the beneficiary's duties while in the U.S., it failed to provide a breakdown of the percentage of time spent on each of the identified duties. Consequently, it is impossible to determine, based on the current record, how much time the beneficiary will allocate to executive or managerial duties as opposed to the non-qualifying duties. The failure to provide this requested information is important because several of the beneficiary's daily tasks, such as "visiting and inspecting sites," "manag[ing] all customer service issues," and implementing the petitioner's marketing plan by placing advertisements in the media and via the internet do not fall directly under traditional managerial duties as defined in the regulations. Despite the director's request for a breakdown of the beneficiary's time spent on each duty, the petitioner failed to provide such a breakdown. 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).¹

Additionally, it appears that the beneficiary is directly responsible for generating the services of the business, since visiting and inspecting sites and handling customer services issues are essential services needed to establish a company's reputation in the industry and since, by the petitioner's own admission, there are no goods currently being distributed, the customer service element of this company must be the main source of revenue and prosperity for the petitioner. Therefore, absent evidence to the contrary, the beneficiary is directly responsible for generating the petitioner's business and potential sales and, thus, is personally ensuring that the petitioner's product and/or services penetrate the U.S. market. 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

¹ The petitioner also states that the beneficiary "manages finances" for the company. However, the record indicates that the petitioner has rendered payment to Service Expenses, Inc., an outside company, for bookkeeping expenses. This evidence contradicts the petitioner's claim that the beneficiary handles the finances of the company. 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). 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. *Id.* at 591.

(Comm. 1988). Counsel on appeal alleges that CIS erred in concluding that the beneficiary would be performing routine tasks associated with the business operations, and specifically stated that no such evidence existed to support this finding. The AAO respectfully notes that counsel's own admissions, both prior to adjudication and on appeal, admit that the beneficiary engages in non-qualifying tasks. With no evidence to contradict these admissions, the AAO rejects this argument.

Counsel further alleges that the director's decision was focused exclusively on the small staff employed by the petitioner, and that contrary to the director's decision, the small number of employees is not dispositive of whether the beneficiary's position is managerial or executive. The AAO disagrees. Although a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying classification as a multinational manager or executive, 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* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C); *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. *See id.*

As required by section 101(a)(44)(C) of the Act, 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. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties, such as performing marketing duties and customer service tasks. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. Again, since the petitioner has failed to provide a concise and detailed description of the percentage of time devoted by the beneficiary to each of her duties, the AAO cannot conclude that she will be engaged in primarily managerial or executive tasks, or alternatively, whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). The burden is on the petitioner to clearly establish that the beneficiary qualifies as a manager or executive.

Counsel further alleges that CIS overlooked the petitioning entity as a whole, and failed to take into account the duties of all employees named in the record. At the time the petition was filed, however, the petitioner

only employed one other employee in addition to the beneficiary. Although the petitioner alleges that numerous subcontractors work for the company, and the petitioner has since hired other employees and will continue to do so, these assertions are misplaced and unpersuasive. 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 did not reach the point where it could employ the beneficiary in a predominantly managerial or executive position by the end of this one-year period.

Finally, counsel asserts that the director erroneously applied the standard for executive capacity to the analysis in reaching the decision in this matter. The policy of CIS is to afford the petitioner the greatest chance to conform to the required criteria. Consequently, CIS will routinely examine the beneficiary's duties for compliance under both the definition of managerial capacity and executive capacity, in an effort to ensure that all possible options have been afforded to the petitioner. This standard yields no prejudice to the petitioner or the beneficiary, and consequently, counsel's arguments based on this practice are without merit.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties are primarily managerial or executive in nature. For this reason, the petition may not be approved.

Beyond the decision of the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. In this case, the petitioner admits that it is not currently distributing goods. No further documentation is presented to rebuke this claim, nor is there any additional documentation which would establish that the petitioner has in fact been doing business as defined by the regulations. Again, as the appeal will be dismissed on other grounds, this issue need not be examined further.

In addition, while not directly addressed by the director, the record reflects that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's authorized period of stay expired on February 15, 2003. However, the petition for an extension of the beneficiary's L-1A status was filed on February 18, 2003, three days following the expiration of the beneficiary's status. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed, it is noted for the record that the beneficiary is ineligible for an extension of stay 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).

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.