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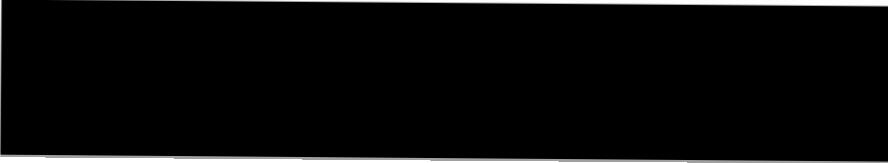
File: SRC 04 128 53026 Office: TEXAS SERVICE CENTER Date: APR 03 2006

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 president and 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 and claims to be engaged in the export business.¹ The petitioner also claims that it is the subsidiary of [REDACTED], located in Carabobo, Venezuela. 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 for an additional three 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, counsel for the petitioner asserts that the beneficiary is in fact serving in both a managerial and executive capacity. In support of this assertion, the petitioner submits a detailed brief and additional evidence.²

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(i)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

¹ It should be noted that, according to the Florida Department of State, Division of Corporations, the petitioner has been administratively dissolved due to its failure to satisfy the state's annual report requirements. Therefore, regardless of whether the petitioner's annual report issues in Florida can be easily remedied or not, it raises the critical issue of the company's continued existence as a legal entity in the United States.

² The AAO notes that counsel's brief, dated October 1, 2004, requested an additional twelve days to submit additional evidence. Counsel claims that post office closures resulting from Hurricane Francis contributed to the late delivery of the director's denial. Upon review of the record, there is no indication that additional evidence was submitted in support of the appeal. Since the October 1, 2004 brief is sufficiently thorough and is also supported by additional evidence, the AAO will render a decision based on the evidence in the record as of the date of this decision.

- (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 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 dated April 1, 2004, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] will continue to assume the role as President and General Manager of the U.S. company. [The beneficiary] will continue to have full responsibility for development of the corporate strategy of the company; business development; and managing and executing the trade logistics; and negotiating the purchase and transport agreements for the Company; and overall administrative and financial operations of the U.S. company.

Specifically, [the beneficiary] will conduct the following activities as the President and General Manager of the U.S. corporation in the past year, since he was the beneficiary of a[n] L-1A Visa:

- 1) Manage the overall Finances, Administration, and Strategy of the U.S. Company;
- 2) Develop Corporate Strategy for Company;
- 3) Identify product distributors and wholesalers for the U.S. company;

- 4) Manage and Execute the Coordination of the U.S. Company export and transportation logistics to Venezuela
- 5) Manage and Oversee all Financial Operations for the Company.
- 6) Develop and execute expansion strategy for the company.
- 7) Identify New Foreign Markets for the Company's products outside of Venezuela (Europe, Asia, and other Latin American countries).
- 8) Market U.S. Company's Services

On April 29, 2004, the director requested additional evidence. Specifically, the director requested an organizational chart for both the U.S. and foreign entities, the petitioner's quarterly tax returns for 2003 and 2004 showing wages paid to its employees, and a statement of the petitioner's staffing level, the titles and duties of all the petitioner's employees, and their educational level.

In response, the petitioner submitted quarterly wage reports for the first two quarters of 2004, accompanied by a statement claiming that no wages were paid by the petitioner in the year 2003. Additionally, the petitioner provided an organizational chart for the U.S. entity which indicated that the beneficiary was the petitioner's sole employee. The petitioner further stated that the petitioner was still in a start-up phase and that it planned to hire an operations manager within the coming months.

On September 3, 2004, the director denied the petition. The director determined that the petitioner had failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director noted that the evidence provided in support of the extension did not support a finding that the petitioner's business required the services of a manager or executive and concluded that, based on the record, the beneficiary was not operating in a capacity that was *primarily* managerial or executive.

On appeal, counsel for the petitioner restates the definition of executive capacity and claims that the beneficiary performs the stated duties. Counsel claims that the beneficiary has been involved in the development of the company and that, at the current time, he is targeting the parcel and package shipment market and the export logistics of larger products to Venezuela. Counsel claims that although no other employees were working for the petitioner at the time of the petitioner's response to the request for evidence, the petitioner now employs another professional employee. Counsel further provides a breakdown of the percentage of time the beneficiary devoted to each of his duties, claiming that half of his time, or 50%, was devoted exclusively to developing and managing marketing, sales, and export logistics strategy for the petitioner, and that an additional 25% of his time was devoted to negotiating purchase agreements with clients.

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(l)(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 this case, the petitioner specifically states that the beneficiary is primarily employed in an executive capacity; however, in order to afford the beneficiary the widest opportunity for qualification, the AAO will evaluate his stated duties under both regulatory definitions.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Prior to adjudication, the description of the beneficiary's duties was generalized and at times seemed to paraphrase the regulatory definitions. For example, duties such as "develop corporate strategy" and "manage the overall finances, administration, and strategy" do little to clarify what the beneficiary does on a daily basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *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).

On appeal, counsel provides a more detailed overview of the beneficiary's duties, and indicates that 75% of the beneficiary's time is spent negotiating contracts and developing and managing the sales and marketing strategy for the company. While this more specific description of duties is helpful in clarifying the nature of an average workday for the beneficiary, it presents additional problems, because traditionally, negotiating contracts and managing sales and marketing do not fall directly under traditional managerial or executive duties as defined in the statute. Rather, these duties are essential to the viability of the petitioner's business. 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).

The director further noted that by virtue of the beneficiary being the petitioner's sole employee, his duties could not be classed as primarily managerial or primarily executive. As noted by counsel on appeal, 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. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

In this matter, the beneficiary was the sole employee of the petitioner at the time of filing. While counsel for the petitioner alleges on appeal that the petitioner had since hired an additional professional employee to relieve the beneficiary from performing day-to-day functions, this allegation is irrelevant. 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).

The record, therefore, is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, as noted above, 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. *Id.* 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. Counsel continually alleges that the petitioner is still in a start-up phase and therefore should be treated accordingly. If the business is not sufficiently operational after one year, however, 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.

Accordingly, 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).

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.

Beyond the decision of the director, the petitioner has provided insufficient evidence to establish that a qualifying relationship exists between the petitioner and the foreign entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the petitioner has provided the articles of incorporation for the petitioner and an affidavit, sworn by the beneficiary in his capacity as president of the petitioner, affirms that the foreign entity owns 100% of the petitioner's stock. This evidence, however, is insufficient. As general evidence of a petitioner's claimed qualifying relationship, stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems*,

Inc., 19 I&N at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. For this additional reason, the petition may not be approved.

Additionally, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted a number of invoices and shipping documents suggesting that it has been engaged in the export business on a regular basis. However, there appear to be only five or six invoices and/or Western Union wire transfer documents, none of which clearly state the nature of the transactions they represent. Since the petition was approved in April 2003, the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B). In the instant case, there is insufficient evidence that the petitioner was regularly and consistently doing business from April 2003 through April 2004. 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).

ORDER: The appeal is dismissed.