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U.S. Citizenship
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Services

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File: [Redacted] Office: TEXAS SERVICE CENTER Date: MAY 19 2015

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

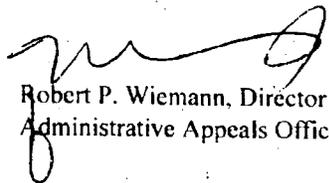
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration
and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 employ the beneficiary as its Chief Executive Officer/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 import and export of medical devices and equipment. The petitioner claims that it is the subsidiary of [REDACTED], located in Brazil. The beneficiary is currently employed by the petitioner in H-1B status, and the petitioner seeks to change his status to L-1A and extend his stay for a three-year period.

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 possesses extensive managerial and executive skills, and his duties will require managing subordinates who will carry out the day-to-day operations of the petitioner. In support of these assertions, counsel submits a statement, additional evidence, and a previously submitted document.

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 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 a letter submitted with the initial petition on November 28, 2003, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] will provide the proper and necessary guidance that is essential to the development and expansion of the company's operations. He will oversee the company's entire business development, including financial, marketing, and distribution operations. He will guide and lead other members of management, and will plan, develop, and establish policies and objectives to increase the company's productivity and profitability. [The beneficiary] will develop sound short and long range plans for the company and assure that profit or year-end goals are attained, analyzing and planning strategies to procure new business and increase revenues, maximizing the company's market share and profits, while ensuring customer satisfaction. He will review activity reports and financial statements to determine progress and status in attaining objectives. [The beneficiary] will spend approximately 50% of his time or more at the Brazilian parent company, [REDACTED] and thus, his U.S. employment with [the petitioner] will be intermittent.

On December 10, 2003, the director requested additional evidence. Specifically, the director requested: (1) a description of the duties and educational backgrounds of the petitioner's employees; (2) an explanation of how the beneficiary will not engage in the day-to-day operations of the petitioner such that he will be employed in a primarily managerial or executive capacity; (3) copies of the petitioner's State quarterly tax filings with all attachments for the past two quarters, including proof that payments were made; and (4) a copy of the petitioner's Form 940EZ, Employer's Annual Federal Unemployment Tax Return.

In a response dated March 9, 2004, the petitioner, through counsel, submitted the requested evidence, including a description of the duties of the beneficiary and his subordinates as follows:

As CEO & General Manager, the beneficiary will be responsible for providing overall guidance essential to successful operations and business development. He will be responsible for developing short and long range plans to assure that company goals are attained, and to ensure the company's productivity and profitability. He will review analysis of activities, costs, operations, and forecast data to determine progress toward stated goals and objectives. As CEO & General Manager, the beneficiary will oversee the company's entire business development. The day to day operations of the business will be performed by the following individuals:

- The Financial Manager . . . is responsible for corporate financial management and accounting supervision;
- The Logistics Manager . . . is responsible for managing logistics (warehousing/imports/exports) operations and relationships with freight forwarders and logistics providers;
- The Purchasing Manager . . . is responsible for managing purchases of merchandise for inventory and fixed assets;
- The Sales and Business Development Manager . . . is responsible for managing sales and business development of new market opportunities.

The Administrator . . . is responsible for accounts payable, invoicing, accounts receivable, general accounting, general documentation filings and office functions.

The petitioner further submitted a document that provides that each of its six employees possess at least a bachelor's degree.

On March 17, 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 the beneficiary is not managing other professionals or managers. The director found that the current structure of the petitioner will require the beneficiary to engage in the day-to-day activities of the company.

On appeal, counsel asserts that the beneficiary possesses extensive managerial and executive skills, and his duties will require managing subordinates who will carry out the day-to-day operations of the petitioner. Counsel provides an attachment to Form I-290B that states the following:

As CEO & General Manager of [the petitioner], [the beneficiary] will not directly engage in day-to-day operations of the business. He will be responsible for overseeing the company's entire business development, and will provide overall guidance essential to successful international business development and operations. [The beneficiary] will manage and direct . . . individuals who are responsible for carrying out the company's day-to-day operations[.]

Counsel submits educational credentials for some of the beneficiary's subordinates, as well as the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, and Florida State Employer's Quarterly Report for the first quarter of 2004.

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.*

In the instant matter, the beneficiary's job descriptions are brief and vague, providing little insight into the true nature of the tasks he will perform in the United States. For example, the statement that the beneficiary "will oversee the company's entire business development, including financial, marketing, and distribution operations" does not indicate what tasks the beneficiary will perform on a daily basis. The petitioner indicates that the beneficiary "will guide and lead other members of management, and will plan, develop, and establish policies and objectives to increase the company's productivity and profitability." Yet, the petitioner has failed to provide a clear account of its management structure, or an explanation of how the beneficiary will interact with his claimed subordinates. The petitioner provides that the beneficiary "will be responsible for developing short and long range plans to assure that company goals are attained, and to ensure the company's productivity and profitability," yet this general statement does not adequately address the beneficiary's specific daily duties. Counsel asserts that the beneficiary "will be responsible for overseeing the company's

entire business development," however, such broad statements provide no indication of how the beneficiary will invest his time. 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.* The provided job descriptions do not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

As evidence of the petitioner's current staffing, on appeal the petitioner submits its IRS Form 941, Employer's Quarterly Federal Tax Return, and Florida State Employer's Quarterly Report for the first quarter of 2004. However, these documents reflect the petitioner's business activity that occurred after November 28, 2003, the date the petition was filed. 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). Thus, the 2004 tax documents are not probative of the petitioner's and beneficiary's eligibility as of the filing date, and they are given no weight in this proceeding. The petitioner's Florida State Quarterly Reports for the third and fourth quarters of 2003 report only two employees, the beneficiary and the individual identified as the administrator.

Counsel claims that the beneficiary's duties "will require managing subordinates who will carry out the day-to-day operations of the petitioner." 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.

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 indicates that each of the beneficiary's subordinates possess at least a bachelor's degree. However, from the brief descriptions of the duties of each subordinate, it is not possible to determine whether bachelor's degrees are in fact required to successfully perform their tasks. Thus, the petitioner has failed to show that the beneficiary's subordinates are professionals. Nor has the petitioner shown that any of the beneficiary's subordinates supervise other 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.

Based on the foregoing, 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 it has failed to show that the foreign entity is doing business. See 8 C.F.R. § 214.2(l)(3)(i). 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.

As evidence of the foreign entity's business operations, the petitioner provided a 2002 financial statement, a 2002 tax filing, a registration document, two invoices dated in 2002, and documents without complete translations. Regarding the untranslated evidence, because the petitioner failed to submit certified translations of the documents, 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 remaining documents are not sufficient to show that the foreign entity is engaged in "the regular, systematic, and continuous provision of goods and/or services." For this additional reason, the petition may not be approved.

Also beyond the decision of the director, the petitioner has not established that the beneficiary 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. 8 C.F.R. § 214.2(l)(3)(iii). The petitioner states that the beneficiary began employment with the foreign entity in January 2002. Yet, the beneficiary was approved for H-1B status with the petitioner from June 1, 2002 to April 15, 2005. The beneficiary's passport reflects that he entered the United States in H-1B status on August 4, 2002, approximately seven months after he began employment with the foreign entity. Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(A), periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof are not interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement. The beneficiary's passport shows that he departed and reentered the United States several times after his initial entry in H-1B status. Yet, from the evidence provided it is not possible to determine where he

was, when he departed the United States, and whether he was working on behalf of the foreign entity while abroad. Accordingly, the petitioner has failed to show that the beneficiary worked for the foreign entity for a continuous year of full time employment. For this additional reason, the appeal will be dismissed.

Also beyond the decision of the director, the petitioner has failed to provide a detailed description of the beneficiary's duties abroad such that the AAO can determine whether he was employed in a primarily managerial or executive capacity. 8 C.F.R. § 214.2(l)(3)(iv). 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. The petitioner has not met this burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.