



U.S. Citizenship
and Immigration
Services

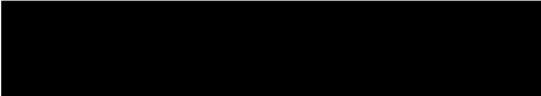
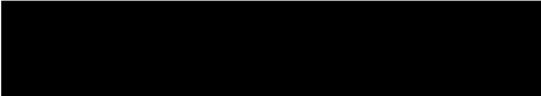
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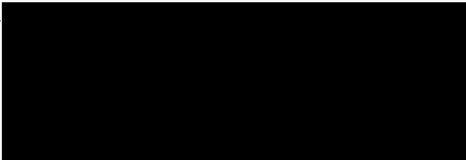
D-7

FILE: SRC 05 169 50627 Office: TEXAS SERVICE CENTER Date: **MAR 07 2007**

IN RE: Petitioner: 
Beneficiary: 

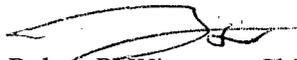
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 employ the beneficiary 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 New Jersey corporation, claims to be the subsidiary of Zai Cargo E.U., located in Cali, Colombia. The petitioner claims to be a shipping company and seeks to employ the beneficiary as Zone Director.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) the beneficiary had been employed abroad 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 erroneous, and submits a detailed statement in support of this contention.

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)(3)(v) provides that, if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue in this matter is whether the beneficiary will be employed in the United States 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 dated May 25, 2005, counsel for the petitioner provided the following overview of the beneficiary's proposed duties in the United States:

[The beneficiary's] experience at [the foreign entity] makes [him] exceptionally well-qualified for the position of Zone Director that we are offering him. As the Zone Director in North Carolina, [the beneficiary] will manage the territory covering North and South Carolina, Tennessee, and Virginia. He will be responsible for managing all operations and activities in this zone. His duties in the United States will be almost identical to the work he has fulfilled in Colombia, including managing the financing and resources function related to processing all paperwork and records to release and transport cargo, such as payment of all fees and taxes required; coordinating and directing logistics to prepare and distribute cargo within the United States and internationally; ensuring proper delivery of cargo of Colombia and other international destinations; and management of human resource functions in this zone. Additionally, he will direct and develop logistical and management systems and will be involved with marketing and developing new contracts for our company. He will report directly to the company president.

On June 7, 2005, the director requested additional evidence pertaining to the beneficiary's proposed employment in the United States. Specifically, an organizational chart outlining the U.S. hierarchy was requested, as well as more details pertaining to the beneficiary's position as well as the positions of his subordinates. In a response dated August 29, 2005, the petitioner clarified that the beneficiary's proposed duties would be identical to those he performed in Colombia. Specifically, the petitioner stated:

[The beneficiary's] duties are as follows: establish, formulate, and approve policies and programs; determine and create positions in the regional offices and analyze employee wages, promotions, and profiles, with complete authority to hire, terminate, and promote employees in this department; represent [the foreign entity] and delegate outside counsel/attorneys to act on behalf of the company in negotiations of contracts and other executive functions; keep informed about customs and tax laws and regulations and changes in the laws; analyze the market to study and determine potential customers, sales volumes, concurrence, capture, and retention of new customers; prepare and submit monthly status reports directly to the company president.

The petitioner further indicated that despite having a number of offices throughout the United States, the beneficiary would have no co-workers or subordinate employees at his place of duty.

The director denied the petition on September 13, 2005. Specifically, the director determined that based on the description of the beneficiary's duties contained in the record, it appeared that the beneficiary would perform more non-qualifying duties than actual managerial duties. The director specifically noted that the proposed organizational structure of the U.S. entity, with no other employees, did not support the premise that the beneficiary would enter employment with the United States entity in a primarily managerial or executive capacity.

The AAO concurs with the director's determination. First, the description of the beneficiary's duties, as provided in the initial petition and which was not supplemented in the response to the request for evidence, is extremely broad. 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 will 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).

Although some specifics are listed, the petitioner identifies numerous duties for the beneficiary that are not traditionally managerial or executive. 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 each. This failure of documentation is important because several of the beneficiary's daily tasks, such as "analyze the market" and "prepare and submit monthly status reports," do not fall directly under traditional managerial duties as defined in the statute. Specifically, these duties identify crucial tasks that are necessary for the petitioner to promote and provide its products and services. 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. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Without a breakdown of the percentage of time the beneficiary will devote to each of his duties, the AAO cannot determine 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).

A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology*

International, 19 I&N Dec. at 604. In this matter, however, there are no employees other than the beneficiary.

On appeal, counsel asserts that the director's decision on this issue was erroneous and that the record contains ample information to establish the beneficiary's qualifications. In addition, counsel asserts that despite the director's findings, the beneficiary will in fact oversee an accountant, and will eventually oversee a warehouse manager who will be hired after the approval of the petition on behalf of the beneficiary. Counsel further contends that despite the director's findings, there are in fact other employees working for the petitioner at the other United States offices. Counsel further claims that the U.S. petitioner should be treated as a new office as this is the petitioner's newest worksite in the United States. The AAO disagrees.

There are two major problems with counsel's arguments. First, although the petitioner claims for the first time on appeal that the petitioner should be treated as a new office, it is evident that, based on the petitioner's claim on Form I-129 that it has been operating its shipping business since 1996, this is not the case. Therefore, the staffing levels of the office in which the beneficiary will work are particularly relevant for purposes of this matter. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was allegedly a 9-year-old shipping company that claimed to have a gross annual income of \$1,143,154. The petitioner further claimed that it employed 30 persons throughout the United States. With regard to the proposed work location of the beneficiary, however, the firm employed no other persons on site. In addition to the fact that the petitioner's comprehensive organizational chart for locations in the United States is vague and omits the names of its alleged employees, the fact remains that no other employees have been designated as permanent workers in the North Carolina office in which the petitioner intends to transfer the beneficiary. As the petitioner clearly indicated that the beneficiary was *not* coming to the United States to open a new office, this skeletal structure at the beneficiary's proposed duty station does not appear to meet the reasonable needs of an established corporation able to support a primarily managerial or executive position at that location. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company in that region might plausibly be met by the services of the beneficiary alone. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

No evidence to overcome the director's specific basis for the denial is submitted on appeal, nor are any additional arguments in support of the beneficiary's qualifications submitted. Counsel merely claims that by virtue of the beneficiary's position and his vast experience abroad, he is qualified for the benefit sought. 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)). In addition, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director determined that the petitioner lacked the organizational complexity to support the beneficiary in a primarily managerial or executive capacity. Specifically, the director noted that absent evidence to the contrary, the beneficiary would be required to perform all administrative, clerical, and non-qualifying duties based on the nature of the business and the lack of other staff members. While the petitioner claims that a warehouse manager will eventually be hired to assist the beneficiary, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition, which has not been established here. For this reason, the petition may not be approved.

The second issue in this matter is whether the beneficiary was employed abroad in a primarily managerial or executive capacity.

In a letter dated May 25, 2005, counsel for the petitioner discussed the nature of the beneficiary's employment abroad. Specifically, counsel explained that the beneficiary had been hired by the foreign entity in October 2002 as a Zone Coordinator. With regard to his duties, counsel stated:

[The beneficiary's] duties include managing the daily operations of the offices in Colombia. He has full responsibility for the financing and resources function related to [processing] all paperwork and records to release and transport cargo, including payment of all fees and taxes required. Additionally, he coordinates and directs logistics to prepare and distribute cargo nationally and across international lines and is responsible for communications with and reporting US operations. [The beneficiary] also manages human resources functions in Colombia. Furthermore, he directs and develops logistical and management systems for [the foreign entity],

On June 7, 2005, the director requested additional evidence pertaining to the beneficiary's employment abroad. Specifically, the director requested a more detailed description of the exact nature of the beneficiary's duties, in addition to an organizational chart outlining the petitioner's hierarchy abroad. Finally, details pertaining to the beneficiary's subordinates and the nature of their positions were also requested. In a response dated August 29, 2005, the petitioner clarified that the beneficiary's proposed duties would be identical to those he performed in Colombia, and provided the following description (which was first noted above but repeated here for simplicity):

[The beneficiary's] duties are as follows: establish, formulate, and approve policies and programs; determine and create positions in the regional offices and analyze employee wages, promotions, and profiles, with complete authority to hire, terminate, and promote employees in this department; represent [the foreign entity] and delegate outside counsel/attorneys to act on behalf of the company in negotiations of contracts and other executive functions; keep informed about customs and tax laws and regulations and changes in the laws; analyze the market to study and determine potential customers, sales volumes, concurrence, capture, and retention of new customers; prepare and submit monthly status reports directly to the company president.

The letter further outlined positions and duties of the beneficiary's subordinates in the foreign entity. Specifically, the petitioner indicated that the beneficiary oversaw the following: (1) Factory Manager/General Coordinator; (2) Warehouse Chief; (3) Warehouse Assistant; (4) Secretary; (5) three full-time drivers; and (6) one part-time employee who serves as a driver and warehouse assistant during the night shift as needed.

The director denied the petition on September 13, 2005. Specifically, the director determined that based on the description of the beneficiary's duties contained in the record, it appeared that the beneficiary would perform more non-qualifying duties than actual managerial duties.

Once again, the AAO concurs with the director's determination. First, the description of the beneficiary's duties, as provided both in the initial petition and in the response to the request for evidence, is extremely broad. As discussed above, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient because the regulations require a detailed description of the beneficiary's daily job duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The main problem, however, is that the petitioner's description of the beneficiary's tasks abroad focus on two major areas: financing and distribution of cargo, and human resources. Neither of these areas encompass tasks that are exclusively or traditionally managerial or executive. Although the petitioner claims that the beneficiary oversees a staff of at least seven people, there is no explanation as to why the beneficiary is required to focus primarily on these non-qualifying tasks. The petitioner fails to quantify the time the beneficiary spends on other duties, such as supervising subordinate staff members and directing the organization. This failure of documentation is important because finance and human resources are typically areas not normally overseen by managerial or executive employees. In fact, these duties identify crucial tasks that are necessary for the petitioner to promote and provide its products and services. 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. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Without a breakdown of the percentage of time the beneficiary will devote to each of his duties, the AAO cannot determine 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).

A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. at 604. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. In this matter, while the petitioner claims that the beneficiary oversees all the employees identified in the response to the request for evidence, it remains to be established that these employees are professional, supervisory, or managerial in nature.

As requested by the director, the petitioner explained that the subordinate employees had completed high school but possessed no advanced degrees. Based on this evidence, it is apparent that the petitioner has not established that these employees require an advanced degree to perform the duties of their positions, such that they could be classified as professionals. Nor has the petitioner shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Although it is alleged that the warehouse chief oversees the warehouse assistant, the exact nature of their rank and duties within the organizational hierarchy are unclear. 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.

As previously stated, counsel asserts on appeal that the record contains sufficient evidence to establish that the beneficiary was employed in a qualifying position abroad. However, counsel provides no independent evidence to corroborate these claims, nor does she seek to explain why the beneficiary's position abroad required him to handle finance and human resource duties which fall outside the realm of traditional managerial or executive duties.

The petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. Specifically, the petitioner submitted no information to establish the percentage of time the beneficiary actually performs or will perform the claimed managerial or executive duties. Although the record contends that a secretary is employed by the foreign entity, the petitioner still alleges that the beneficiary performs the human resource functions. There is no mention in the record of any additional administrative assistant who could relieve the beneficiary from this non-qualifying task. Collectively, therefore, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

As previously stated, no evidence to overcome the director's specific basis for the denial is submitted on appeal, nor are any additional arguments in support of the beneficiary's qualifications submitted. Counsel merely claims that by virtue of the beneficiary's position and his vast experience abroad, he is qualified for the benefit sought. 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. at 165. In addition, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. For this additional reason, the petition may not be approved.

Beyond the decision of the director, there is insufficient evidence in the record that a qualifying relationship exists between the U.S. petitioner and the foreign entity. For example, on the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2004, the petitioner indicates that it has no foreign shareholders with more than a 25% interest, and further indicates that it has no shareholders with more than a 50% interest in its voting shares. This directly contradicts the petitioner's claim that it is a wholly-owned subsidiary of the foreign entity. In addition, the corporate documents pertaining to the U.S. petitioner are confusing. For example, the Form I-129 indicates that the petitioner has been in business since 1996. However, the record contains articles of incorporation for the petitioner in the state of New Jersey (June 30, 2000), North Carolina (November 21, 2002), and California (March 11, 2003). No ownership information has been submitted for these entities. More importantly, it makes unclear the identity of the true petitioner in this matter, since all three are separate corporate entities. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. 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). 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).

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.