

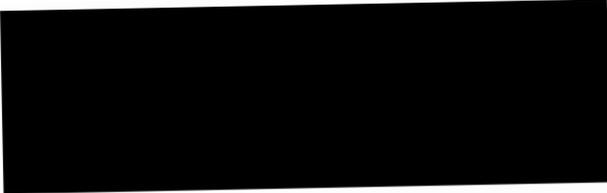


U.S. Citizenship  
and Immigration  
Services

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File: SRC 04 230 50762 Office: TEXAS SERVICE CENTER Date: JUL 06 2006

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

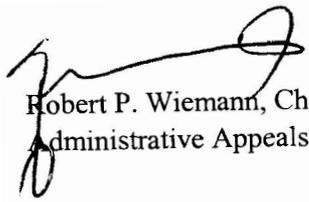
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president/director 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 claims to provide sound systems and amplification services for events, and other related services. The petitioner states that it is the subsidiary of [REDACTED] located in Montevideo, Uruguay. The beneficiary was initially granted L-1A classification for a one-year period in order to open a new office in the United States and the petitioner now seeks to extend his stay for two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would 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, the petitioner asserts that the director failed to consider evidence demonstrating that the petitioner utilizes independent contractors to perform some of the day-to-day activities of the business. The petitioner asserts that the beneficiary will be employed in an executive capacity. The petitioner submits a letter in support of the appeal.

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 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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

At issue in the present matter is whether the petitioner established that 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.

The nonimmigrant petition was filed on August 26, 2004. The petitioner indicated on Form I-129 that it intended to continue to employ the beneficiary as president/director of its three-person company. In an August 21, 2004 letter submitted in support of the petition, the petitioner described the beneficiary's duties as follows:

[The beneficiary] was transferred . . . in L-1 status . . . for a period of one year, in order to serve in this country in the position of President. He wrote the new business plan, set up the goals and strategies and he did a research. While [the beneficiary] [is] in the United States working with [the petitioner], his day-to-day managerial and executive duties will be assigned and divided between Connecticut and Florida. [The beneficiary] has had a key role in the expansion plans, and his continuing presence is essential to bring the expansion effort to a successful conclusion.

The petitioner mentioned that the U.S. company has two locations, in Stamford, Connecticut and Miami Beach, Florida, and stated that the beneficiary "is opening, setting up and organizing the new business location in Miami Beach." The petitioner indicated that the company's services include amplification and audio services for companies, updating audio systems, transporting services, third party services, and amplification and sound systems for events and conventions.

In support of the petition, the petitioner submitted its most recent Florida Form UCT-6, Employer's Quarterly Report, showing that the petitioner had three employees, including the beneficiary, as of June 2004. The petitioner submitted a copy of the lease agreement and photographs of its Stamford, Connecticut office, but did not provide evidence of wages paid to employees working at that location.

The director issued a request for additional evidence on October 12, 2004, advising the petitioner that additional evidence would be needed to establish that the U.S. company can currently support a managerial or executive position. Specifically, the director instructed the petitioner to submit: (1) a detailed job description for the beneficiary demonstrating that he would be functioning as an executive or manager, including the

percentage of time he would devote to performing each duty; (2) evidence of the current staffing level in the United States, including job titles, duties and educational background for the petitioner's employees; and (3) a copy of the U.S. company's organizational chart.

The petitioner submitted a response to the director's request on November 9, 2004. The petitioner provided an organizational chart which depicts the beneficiary as president supervising an executive secretary, who in turn supervises a contract employee. The chart shows that the beneficiary also supervises an operations director who oversees a contract employee and a contracted company, "Big Apple Smoothies, Inc."

In response to the director's request for a detailed description of the beneficiary's duties, the petitioner provided the following:

- Responsible for commercial planning and strategies.
- In charge of Public Relations and be responsible for developing new markets, customers or joint-ventures.
- Market development
- Commercial agreements.
- Making contacts with clients.

The petitioner stated that the operations director is in charge of the Miami Beach branch, supervises contract laborers and sub-contracted companies, and plans marketing actions, with the assistance of a contract employee who is responsible for "collaborating and helping the Operations Director in the operative part in moments of greater activities." The petitioner stated that the executive secretary is responsible for "facing the daily operation," reporting directly to the beneficiary, and "maintaining record of financial reports and economic transactions," with the assistance of a contract employee who assists her "in the administrative system maintenance in moments of greater activities or whenever deadlines require additional efforts." The petitioner stated that Big Apple Smoothies, Inc. is a "sub-contracted company in order to perform day-to-day works."

The petitioner submitted a payroll summary for the first nine months of 2004, confirming employment of the beneficiary, the executive secretary, and the operations director. The petitioner submitted copies of four checks paid to the three claimed contractors, dated April, July and August 2004, which amount to total payments of \$22,200. The petitioner also provided its profit and loss statement for January 1, 2004 through October 22, 2004, which reflects \$11,700 in payments for "subcontractor labor" and \$50,800 in payments for "events organization."

The director denied the petition on November 24, 2004 concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the beneficiary is one of only three employees, "his primary assignment does not appear to be supervising a subordinate staff of professional, managerial or supervisory personnel."

On appeal, the petitioner contends that the director failed to take into account evidence that the petitioner utilizes subcontractors to perform some of the day-to-day functions of the business. The petitioner asserts that the beneficiary is "primarily and exclusively" serving in an executive capacity in that: he directs the

management of the organization, namely, the operations director who also serves as the manager of the company's Florida branch. The petitioner also states that the beneficiary exercises wide latitude in discretionary decision-making, with responsibility for making decisions and influencing the business in order to correct any deviation from company goals. The petitioner asserts that this duty is complex, non-delegable and "extremely time consuming," and does not allow the beneficiary "to perform any other day-to-day non-managerial/executive functions." Finally, the petitioner asserts that the beneficiary receives direction only from the petitioner's parent company.

The petitioner'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.*

The petitioner initially provided a vague and nonspecific description of the beneficiary's duties that failed to demonstrate what managerial or executive functions the beneficiary performs on a day-to-day basis. For example, the petitioner stated that the beneficiary "wrote the new business plan, set up the goals and strategies and . . . did a research," and noted that the beneficiary's "day-to-day" managerial and executive duties will be assigned and divided between Connecticut and Florida." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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 director specifically requested that the petitioner provide a detailed account of the beneficiary's duties, along with the percentage of time he would devote to each duty. The petitioner's response included only a brief and general description of the beneficiary's duties and did not indicate how the beneficiary allocates his time among his various duties. This evidence is critical as it would have established the actual duties performed by the beneficiary, whether they are managerial or executive in nature, and the proportion of time he devotes to qualifying duties as opposed to operational or administrative tasks. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Specifically, when requested to provide a more detailed account of the beneficiary's specific duties and the percentage of time he devotes to each duty, the petitioner provided an abbreviated job description which appears to include non-qualifying duties. For example, the petitioner states that the beneficiary is responsible for "marketing development," "commercial agreements," "making contacts with clients," "public relations," and developing new markets, customers." Without further explanation, these duties, which account for the majority of the beneficiary's job description, could depict an employee who is directly involved in the company's day-to-day market research, marketing, promotion, customer service and sales activities. It is not possible to determine that the beneficiary's duties associated with these activities are primarily managerial or executive. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections

101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int’l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Overall, the petitioner’s descriptions of the beneficiary’s duties appeared to include non-qualifying duties and were too vague and general to allow any meaningful determination as to what actual duties the beneficiary performs, or how much time he devotes to qualifying managerial or executive functions. 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 petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

On appeal, the petitioner again declines to further delineate the beneficiary’s actual tasks. Instead, the petitioner paraphrases the statutory definition of executive capacity, asserts that the beneficiary meets all four criteria outlined by the statute, and implies that the beneficiary is required to devote all of his time making decisions regarding the business and therefore cannot be involved in the day-to-day functions of the business. Again, conclusory assertions regarding the beneficiary’s employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). As discussed above, the record contains no comprehensive description of the beneficiary’s duties and no supporting evidence to support the petitioner’s claim that the beneficiary is employed in a managerial and executive capacity, other than in position title. 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)).

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.

Although requested by the director, the petitioner did not provide the level of education required to perform the duties of its “operations director” or executive secretary. Thus, the petitioner has not established that these employees possess or require a bachelor’s degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Although the petitioner indicates that both of the beneficiary’s subordinates supervise independent contractors, as discussed further below, the petitioner did not adequately document the employment of these claimed employees, other than submitting copies of one or two checks paid to each one. There is insufficient evidence to establish that either of the beneficiary’s subordinates regularly supervises other employees. 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.

On appeal, counsel emphasizes that the director failed to consider the company’s growth and gross income for the first half of 2004, and asserts that the director mischaracterized the petitioner’s staffing levels by failing to take into account the company’s use of subcontracted personnel who “do part of the day to day activities.” 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. 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 first-line supervisory tasks, the petitioner is ineligible by regulation for an extension.

At the time of filing, the petitioner was a one-year-old company that claimed to provide sound and amplification services for events, as well as related services. The petitioner employs the beneficiary as president/director, an operations director who is described as the manager of the petitioner's Florida office, and an executive secretary. The petitioner claims to utilize the services of two contract laborers but has not provided a sufficient description of the nature or scope of the services they provide or evidence that the company regularly utilizes their services. The petitioner did provide copies of three checks paid to the two claimed contract employees; however, there is insufficient evidence that these monies were paid specifically for services rendered to the U.S. company. 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 at 165. Similarly, the petitioner claims to utilize the services of "Big Apple Smoothies, Inc." which is described as a "fully operational subcontracted company" that performs "day-to-day works." The petitioner submitted a copy of a single check paid to this company in April 2004. The petitioner did not describe the types of services provided by this company, or explain what specific functions it performs in relation to the petitioner's "day-to-day works." The petitioner has not established that it regularly utilizes subcontracted employees to perform the day-to-day duties of the company.

Finally, the petitioner has not explained how it is able to operate two branch offices in two different states with only three employees. Of these three employees, it appears that only the beneficiary would actually work in the petitioner's Connecticut office, although the petitioner stated that he will divide his time between the two offices. The petitioner's invoices indicate that the company is providing services out of both offices to customers in Connecticut and Florida. Therefore, the record suggests, and it has not been shown to be otherwise, that the beneficiary himself may be providing the company's services and performing all of the non-qualifying tasks associated with operating the company's Connecticut office. As discussed above, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has not established that its reasonable needs would be met by a president who performs only executive or managerial duties, an operations director, and an executive secretary, even if it does utilize the services of subcontracted personnel for certain tasks. 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. As discussed above, the petitioner has not established this essential element of eligibility.

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 show 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).

The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties related to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company. Hence, the fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(44)(A) and (B) of the Act. The record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization. While the AAO does not dispute the beneficiary's responsibility for the petitioner's long-term planning and performance, the record is not persuasive in demonstrating that the beneficiary's actual duties will be in a primarily managerial or executive capacity. In the instant matter, the petitioner has failed to show, as of the date this petition was filed, that non-qualifying operational and first-line supervisory duties will not constitute the majority of the beneficiary's time.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

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.