

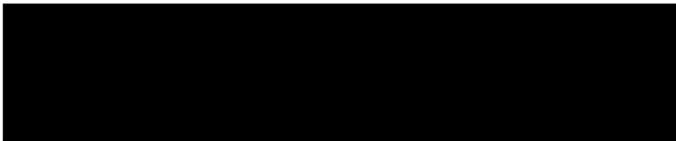
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**U.S. Citizenship
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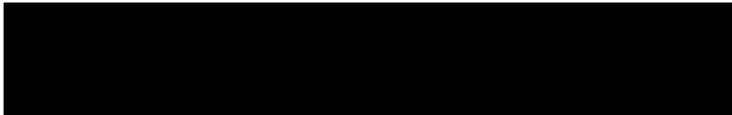
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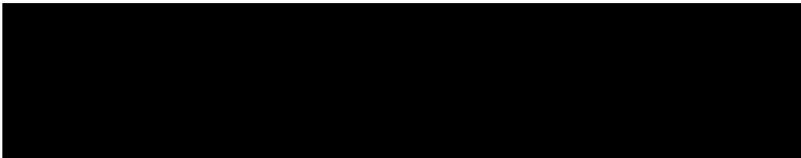
File: SRC 04 190 50889 Office: TEXAS SERVICE CENTER Date: **JUN 01 2007**

IN RE: Petitioner:
Beneficiary:



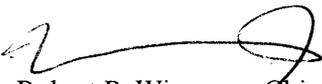
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 general 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 is a corporation organized in the State of Florida that is engaged in insurance services. The petitioner claims that it is the subsidiary of INASEG LTDA., located in Bogota, Colombia. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

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, counsel for the petitioner asserts that the director's decision is based on misperceptions resulting from the failure of the petitioner's previous counsel to provide adequate supporting documentation. In support of this assertion, counsel submits additional evidence.

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 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 an unsigned letter dated June 28, 2004 accompanying the Form I-129, Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] plans and coordinates the policies, goals, and . . . supervises the company's production and research activities, develops pricing strategy for the company which results in competitiveness within the insurance market share [sic].

* * *

He directs and oversees all operations and projects, and makes all business decisions. As the General Manager, he is involved in doing continuous market research to determine how best to introduce and expand the U.S. company. Under this position he is also responsible for the promotional department of the company and the continuing development of marketing strategies and plans.

In the same letter, the petitioner indicates that it has two other employees, a sales director/representative and personnel officer and a sales representative and office secretary.

On July 15, 2004, the director issued a request for further evidence (RFE). Specifically, the director requested (1) an explanation of the duties and educational background of the other employees on the U.S. company's staff; (2) an organizational chart for the U.S. company; (3) evidence of how the beneficiary will not engage in the day-to-day operations of the business and will primarily be engaged in managerial or executive duties and managing other managers and professionals; (4) copies of the U.S. entity's state quarterly tax returns for the previous two quarters; and (5) Form 940EZ, Employer's Annual Federal Unemployment Tax Return.

In response, the petitioner submitted an organizational chart showing that it has four employees in total – the beneficiary as general manager and, directly below him, a life insurance representative, a customer

representative, and a sales associate. The life insurance representative is the individual who was previously described in the initial petition as the sales director/representative and personnel officer; the other two employees under the beneficiary were not previously named. The petitioner submitted resumes and job descriptions with breakdowns of the percentage of time spent per duty for all four employees. The beneficiary's duties are broken down in the new job description as follow:

- Keep track of cash flow: 60%
 - * Keep balanced sheets [sic] of cash in and cash out.
 - * Pay bills.
 - * Maintain statistics of money flow.
 - * Do financial planning for the agency.
 - * Review purchase orders.

- In charge of legal department: 10%
 - * Make sure that all legal requirements are kept. Licenses, continuo[us] education, taxes, permits, etc.

- Find qualified staff: 10%
 - * Interview prospects.
 - * Hire and set up payroll through Crum (staff leasing).
 - * Appoint new staff with Allstate.

- Marketing: 10%
 - * Create marketing strategies.
 - * Negotiate with vendors price for advertisement.
 - * Creat[e] ads.

- Overview: 10%
 - * Overview that the agency is producing [and] that it is viable and solvent.

The petitioner also submitted its federal and state employer's quarterly tax reports for the first and second quarters of 2004 and its payroll record for the months of July and August 2004. The payroll record lists only two employees – the beneficiary and the person described in the initial petition as the sales director/representative and personnel officer.

On November 9, 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. The director noted that, although the petitioner declared in the initial petition that it has four employees, payroll records show that it has only two. The director found the record does not establish that the beneficiary will be supervising professional, managerial, or supervisory employees who will relieve the beneficiary from performing non-qualifying duties, and that given the current structure of the business, the beneficiary will have to engage primarily in the day-to-day operations of the company.

The petitioner is represented by new counsel on appeal. Counsel asserts that the director misperceived the facts because previous counsel failed to submit sufficient evidence. Counsel claims that the reason the U.S. entity's payroll only shows two employees, rather than four as disclosed in the response to the RFE, is because the U.S. entity had acquired another insurance company shortly before the petition was filed, and the employees of the acquired company continued to be paid through that company's payroll arrangement. Counsel further indicates that in the interim between the filing of the initial petition and the petitioner's response to the director's RFE, the company added two new employees and lost two of the employees previously listed in the petition. The two new employees are also paid through the staffing service for the recently-acquired company even though they are employees of the U.S. entity. Counsel asserts that the petitioner's previous counsel had failed to explain these details earlier. Counsel further asserts that the U.S. company's essential daily operations consist of the sale and service of insurance policies, and since the beneficiary is not a licensed insurance agent, he cannot be carrying out the company's daily operations. Rather, counsel maintains the beneficiary is there to manage the company and to supervise and control the work of the other employees, all of whom are licensed insurance professionals. Counsel also claims that the beneficiary's subordinates do in fact perform in some managerial capacity. Additional documentation is submitted on appeal in support of the above assertions.

Upon review, the record is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. 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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

The petitioner and its counsel have claimed in the petition and on appeal that the beneficiary functions in a primarily managerial capacity within the U.S. company. Counsel asserts on appeal that the beneficiary cannot be considered to be engaging in the day-to-day operations of the company because he does not have a license to sell insurance. However, in response to the director's RFE, the petitioner disclosed that the beneficiary spends 60% of his time on routine tasks relating to the company's finance, such as paying bills, keeping track of cash flow, and reviewing purchase orders; 10% on maintaining the company's compliance with legal requirements; and 10% on marketing tasks such as creating advertisements and negotiating prices with vendors. The job descriptions for the company's other employees show that they are involved either in customer service or the sales and service of insurance policies and do not perform any of the routine finance, legal compliance, and marketing tasks attributed to the beneficiary. As such, it must be concluded that the beneficiary performs the described tasks himself rather than supervises other employees who perform them. Even if the beneficiary does not sell insurance policies, the tasks that he performs in finance, legal compliance, and marketing are also tasks that are necessary to provide the company's service or product. As such, these tasks will not be considered managerial or executive in nature. Based on his job description, it would appear that the beneficiary spends up to 80% of his time on these non-qualifying tasks. 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).

Moreover, as the director noted, there is a discrepancy in the record regarding the number of employees on the U.S. entity's staff. The petitioner's June 28, 2004 letter states that the company has three employees – the beneficiary as general manager, a sales director/representative and personnel officer, and a sales representative/office secretary. The response to the RFE, submitted about three months later, indicates that the company has four employees. The beneficiary remains the general manager, but the sales director/representative and personnel officer has become a sales associate; the sales representative/office secretary no longer appears to be on the staff; and a life insurance representative and a customer representative have been added. In addition, the petitioner submitted the company's payroll record, which lists only the beneficiary and the person identified as the sales associate. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. The petitioner offered no explanation for these changes in the company's staffing prior to the issuance of the director's decision. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO acknowledges that counsel does clarify on appeal that the U.S. company claims to have four employees, as disclosed in the petitioner's response to the RFE, and does explain why there are only two listed on the company's payroll. However, counsel also confirms that two of the beneficiary's subordinate employees were hired in the interim between the filing of the petition and the petitioner's response to the RFE, and therefore were not employed by the U.S. company at the time the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Even assuming that the staff of the company consists of four employees, the record still does not demonstrate that the beneficiary supervises professional, managerial or supervisory subordinate employees, as required by section 101(a)(44)(A)(ii) of the Act. According to the organizational chart the petitioner submitted in response to the RFE, the beneficiary directly supervises the other three employees of the company. Counsel claims on appeal that at least two of the beneficiary's subordinates "have some managerial capacity themselves" – the sales associate, counsel claims, "hold[s] a license to act as a general managing agent of a Florida-based agency", and the life insurance representative "has authority to direct any customer service activity." However, based on the job descriptions the petitioner has provided, the duties of these employees appear to involve direct sales and service of insurance policies. There is no indication that they, or the customer representative, carry out any managerial or supervisory function, nor is there any other staff for them to manage or supervise. As such, the record does not show that the beneficiary supervises managerial or supervisory subordinate employees.

The petitioner also has not established that the beneficiary's subordinates are professionals. Counsel claims on appeal that all three of the beneficiary's subordinate employees are "insurance industry professionals" based on their licenses from the Florida Department of Insurance or Financial Services. In evaluating whether the beneficiary manages professional employees, however, the AAO must evaluate whether the

subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). In this instance, the petitioner submitted resumes for the life insurance representative and the customer representative, which show that both employees have graduated from high school and each has completed an insurance or customer service course of unstated duration. There was no evidence submitted relating to the sales associate's educational level, although certificates for completion of various insurance courses were included. On appeal, the petitioner submitted an informational printout from the Florida Department of Financial Services relating to the application process for an insurance license; however, while this document mentions the requirement of an examination, it sheds no light on the level of education required in order to pass the examination, or to acquire a license. Based on the information submitted, the AAO cannot determine whether the work of these individuals, as insurance agents, require the level of education that might be considered equivalent to "at least a baccalaureate level." Thus, without further information, the record is insufficient to demonstrate that the beneficiary's subordinate employees are professionals.

In light of the foregoing, the AAO concurs with the director's conclusion that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the director's decision, the petitioner has not provided sufficient evidence to establish that a qualifying relationship continues to exist between the U.S. and foreign entities. The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 597; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

On the L Supplement to Form I-129, the petitioner indicated that the U.S. entity is 51% owned by the foreign entity. In support of this claim, the petitioner submits a copy of share certificate number 1 of the U.S. entity, dated May 23, 2003, which indicates that the foreign entity owns 3,825 shares of the U.S. entity. The petitioner submitted no other evidence of ownership interest in the U.S. entity.¹ As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine

¹ The AAO notes that the U.S. entity's 2003 federal tax return indicates that [REDACTED] owns 49% of the company. However, there is no other documentation on the record to substantiate this claim.

whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, Citizenship and Immigration Services is unable to determine the elements of ownership and control and therefore cannot conclude that a qualifying relationship between the U.S. and foreign entities continues to exist as claimed. For this additional reason, the petition will be denied.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.