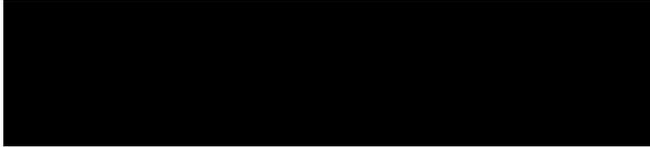


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U.S. Citizenship  
and Immigration  
Services

DA



FILE: SRC 04 251 50366 OFFICE: TEXAS SERVICE CENTER Date: MAY 11 2006

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

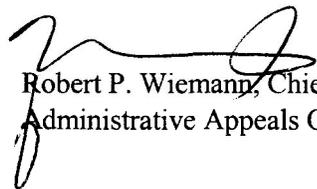
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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 nonimmigrant visa petition. 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 and chief executive officer 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 Texas corporation that claims to be engaged in software development and support services, as well as construction and building maintenance services. It claims to be a subsidiary of Sincotel Ltda, located in Bogota, Colombia. The beneficiary was initially granted a one-year period in L-1A classification in order to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's status for two additional years.

The director denied the petition concluding that the petitioner had not established: (1) that the beneficiary would be employed by the U.S. entity in a managerial or executive capacity; or (2) that the U.S. entity had been doing business for the previous year.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director failed to consider that the beneficiary did not enter the United States until November 2003 when determining whether the petitioner had been doing business for the entire previous year. Counsel contends that the director placed undue emphasis on the number of employees, and asserts that the evidence previously submitted is sufficient to establish that the beneficiary is employed in an executive capacity. Counsel submits a brief, but no additional evidence, 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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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.

The first issue in this proceeding is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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.

The nonimmigrant petition was filed on September 24, 2004. In an undated letter appended to the petition, the petitioner provided the following description of the beneficiary's duties:

He has been responsible for the administration of the company's finances, employees, entering into contracts, ordering supplies and supervision of employees ordering supplies, setting prices, implementing marketing techniques, delegating responsibilities to employees, representing the company before a public body, and making all business decisions. [The beneficiary] does not perform the day-to-day duties of the company, yet he oversees his lower level employees.

The petitioner indicated that it had three full-time employees and "various contract workers." The petitioner submitted its most recent payroll summary confirming the employment of the beneficiary and two other employees as of August 2004, and a "transaction detail" which provided a summary of payments for "contractor labor" amounting to more than \$32,000 during the first eight months of 2004.

The director issued a request for additional evidence on September 30, 2004, in part, instructing the petitioner to submit: (1) a definitive statement describing the beneficiary's employment in a managerial or executive capacity, including a list of all duties, the percentage of time spent on each duty, and a brief description of the job titles, educational background and duties of the beneficiary's subordinates; (2) an explanation regarding

who provides the petitioner's product sales/services; (3) a current organizational chart for the U.S. entity; (4) copies of IRS Form 1099, Miscellaneous Income, for all contract employees; (5) copies of all receipts, bills, or other evidence to establish the salaries being paid to contract workers; (6) the number of hours worked by contract employees and their job titles; and (7) copies of all contracts entered into with contract employees.

In a response dated October 18, 2004, the petitioner submitted the following job description for the beneficiary:

- Directing the objectives and efforts to develop the business.  
Finding the customers and business possibilities.
- Examine the market and define strategies
- Establish the price lists.
- Direct the goals of other levels.
- Make a budget and Income/Expenses plan.
- Present periodical informs [sic] to the partners meeting.

The petitioner indicated that it employs an "assistant" who assists the beneficiary, contacts customers, supports the cash flow, and facilitates human resources control. The petitioner indicated that its other employee is a clerk who assists the assistant and provides support in all office activities.

In response to the director's detailed request for additional information and documentation establishing the petitioner's employment of contract workers, the petitioner stated: "The contract employees work a full-time 40-hour work week when the work is available. The job-titles of the contractors are laborers. There are no written contracts with the contractors. All of the contracts with the contractors are oral." The petitioner provided copies of invoices and canceled checks as evidence of payments to contractors who performed carpet and tile floor installation and general contracting services.

The director denied the petition on October 28, 2004, concluding that the petitioner had not established that the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition. The director referenced the petitioner's description of the beneficiary's duties and observed that the job description does not establish that the beneficiary is managing the organization, department, subdivision or function, or that he supervises and controls the work of supervisory, professional or managerial employees. Rather, based on the level of development achieved by the business and its current organizational structure, the director concluded that the beneficiary would perform the day-to-day services of the organization.

On appeal, counsel for the petitioner states:

The [director] . . . stated that the Beneficiary is not engaged in executive activities because the staff is not composed of other managers. The Petitioner is a small start-up company, and it is unrealistic that the Petitioner will hire additional managers or executives at this point. The Beneficiary clearly is not involved in the day to day activities, and the Beneficiary clearly makes all of the final business decisions of the Petitioner. Therefore, the Beneficiary is clearly an executive. The statute was not intended to limit managers or executives to persons who supervise a large number of persons or large enterprises. See *National Hand*

*Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5<sup>th</sup> Cir. 1989); *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988). In addition, the supervision includes supervising independent contractors as well as employees. 9 FAM 41.54 N8.2-1a.

Counsel's assertions are not persuasive. Upon review of the record and for reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

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 in either an executive or a managerial capacity. *Id.*

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 (9<sup>th</sup> 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 relate 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. In the instant matter, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time.

In this case, the petitioner initially provided a vague and nonspecific description of the beneficiary's duties that failed to demonstrate that he would be employed in a primarily managerial or executive capacity. For example, the petitioner indicated that the beneficiary would administer company finances and employees, enter into contracts, order supplies, set prices, implement marketing techniques, delegate responsibilities to "employees," and make "all business decisions." The petitioner stated that the beneficiary would not perform the "day-to-day duties of the company," but without additional explanation regarding the beneficiary's actual tasks and more information regarding the "employees" referenced in the job description, this initial job description suggested that the beneficiary would be performing a number of routine finance, sales and marketing tasks that do not fall under the purview of a managerial or executive position as defined in the statute. The petitioner did not identify any "business decisions" made by the beneficiary, specify the types of contracts he negotiated, clarify how or through whom the beneficiary implements "marketing techniques" or explain how "ordering supplies" qualifies as a managerial or executive duty. 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).

In the request for evidence, the director specifically requested that the petitioner submit a comprehensive description of what specific duties the beneficiary performs and the percentage of time the beneficiary spends on each duty. The petitioner failed to submit the requested information in response, instead submitting a slightly different, but equally brief and vague job description. For example, the petitioner added that the beneficiary would "direct the objectives and efforts to develop the business," "define strategies," and "direct

the goals of other levels.” 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The evidence requested by the director is critical, as it would have assisted in determining whether the beneficiary's duties are primarily managerial or executive. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Although requested by the director, the petitioner failed to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial or non-executive in nature. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's responsibilities, such as ordering supplies and “finding the customers,” do not fall directly under traditional managerial or executive duties as defined in the statute. 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 the requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). For this reason, the petition will not be approved.

Without a comprehensive job description of the beneficiary's duties on which to base his determination, the director looked to the petitioner's staffing levels in order to determine whether the beneficiary could be deemed to be serving in a primarily managerial or executive capacity. The AAO notes counsel's objections to the director's consideration of the petitioner's size and staffing levels. 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, 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 administrative 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 be engaged in software development, technical support services, construction, and building maintenance services. At the time of filing, the petitioner employed the beneficiary as president, an assistant, and a clerk. The duties of the assistant and clerk have been described as administrative and clerical in nature. The petitioner has submitted evidence that it utilizes outside contractors to perform tasks associated with the construction and building maintenance aspect of its business, such as performing flooring installation and electrical contracting duties. The petitioner has not submitted evidence that it employs any staff to relieve the beneficiary from performing the petitioner's day-to-day sales and marketing tasks, or to provide software development or technical support

services. The AAO further notes that the beneficiary, who has a degree in systems engineering and a technical background, is the only employee of the petitioning company who appears to be qualified to provide software development or support services.

In this matter, the petitioner and counsel have emphasized that the beneficiary does not perform any of the “day-to-day” duties, presumably associated with providing construction and building maintenance services. Therefore, the petitioner and counsel assert that the beneficiary is relieved from performing non-qualifying functions. However, merely establishing that the beneficiary does not perform the petitioner's most essential function does not mean that the beneficiary is relieved from performing many of the other types of non-qualifying functions associated with the petitioner’s business. An analysis of the nature of the petitioner’s business undermines counsel’s assertion that it has a sufficient staff of subordinate employees who relieve the beneficiary from performing non-qualifying duties. Rather it appears that the beneficiary, who is described as “examin[ing] the market,” “implementing marketing techniques,” “finding the customers and business opportunities,” “ordering supplies,” and “entering into contracts,” is the only individual performing any purchasing, sales or marketing functions. The evidence in the record does not establish whether the petitioner is actively engaged in providing software development and support services as claimed in the petition. If the petitioner is providing these services, it is evident that the beneficiary would also required to perform these duties as well. While these duties may be crucial to the proper functioning of the petitioner’s business, they are also daily operational tasks that cannot be deemed managerial or executive in nature. Collectively, the lack of subordinate employees to perform these tasks brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties.

The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). As discussed above, the petitioner has not established this essential element of eligibility. The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5<sup>th</sup> Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp. v. Pasquarell* or *Mars Jewelers, Inc. v. INS*. It is noted that both of the cases cited by counsel relate to immigrant visa petitions, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, the cases cited by counsel are distinguishable based on the applicable regulations. *See* 8 C.F.R. § 214.2(l)(14)(ii). Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. As counsel has not discussed the facts of any of the cited matters, they will not be considered in this proceeding.

In summary, the evidence of record in this case does not establish that the beneficiary would be employed in a primarily managerial or executive capacity. While the AAO does not dispute the heightened degree of authority imparted upon the beneficiary as president of the U.S. company and shareholder of the parent company, the actual duties themselves 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). As discussed above, the beneficiary's actual duties include first-line supervision of non-professional administrative and clerical employees and non-qualifying sales and marketing duties which prohibit him from performing primarily managerial or executive duties.

The regulation at 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. 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. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. 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 appeal will be dismissed.

The second issue in this matter is whether the petitioner established that it has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) states: "*Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad."

In support of the initial petition, the petitioner submitted: its balance sheets and profit and loss statements for 2004, showing gross income of approximately \$44,500; payroll summaries for 2004; its Forms 941, Employer's Quarterly Federal Tax Return for the first two quarters of 2004; its 2003 IRS Form 1120, U.S. Corporation Income Tax Return showing no receipts or sales; and nine invoices for services performed by the petitioner in July and August 2004.

On September 30, the director instructed the petitioner to submit additional evidence to establish that the petitioner was doing business for one year. Specifically, the director requested copies of bank statements, payroll records, invoices, sales records, bills of sale, shipping receipts and orders for goods and services.

In a response dated October 18, 2003, the petitioner noted that the beneficiary did not enter the United States until November 2003 and therefore "he did not begin to direct the U.S. operations until the last 2 months of 2003." The petitioner submitted additional invoices for services rendered in February 2004, May 2004, and June 2004, and copies of previously submitted invoices.

The director denied the petition, in part concluding that the petitioner had not established that it has been doing business for the previous year.

On appeal, counsel concedes that the petitioner did not invoice any customers in 2003 following the beneficiary's arrival on November 2, 2003, but asserts that the director should have considered the "substantial business activity" generated by the U.S. company during the first two quarters of 2004.

Upon review, the AAO finds insufficient evidence to establish that the petitioner has been engaged in the regular and continuous provision of goods and/or services for the year preceding the filing of the petition. The director specifically requested that the petitioner provide additional documentary evidence in the form of invoices, orders, receipts and other documents to establish that the petitioner had been doing business for the previous year. The submitted invoices show business transactions only during the months of February 2004 and May through August 2004. Thus, while the initial new office petition was approved on September 26, 2003, and the beneficiary arrived in the United States approximately one month later, the evidence submitted shows the petitioner was not prepared to commence doing business until several months after approval of its initial new office petition. The petitioner has not submitted evidence on appeal to overcome the director's decision on this issue. For this additional reason, the appeal will be dismissed.

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.