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FILE: SRC 04 189 53151 Office: TEXAS SERVICE CENTER Date: **OCT 04 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 commercial manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida corporation, claims to be the subsidiary of Ricardo Gomes de Souza ME, d/b/a Lajes Modelo, located in Sao Paulo, Brazil. The petitioner claims to be engaged in industrial cleaning. The beneficiary was initially granted a one-year period of stay in to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was erroneously based on the size of the petitioner's company and its number of employees. Counsel submits a detailed brief in support of these contentions.

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) provides 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.

In addition, 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 from counsel dated June 18, 2004, the beneficiary's duties were described as follows:

[The beneficiary] will continue managing the [REDACTED]. Her tasks involve directing and managing the contracts directly, dealing with contractors and customers in general, and overseeing the work done by the employees and independent contractors. She also establishes goals, market and sales strategies, developing new procedures for promoting the company. She also has authority to hire and fire employees, or promote personnel.

On October 21, 2004, the director requested additional evidence pertaining to the business activities of the petitioner, its current staffing levels, and the duties of its employees, including the beneficiary. A request for the organizational hierarchy and the position titles of all employees was likewise requested.

In a response dated January 11, 2005, the petitioner indicated that it currently employed three persons, and used independent contractors to "perform the hands on routine duties of the business." The petitioner continued by stating that "the Beneficiary is the Commercial Manager (Sales/Services Manager), [REDACTED] the General Manager, and [REDACTED] an Administrative Assistant." The petitioner stated that it was engaged in the business of providing industrial and commercial cleaning through independent contractors, under the indirect supervision of the beneficiary.

Quarterly tax returns were also submitted, which showed that the petitioner employed the beneficiary and the general manager as of the quarter ending June 30, 2004. Two Miscellaneous Income forms (Form 1099) were submitted, showing wages paid in 2003 to [REDACTED] in the amount of \$1,650, and to [REDACTED] the amount of \$2,000. The petitioner did not submit any 1099 forms for the year 2004, indicating that they were not yet available, but claimed to employ two contract workers.

On April 13, 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 was managing a staff of professional employees, and thus the petitioner could not be found to be

managing rather than performing the necessary functions and tasks of the organization. The director concluded that based on the information contained in the record, it appeared that the beneficiary was responsible for performing the tasks necessary to provide the petitioner's services, and thus was not functioning in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner argues that the beneficiary is functioning in a primarily managerial capacity and asserts that the evidence provided was sufficient to establish this claim. Counsel asserts that the director erroneously relied on the size of the entity in making its determination. Counsel further asserts that the administrative assistant relieves the beneficiary from performing non-qualifying duties and requests that the AAO consider that the petitioner still remains in its start-up phase and would benefit from an additional year to be up and running.

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 did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a vague overview of the nature of her duties. The AAO, 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. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner contends that the beneficiary, as commercial manager, or sales/service manager, is acting in a high level position, but provides virtually no details with regard to the beneficiary's day-to-day workload. Despite the director's request for additional information regarding her position, the petitioner failed and/or refused to submit such information. 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).

The petitioner claims on appeal that the beneficiary oversees subordinate personnel and is in charge of the overall operations of the company. Although the beneficiary is not required to supervise personnel, if it is claimed that her 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.

While the petitioner claims that the beneficiary oversees two subordinate employees and two independent contractors, the petitioner has failed to establish that these positions require an advanced degree, such that they could be classified as professionals. Although one of these employees possesses the title of "general manager," no additional information regarding her qualifications, or the requirements of that position, has been provided. Additionally, the petitioner has failed to show that this employee supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that she could be classified as a manager or supervisor. While the petitioner claims to employ an administrative assistant as

well as two independent contractors, no definitive evidence of their employment has been submitted. The quarterly tax returns as of June 30, 2004, the filing date of the petition, indicate that the petitioner only employed the beneficiary and the general manager. The administrative assistant, though listed on the September 30, 2004 return, was not on the petitioner's payroll at the time of filing. While the petitioner claims that the two contractors were on staff, no documentation of wages paid has been submitted. 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)). 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.

Finally, counsel's main assertion with regard to the appeal is that the director erroneously relied on the size of the petitioner in reaching the decision. 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 § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the record indicates that at the time of filing, the petitioner employed only the beneficiary and the general manager. While it claimed to employ two contractors to perform the cleaning services of the business, it submitted no evidence of their retention. Specifically, although the petitioner claims that its 1099 forms were not yet available for the tax year, it made no effort to submit other independent evidence, such as cancelled paychecks or payroll records, evidencing wages paid to these employees. Furthermore, the administrative assistant was not on the payroll until after the filing of the petition.

Based on this evidence, it appears that without evidence of additional staff members to perform the cleaning services, the beneficiary would have to engage in the provision of these services herself. Absent evidence to the contrary, there is no other legitimate explanation for the petitioner's ongoing services on or about the time the petition was filed. 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).

Consequently, despite counsel's assertions to the contrary, the petitioner has failed to submit sufficient documentary evidence that demonstrates the employment of the beneficiary in a primarily managerial or executive capacity. In the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year

period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In 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 record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial capacity. Although counsel refers to the beneficiary's overseas position as "Sales Manager," there is no documentation in the record that establishes that the duties performed by the beneficiary in this position were primarily managerial or executive. Merely relying on the beneficiary's managerial title alone is insufficient to establish that the beneficiary did in fact hold a position that was primarily managerial or executive. 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)). For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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 at 1043.

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.