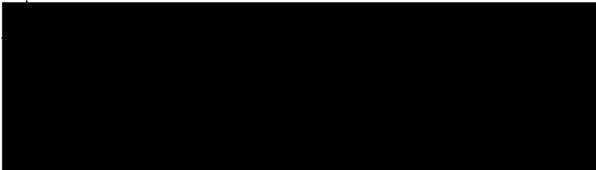




U.S. Citizenship
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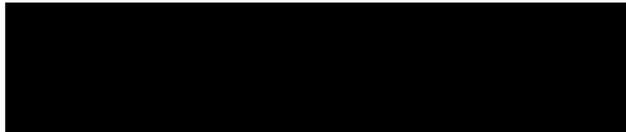
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FILE: SRC 05 108 50329 Office: TEXAS SERVICE CENTER Date: DEC 06 2006

IN RE: Petitioner:
Beneficiary:



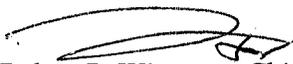
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Chief
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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president 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, a Florida corporation, claims to be the subsidiary of [REDACTED] located in Mumbai, India. The petitioner identifies itself as an investment, consulting, and hiring agent. 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 alleges that the director's decision was erroneous, and that contrary to the director's findings, the petitioner is qualified for the benefit sought. In support of this contention, counsel 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)(14)(ii) 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 managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The 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 a letter dated March 4, 2005, counsel for the petitioner explained that the beneficiary, in his capacity as president of the U.S. entity, had obtained the exclusive rights to be the hiring agent for a U.S. based ship for [REDACTED]. This claim was repeated in a separate letter from the petitioner dated March 1, 2005. Both letters indicated that in August 2004, the beneficiary had hired two subordinate employees, namely, Amit Handa, secretary, and Rajiv Pandey, human resources manager.

On March 15, 2005, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked for "convincing evidence" that the beneficiary is employed in a managerial position and further requested additional information regarding the duties, and educational backgrounds of the other employees, as well as their place in the organizational hierarchy of the petitioner.

In a response dated April 8, 2005, counsel submitted the following description of the beneficiary's duties:

Responsibilities:

- To develop and execute business plans.
- To conduct research activities in new markets and then design strategies based on the study.
- Give strategic Directions[.]
- To Hire and Fire Employees.
- To appoint consultants and vendors to meet the business requirements.
- To supervise and oversee all the major departments like Finance, Marketing & Human Resources department. Conduct daily briefing with department heads in regards to daily operation matter and ensure instructions and directives are disseminated.
- To manage and ensure that highest level of service is provided to our customers.
- To ensure the highest service standard and achieve the desire[d] budgeted cost and revenue presented to the Board of Directors.
- To optimize resources and finances of the company[.]
- Networking with Industrial lobbies, Business world, Media and Government bodies
- Build second level of leadership.
- To meet bottom lines[.]
- To liaise with all major Client's, collect feedback and then develop system and procedure's [sic] to satisfy the customers.
- To conduct the final interviews before the candidate is placed.

A list of duties for the secretary and human resources manager were also provided. These duties indicated that they answered to the petitioner in his capacity as president. Also, the petitioner indicated that since the filing of the petition, it had hired a third employee, who occupied the position of receptionist.

On April 22, 2005, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary had sufficient subordinate staff to relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner reasserts that the beneficiary, by virtue of his position as president, is by definition functioning in a managerial and/or executive capacity, and contends that the director's decision to find otherwise was erroneous. Counsel further asserts that the petitioner has only been operating for eight

months (due to a delay in the beneficiary's arrival in the United States), and that it now employs a total of four persons. Based on these factors, counsel requests reconsideration of the denial.

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.*

The description of duties provided by the petitioner in these proceedings does little to describe the beneficiary's actual duties, nor does it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a vague overview of the nature of his duties; namely, that he would function as president and oversee virtually all aspects of the business. When a specific list of duties was requested, counsel responded, but such duties as "to meet bottom lines" and "to build second level of leadership" are simply too vague to understand what the beneficiary will do on a daily basis. 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).

While certain aspects of the beneficiary's position remain vague, some duties, like "hire and fire employees" and "conduct final interviews before candidate is placed" are more specific. While it does appear that the beneficiary has hired two employees since his arrival in the United States in August 2004, it simultaneously appears that he still plays a large and active role in generating the actual services of the 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).

More specifically, the petitioner indicates that it has an exclusive contract with Norwegian Cruise Lines in which it hires staff for one of its U.S. based ships. The petitioner claims that since August 2004 to April 2005, the beneficiary has operated in a primarily managerial and/or executive position while overseeing this business, leaving the hands-on, non-qualifying tasks to the secretary and the human resources manager. However, it is clear from the description of duties that the beneficiary personally conducts final interviews with candidates before they are selected to work for the petitioner's client. Presuming that the exclusive job of staffing an entire cruise ship requires a major amount of employee screening and interviews, it appears that the beneficiary is required to extensively engage in this non-qualifying task. In particular, the board of directors, as set forth in an extract from the meeting minutes dated January 27, 2005, specifically authorize the beneficiary to conduct the final interviews, including traveling to the interview sites as well as overseeing and controlling the interview and selection procedure. Since the record indicates that Norwegian is currently the petitioner's only client, it is clear that the beneficiary's services are essential to the interview process and the provision of successful staffing services to the client. Since it does not appear that the other two employees on staff at that time had the authority to make final decisions on eligible candidates, that would leave the beneficiary as the sole employee responsible for the provision of the petitioner's services. As stated above, 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. *Id.*

The AAO, therefore, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. The petitioner appears to have only recently retained the services of two additional employees, and hired a third person since the filing of the extension. It is clear that a major responsibility, namely, the final say in selecting qualified candidates, rests with the beneficiary, who personally interviews such persons. Typically, such an active role in personnel selection is not the type of duty in which a manager or executive would engage. However, despite the hiring of two subordinate employees, the petitioner failed to delegate this primary role to either of them, thus relying on the beneficiary's active participation in non-qualifying duties.

On appeal, counsel argues that the petitioner is expanding in size and asserts that since it has only been in operation for eight months, it should not be penalized for the beneficiary's role in the organization. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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. Despite counsel's contentions on appeal, in which she asserts that the beneficiary has had less than one year to commence the business, if the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational tasks, the petitioner is ineligible by regulation for an extension. The fact that the beneficiary entered the U.S. four months after the visa was granted is irrelevant for purposes of this analysis. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner indicates that the beneficiary is the sole owner of the foreign entity, which in turn owns the U.S. entity. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

ORDER: The appeal is dismissed.