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Services

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File: SRC 03 158 50028 Office: TEXAS SERVICE CENTER Date: JAN 27 2006

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 with its United States subsidiary 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 Argentina with a subsidiary, Perri Brothers & Associates, Inc., incorporated in Florida. Both companies are engaged in manufacture and sales of wood furniture. The petitioner seeks to employ the beneficiary, who currently serves as a production manager with the parent company in Argentina, in the position of production manager with its U.S. subsidiary 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 director misunderstood the nature and scope of the U.S. entity's operations, and notes that CIS did not properly consider the evidence that contract workers perform the company's production activities. Counsel contends the petitioner has satisfactorily demonstrated that the beneficiary will manage a department within the organization. In support of these assertions, counsel submits a brief.

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 from the petitioner's president submitted with the petition on May 14, 2003, the beneficiary's proposed duties were described as the following:

[The beneficiary] will be supervising a team of approximately 10 production employees and personnel in our market expansion project and will join our Sales Manager, Mr. Michele Perri also in L-1 status.

Furthermore, he will coordinate and support our production and quality control in order to further establish a niche for our company in the United States.

He continue [sic] to be responsible for day to day discretionary decisions involving production, quality control, personnel, payroll and other administrative duties.

On May 21, 2003, the director requested additional evidence. Specifically, the director requested: (1) the gross and net annual income for the U.S. entity, as well as the number of employees and their job titles; (2) the number of employees who are part-time; (3) a copy of the latest quarterly income tax return for the U.S. entity; and (4) a copy of the U.S. entity's 2002 corporate income tax return.

In response, the petitioner submitted two income statements for the U.S. entity, dated December 31, 2002 and March 31, 2003; evidence that the U.S. company submitted an IRS Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return; and a statement from counsel indicating that the U.S. entity has two full-time employees, a sales manager and a sales associate/administrative assistant. Counsel for the petitioner noted that the U.S. company has employed "up to six employees with up to 5 contractors at any given time since its inception."

On May 28, 2003, the director denied the petition. Noting that the petitioner U.S. entity employs two workers, the director determined that the petitioner had not demonstrated that the beneficiary will manage or direct the management of a department, subdivision, function or component of the organization, nor would he be involved in the supervision and control of the work of other supervisory, professional or managerial employees who will relieve him from performing the services of the business. Accordingly, the director concluded that the beneficiary would not be performing in a primarily managerial capacity, remarking that the U.S. business has not expanded to the point where the services of a full-time bona fide production manager would be required.

On appeal, counsel contends that the petitioner has met its burden of proof that the beneficiary will manage a department within the organization, and that the U.S. entity has expanded sufficiently to require the services of a production manager. Counsel asserts that CIS must review the reasonable needs of the business and its stage of development. Finally, counsel contends that CIS failed to take into consideration work performed by independent contractors in determining whether there are sufficient support workers to relieve the beneficiary of non-managerial tasks.

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 has indicated that the beneficiary will be employed in a managerial capacity, but has failed to clearly describe the duties to be performed. The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties will include "coordinating and supporting our production and quality control" and "discretionary decisions involving production, quality control, personnel, payroll and other administrative duties." The petitioner did not, however, specify who actually performs production and quality control tasks, or what specific management-level responsibilities are encompassed by "other administrative duties." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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.* 724, F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Although the petitioner asserts that the beneficiary will be supervising a team of "approximately ten production employees and personnel" as part of a "market expansion project," the record reveals that the petitioner had a staff of two at the time of filing the petition: a sales manager and a sales/administrative assistant. Counsel for the petitioner stated in response to the request for evidence that the U.S. company had employed "up to six people" since its inception, and the record reflects that the number of employees working for the U.S. entity actually decreased in each of the last three quarters of 2002. Accordingly, it is not clear how the beneficiary could supervise a staff of ten "production employees." 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Further, if the beneficiary's proposed supervisory duties are based solely on an as yet unrealized "market expansion," the AAO notes that a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Although counsel states on appeal that the petitioner has contractual employees to perform production activities, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Contrary to counsel's assertions that the evidence presented demonstrates that the production work has been subcontracted to other individuals and firms, the AAO finds no invoices from individuals or firms who provided labor to the U.S. entity, no Forms 1099, nor any other evidence of payments made by the U.S. entity in exchange for labor. The petitioner did not specifically reference the existence of the contractors prior to the appeal. At the time the director issued her decision, the only evidence of contractors to be found in the record were notations on supplementary statements to the company's U.S. corporation tax return and in its unaudited financial statements. Without additional independent documentary evidence identifying how often the company uses contractors, how many hours they work, what duties they perform, and how many workers are typically involved in production activities,

the AAO cannot find that the company maintains a production department for the beneficiary to manage, or that he will supervise any employees or contractors. Without documentary evidence to support its statement, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for 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, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As discussed above, the petitioner had documented the existence of only two full-time employees at the time of filing the petition, both of whom were engaged in sales. It was therefore proper for CIS to question the petitioner's claim that it requires the services of a production manager to oversee a department that apparently has no staff.

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. For the reasons already discussed, the petitioner has not established this essential element of eligibility.

As discussed above, a critical analysis of the U.S. entity's business undermines counsel's assertion that the beneficiary would be primarily supervising employees and "overseeing" production. It appears from the record that the beneficiary will be the only employee available to perform any production-related functions, as the company's other two employees are involved in sales activities. Based on the record of proceeding, the beneficiary's job duties would be principally composed of non-qualifying duties that would preclude him from functioning in a primarily managerial or executive role. 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).

Finally, even if the petitioner had submitted sufficient evidence to establish that the beneficiary would be supervising a subordinate staff, the petitioner must also 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. In the instant case, the petitioner has not established that a baccalaureate degree is actually necessary, for example, to perform carpentry work as a member of a wood furniture company's production staff.

The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record contains insufficient evidence to establish that the foreign company currently employs the beneficiary in a primarily managerial capacity. In the letter submitted with the petition, the petitioner indicated that the beneficiary, in his current role as production manager, "is fully responsible for establishing our production and heading our quality control for our products. As a highly qualified business man, [the beneficiary] has helped our company with training, technology, production and personnel." In addition, the petitioner submitted a list of the foreign company's seventeen employees by name. The petitioner did not provide an organizational chart listing its employees by job title, or depicting its management structure, nor did the petitioner provide any further description of the beneficiary's job duties with the foreign entity to establish that the beneficiary's job duties are primarily managerial.

Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial 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 petitioner has provided only a vague, non-specific description of the beneficiary's duties with the foreign entity, and has not adequately described the foreign company's organizational structure. Without this information and the requisite supporting documentation, the AAO cannot find that the beneficiary has been involved in the supervision and control of the work of other supervisory, professional or managerial employees who relieve him from performing the production tasks of the business. In addition, there is insufficient evidence to establish that the beneficiary has been primarily managing a department, subdivision, function or component of the organization, rather than performing the tasks necessary to produce a product. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Accordingly, the petitioner has not established that the beneficiary has been employed in a primarily managerial or executive capacity for at least one year out of the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3). 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, 1042 (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).

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

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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.