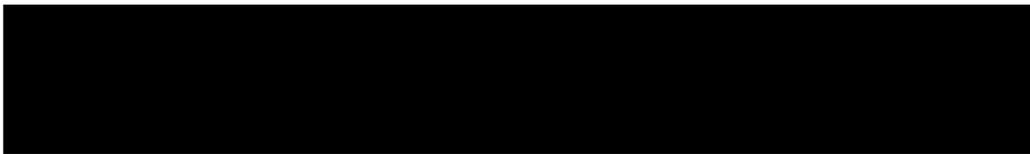


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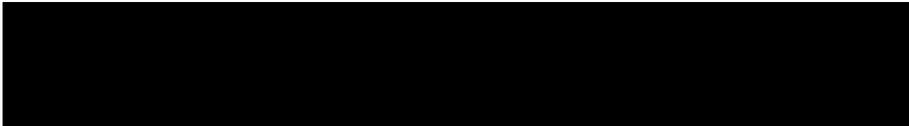
FEB 01 2007

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)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 visa petition seeking to extend the employment of its president and managing 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 under the laws of the State of Delaware and is allegedly engaged in the business of importing and selling cocoa mulch.¹ The petitioner claims a qualifying relationship with [REDACTED] located in the United Kingdom. The beneficiary was granted a two-year period of stay in 2002. The petitioner now seeks to extend the beneficiary's stay for an additional two years.²

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. 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 erred and that the record establishes that the beneficiary will be primarily employed in an executive capacity.

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(1)(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 (1)(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

¹It should be noted that, according to the records of the State of California and the organizational documents provided by the petitioner, the registered name of the petitioner is [REDACTED]

²While the petitioner requests a three-year extension in its letter dated February 4, 2004, a two-year extension was requested in the Form I-129.

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 primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily executive capacity.³

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 petitioner described the beneficiary's job duties in the Form I-129 as follows:

[The beneficiary's] duties have involved development of marketing strategy and programs, developing new business policies and objectives, meeting with distributors on the East Coast and setting up warehouse support to operate and distribute cocoa mulch to chain stores and private nurseries, negotiate contracts, execute policies adopted by the board, and coordinate employees throughout the world.

The petitioner also provided organizational charts for both the United States operation and the entire enterprise. The beneficiary is not identified on the organizational chart for the entire enterprise as being employed by the petitioner; rather, he is portrayed as the president/chairman of the foreign entity and "Mr. Farazian" is identified as the vice president of the petitioner. Likewise, the organizational chart for the United

³While the initial petition is not entirely clear regarding whether the petitioner is seeking to classify the beneficiary as a manager or an executive, the petitioner describes the beneficiary's position as an "executive position" in its letter dated February 4, 2004. Moreover, counsel to the petitioner clearly states in his appellate brief that "[t]his case concerns a position that is executive in capacity." Therefore, the AAO will consider the petition as one seeking to classify the beneficiary as an executive and not as a manager.

States operation places ██████████" at the top of the petitioner's hierarchy and identifies the beneficiary as "international operation executive U.K. offices" several steps below Mr ██████████. The beneficiary's ongoing responsibilities with the foreign employer are corroborated by minutes from corporate meetings held in 2001 and 2002.

On March 3, 2004, the director requested additional evidence. Specifically, the director requested, *inter alia*, further details regarding the beneficiary's job duties, a more detailed organizational chart, wage reports, and information regarding the petitioner's subordinate employees, including job duties.

In response, the petitioner provided a statement describing the petitioner's organization and the beneficiary's duties. The statement included a new organizational chart for the entire enterprise which materially differs from the chart appended to the initial petition in that the beneficiary is now identified as the president of the petitioner. The statement also identifies three full-time employees of the petitioner, a vice president (██████████) and two sales and marketing representatives, and describes the petitioner's business as follows:

Other than [the three listed full-time employees], [the petitioner] outsources [its] sales and marketing operations and has hired DRB Inc. to establish and manage [the petitioner's] nation wide [sic] distribution of products and services, Hamanaka Brokers for their imports, warehousing and logistics, and sales operations to retailers like Kellogg, Cascade and Amex who are well established, solid distributors, to product distribute to retailers like Wal-Mart, Lowe's, Sierra Nursery, Home Depot and Santa Barbara Home Imports[.]

Finally, the statement provides an expanded explanation of the beneficiary's job duties. First, the petitioner confirms that the beneficiary is the president of the foreign employer and that only 40% of his time is dedicated to the United States operation.⁴ Of the time dedicated to the petitioner, 75% of his duties were described as follows:

- Account Management
- Strategic Marketing
- Budget/sales forecasting
- Profit/Loss reporting
- Market/business development
- Future expansion programs
- Contract negotiations
- Distribution set-up
- Product/market positioning via complex communication mix
- Product and sales training
- New product development

⁴It is noted that the breakdown of the beneficiary's job duties only accounts for 80% of the beneficiary's time. The petitioner describes the beneficiary as dedicating 40% of his time to foreign operations and 40% of his time to the United States operation. The petitioner does not account for the remaining 20% of the beneficiary's time.

- Total quality management
- Total Customer Satisfaction programs

Of the time dedicated to the petitioner, the remaining 25% of the beneficiary's duties were described as follows:

[The beneficiary] trains all sales staff with [the sales and marketing representatives]; this involves product knowledge for sales reps. Trade fairs, public to support the product and industry trade faire [sic], geared towards the professional industry. Media advertisement, developing point of sales products such as posters, banners, display units, radio advertisement.

The petitioner also provided California wage reports which identify only two employees of the petitioner, the vice president and the beneficiary. The two sales and marketing representatives are not identified as employees in the California wage reports and appear to be affiliated with the sales and marketing contractor. They do not appear to be employees of the petitioner.

On June 4, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the director erred in denying the petition. Specifically, counsel to the petitioner asserts that the beneficiary is primarily employed as an executive and that independent contractors relieve the beneficiary from performing non-qualifying duties. Counsel asserts that, since importing the goods, transporting goods, warehousing, distributing, and marketing are all tasks performed by contractors, the beneficiary is free to "spearhead the growth" of the petitioner, set goals, and conduct the petitioner's operation "through a trickle-down effect between disjoint corporations."

Upon review, the petitioner's assertions are not persuasive.

When examining the executive 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 matter, the petitioner has failed to prove that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole

managerial employee.

The petitioner's description of the beneficiary's duties in the United States is insufficient to establish that he is employed primarily in an executive capacity. As explained in the record, the beneficiary is one of two employees of the petitioner. While the vice president apparently works full-time for the petitioner, the beneficiary spends only a minority of his time performing services related to the United States operation. The petitioner provided no coherent job description for the vice president and only a vague job description for the beneficiary which fails to reveal what services the beneficiary provides to the petitioner on a day-to-day basis. For example, the job description includes duties such as strategic marketing, contract negotiations, training, and total customer satisfaction programs. However, the petitioner failed to explain what marketing strategies were formulated by the beneficiary, what contracts were negotiated, how training is conducted, or what customer satisfaction programs were created. 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).

Moreover, the beneficiary's role appears to include many administrative and operational tasks necessary to the operation of the business. For example, conducting training and developing new products would most certainly involve non-qualifying tasks. Absent more detail regarding what percentage of his time is dedicated to such duties and a credible explanation as to who, if not the beneficiary, performs the non-qualifying tasks implicit in such broad functions, Citizenship and Immigration Services (CIS) cannot confirm that the beneficiary is primarily employed as an 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Finally, on appeal, the petitioner relies heavily on its assertion that many operational and administrative tasks necessary to the business, i.e., the importation of the cocoa mulch and its warehousing, distribution, and marketing to retailers, have been "outsourced" to various independent contractors thus permitting the beneficiary to primarily focus on executive duties. However, the use of such independent contractors alone is not persuasive in establishing that the beneficiary is primarily employed as an executive. First, while the petitioner puts great effort into defining those operational and administrative tasks which the beneficiary apparently does *not* perform, the petitioner ignores the fact that the beneficiary's job description is still too vague, making it impossible to discern what services, exactly, he provides on a day-to-day basis. Second, while the employment of the contractors may relieve the beneficiary of the need to physically pick up, store, and deliver the product, these contractors are not relieving the beneficiary from the need to perform other operational or administrative tasks inherent in the petitioner's business. It is inherent in the petitioner's business that its operation and administration involves many non-qualifying duties other than those tasks accomplished by contractors, e.g., answering the telephone, filing, correspondence, invoicing, and processing accounts payable and accounts receivable. The petitioner has not established that it employs anyone to relieve the beneficiary of performing all these other non-qualifying duties or, if the beneficiary performs many of these tasks, that he is otherwise primarily employed as an executive.

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). 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.* As explained above, the petitioner has provided various versions of its organizational chart. The beneficiary was omitted from the petitioner's hierarchy in one chart, identified as the president of the petitioner in another, and placed in a subordinate position to the vice president in yet another. Such inconsistencies cast doubt on the reliability of the remaining evidence, and it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily executive capacity as required by 8 C.F.R. § 214.2(l)(3).⁵

Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361. The prior approvals do not preclude CIS from denying an extension of the

⁵In his appellate brief, counsel to the petitioner states that, in the alternative, the beneficiary could be characterized as directing three "functions" of the organization. While counsel is not clearly claiming that the beneficiary could be classified as being employed primarily as a "function manager," the record would fail to support this claim to the extent counsel is making this argument. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. Moreover, without any subordinate staff available to perform the non-qualifying administrative and operations tasks inherent in operating any business, the petitioner must establish that a majority of the beneficiary's time is dedicated to performing managerial duties. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Therefore, even though the petitioner was successful in the past in petitioning for the beneficiary, the director properly denied the petition in this case.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met.

It is further noted that, upon reviewing CIS records, the beneficiary appears to have been employed by the petitioner in H-1B1 visa status since October 1, 2004. The initial H-1B1 petition was approved for the beneficiary from October 1, 2004 until March 1, 2006, or 17 months (WAC 04 212 53036). This petition was subsequently extended for three more years until April 26, 2009 (WAC 06 113 51943). The instant petition sought to extend a previously approved L-1A petition (WAC 01 090 50790), which had been approved for the beneficiary for a period of three years (March 1, 2001 until March 1, 2004). Therefore, upon the expiration of the current H-1B1 petition as authorized (April 26, 2009), the beneficiary will have spent a total of 7 years and 5 months in either L-1A or H-1B1 status without spending at least one year outside of the United States. Absent evidence that the beneficiary qualifies for an exemption to section 214(g)(4) of the Act, the regulations prohibit a beneficiary from being granted H-1B1 status beyond the sixth year limit if the beneficiary had already spent six years in the United States in either H or L visa status without first residing and having been physically present outside the United States for the requisite one year. 8 C.F.R. §§ 214.2(h)(13)(i)(B) and 214.2(h)(13)(iii)(A). Therefore, it appears that the current H-1B1 petition for the beneficiary (WAC 06 113 51943) was partially approved in error.⁶ The expiration date of this petition should have been on or about November 26, 2007, which would have granted the beneficiary a total of six years in L and H status. Accordingly, the director is requested to review the H-1B1 petition in question (WAC 06 113 51943) for possible partial revocation in accordance with 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDERED: The director shall review the prior H-1B1 nonimmigrant petition approved on behalf of the beneficiary for possible partial revocation pursuant to 8 C.F.R. § 214.2(h)(11).

⁶Although CIS records indicate that a Form I-140 immigrant petition was filed on the beneficiary's behalf on June 26, 2002 (WAC 02 218 50419), this petition was denied on October 14, 2005.