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U.S. Citizenship
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FILE:



Office: TEXAS SERVICE CENTER

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SEP 01 2005

IN RE:

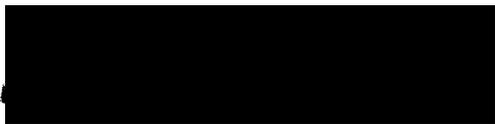
Petitioner:



Beneficiary:

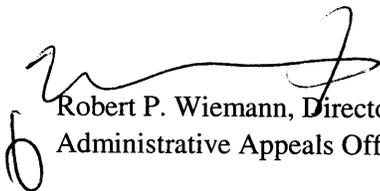
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON 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 nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established in 2001 and claims to be engaged in the distribution and sale of electronic security cards and equipment. The petitioner claims to be a subsidiary of [REDACTED] Ltda., located in Colombia. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager for three years, at an annual salary of \$36,000.00. 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 determined that the petitioner had not submitted sufficient evidence to demonstrate that the job duties performed by the beneficiary are primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the evidence submitted is sufficient to demonstrate that the duties performed by the beneficiary are managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary, or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- 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 this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary's employment with the U.S. entity is primarily managerial or executive in nature.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 response to the director's request for evidence, the petitioner described the beneficiary's position as "president" and acting as a "general manager." The petitioner described the beneficiary's duties within the U.S. entity as:

Delivers expert consulting to achieve rapid market presence, increased value and competitive distinction.

[The beneficiary's] expertise spans a wide range of technical knowledge from system-level software design to sophisticated web application development, including systems architecture, technology infrastructure, security, applications, [and] legacy systems integration.

Responsibilities:

- Business Development in the South Florida area [;]
- Responsible for acquiring the necessary licenses, permit, insurances and bonds to start the cash flow generation through in house customer installations of electronic security equipment [;]
- Developing and maintaining client relationships at the executive level [;]
- Purely customer focused insuring client satisfaction [;]
- Responsible for managing client expectations and facilitating resources [; and]
- Involved in the project development process [.]

The petitioner also submitted position descriptions for the staffing of the U.S. entity as of November 2002, which included a part-time administrative assistant and a part-time technician. The petitioner described the beneficiary's duties as:

General Manager: [The beneficiary] (full Time Employee) ... presently is developing the business plan and strategies to grow the subsidiary company in USA and is expecting the results of the Florida Electric Contractors License after being accepted to take the exam and become an [sic] state certified [sic] and be able to qualify the company to start installing electronic security equipment in the state of Florida. . . .

The petitioner submitted a proposed organizational chart depicting the U.S. entity's hierarchical structure to include the beneficiary as president, a vice-president, accounting contractor, administrative staff, and sales force. The petitioner also submitted copies of the U.S. entity's IRS Form 1120, U.S. Corporate Income Tax Return for 2001, bank statements, profit and loss statement for January through December 2001, commercial lease agreement, distributorship letters, letters of commendation, and statistical data relating to the security industry.

The director denied the petition after determining that the petitioner had submitted insufficient evidence to establish that the beneficiary's duties at the U.S. entity are primarily managerial or executive in nature. The director noted that the U.S. entity employed three individuals. The director further noted that the beneficiary, as general manager, supervised the activities of an administrative assistant and a technician, both of whom appeared to work only part-time. The director surmised that the beneficiary, with only two part-time employees to assist him, was not functioning primarily in a managerial or executive capacity, but rather was primarily engaged in the day-to-day operations of the business.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary is an "executive" and that his day-to-day activities involve primarily managerial or executive matters. Counsel also asserts that rather than managing or supervising subordinate employees, the beneficiary manages an essential function within the organization. Counsel further asserts that the beneficiary's responsibilities include "reduction of cost and penetrating new markets in the United States." Counsel asserts that the beneficiary has "delivered expert consulting to achieve rapid market presence," and has successfully developed numerous business opportunities for the U.S. entity. Counsel contends that due to the economic downturn in both the United States and Colombia, it has been difficult financially for the petitioner to grow, but that it has demonstrated its ability to compensate the beneficiary for his services. The petitioner resubmits the letters of reference from the Sony Corporation, Security Lock Distributors, and Florida Department of Business and Professional Regulation as well as statistical data from Access Control & Security Systems.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The assertions made by counsel on appeal are not persuasive. The U.S. entity was established in 2001 and the record reflects that it has conducted some business. Therefore, for purposes of this petition, the U.S. entity will not be treated as a new office. The petitioner implies that the U.S. entity is in the process of being developed into a viable business enterprise. However, 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 initial petition to support an executive or managerial position. There is no provision in AAO regulations that allows for an extension of this one-year period. Hopeful projections of future company expansion cannot be used to establish intercompany transferee eligibility where, as in the instant matter, the petitioning entity is not a new office. It must be established that the beneficiary is and will be employed in a position that has already been established as being managerial or executive in nature. The record does not demonstrate that the petitioner has reached the point that it can employ the beneficiary in a predominantly managerial or executive position. The evidence establishes that the beneficiary will be performing the day-to-day duties of the organization, rather than serving in a primarily managerial or executive capacity.

While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other such pertinent factors as the nature of the petitioner's business which, together, can be used as indicators which help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant matter, the latter more accurately describes the beneficiary's role. The record demonstrates that the petitioner is engaged in the distribution of electronic security cards and equipment. The petitioner claims that the U.S. entity employs an administrative assistant and a technician on a part-time basis. However, despite the director's request for such evidence, the petitioner failed to submit payroll evidence to substantiate this claim. 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). Further, there has been no independent documentary evidence submitted to establish that there are any individuals available to perform the functions of the organization or to relieve the beneficiary from performing non-qualifying duties. The record reflects that the beneficiary has been and will be the only full-time employee of the U.S. entity. Although requested by the director, the petitioner has failed to produce financial documents and tax records to show that additional employees were employed by the U.S. entity at the time the petition was filed.

The record does not establish that the beneficiary will be primarily managing the organization, or a department, subdivision, function, or component of the organization. The record indicates that a preponderance of the beneficiary's duties will be directly providing the services of the organization. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy. The petitioner has not demonstrated that the beneficiary will be primarily occupied with supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. At best, it appears that the beneficiary will be responsible for supervising part-time non-professional employees.

Neither does the record establish that the beneficiary will be primarily managing an essential function of the organization. When managing or directing a function, the petitioner is required to establish that the function is "essential" and that the manager is in a high-level position within the organizational hierarchy, or with respect to the function performed. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Duties such as: reduction of cost and penetrating new markets in the United States, developing numerous business opportunities in the United States, and delivering expert consulting to achieve rapid market presence have not been shown to qualify as the duties of a functional manager within the organization. The beneficiary's job descriptions depict an individual in charge of the day-to-day services of the organization, not that of a functional manager. 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). Further, the petitioner has failed to provide a detailed position description specifying exactly what the management of the corporate functions associated with the distribution of electronic security cards and equipment will entail. The record must further demonstrate that there are qualified employees to perform the function so that the

beneficiary is relieved from performing non-qualifying duties. The petitioner asserted that an administrative assistant and a technician would perform the non-qualifying duties of the U.S. entity. Absent details concerning the employees' daily activities, and percentage of time spent performing each duty, the record is insufficient to establish that the beneficiary is managing rather than performing the functions of the U.S. entity.

In summary, there has been insufficient evidence presented to establish that the beneficiary is employed by the U.S. entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it is eligible for an extension of the initial one-year "new office" validity period. As previously noted, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not satisfied all of the enumerated evidentiary requirements. The minimal documentation submitted of the foreign entity's business operations raises the issue of whether the foreign entity has been and will continue to be engaged in the regular, systematic, and continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G)(2), during the beneficiary's temporary stay in the United States. On appeal, counsel states in part: "It is also significant to note that the economy both in Colombia and the United States has rapidly deteriorated In Colombia, there is the continuing horrific and devastating civil war . . . the drug war, and economic crisis." Counsel further contends "[a]s a result of the above, the petitioner has struggled to build up its grown [sic] financially." A translation of the foreign entity's business invoices demonstrate seven transactions in 2000, three transactions in 2001, and no transactions in 2002. Further, a copy of a translated memo from the Chamber of Commerce of Bogota identifies the beneficiary as manager of the foreign entity and his wife as the vice-president. It is further stated in that document that "the manager who will be replaced by the vice-president in his temporary absences [sic] may: A) represent the company legal and paralegal, [sic] upon private and public entities" The petitioner has submitted in the instant record of proceedings a copy of the beneficiary's wife's I-94 that indicates she is in the United States rather than abroad managing the foreign 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. 582, 591-92 (BIA 1988). There is insufficient evidence contained in the record to demonstrate that the foreign entity will continue doing business in the absence of the beneficiary. For this additional reason, the petition may not be approved.

Although not directly addressed by the director, another issue is whether the U.S. entity or foreign entity will be able to remunerate the beneficiary for his services. See 8 C.F.R. § 214.2(l)(14)(ii). In this matter, the petitioner submitted the U.S. entity's bank records from Washington Mutual Bank, which shows an ending bank balance of \$1.18 as of June 30, 2002. Furthermore, there is insufficient evidence in the record to demonstrate that the foreign entity is doing business, and thus is in a position to remunerate the beneficiary for his services. For these additional reasons, 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.2nd 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).

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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 sustained that burden.

ORDER: The appeal is dismissed.