

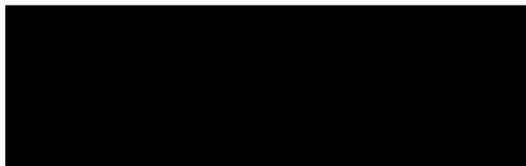
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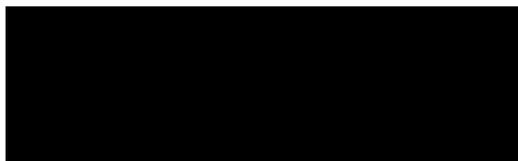
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File: SRC 04 101 50625 Office: TEXAS SERVICE CENTER Date: **OCT 02 2007**

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 visa 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 under the laws of the State of Florida and is allegedly engaged in wholesale distribution and retail sales. 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 will be employed in the United States in a primarily managerial 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 to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of either an executive or a manager. In support, counsel submits a brief.

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.

The primary 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.

Although the position offered has a managerial title, the petitioner does not clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. While the director considered the petition as if the petitioner was asserting that the beneficiary will perform managerial duties, counsel on appeal argues that the beneficiary may be classified as either a manager or an executive. Given the lack of clarity, the AAO will consider both classifications on appeal.

The petitioner described the beneficiary's job duties as "general manager" in a letter dated February 17, 2004 as follows:

Specific duties will include: (i) seeking out, hiring and then supervising qualified professionals such as attorneys, accountants and consultants to assist in establishing the U.S. company's operations; (ii) recruiting, hiring and training staff (including subordinate managers); (iii) managing all aspects of the company's administration functions including (until subordinate managers are hired to do so) the finance, sales/marketing and human resources functions; (iv) exercising ultimate discretion over the day-to-day operations of the organization; and (v) performing business development activities such as reviewing potential property and business acquisitions and negotiating partnerships. As noted above, and once the company proceeds past the initial "start up" phase, the General Manager will supervise all employees (including subordinate managers).

The petitioner also submitted wage reports indicating that it employed five people, including the beneficiary, in the quarter immediately preceding the filing of the instant petition.

On March 15, 2004, the director requested additional evidence. Specifically, the director requested a description of the petitioner's other employees.

In response, the petitioner submitted a description of its employees. The "till operator" and the "sales" employees are described as performing the tasks necessary to provide a service or to produce a product. The "manager" is described as follows:

[The manager] work[s] directly with the General Manager by constantly discussing and

reporting to the General Manager on ALL issues pertaining to the daily operations of the business. Other managerial responsibilities include advising the General Manager in the selection of merchandise to order or purchase, receiving and checking suppliers[] invoices and merchandise, pricing of merchandise, promoting selected merchandise for sale clearances, arranging interior store displays and signs, delegating staff duties and supervising staff work performances, acting as temporary relief for any absent staff, attending to any customer related disputes or grievances, ensuring store tidiness and neat appearance.

Counsel indicated that two of the sales employees are part-time/seasonal workers.

On April 9, 2004, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial capacity.

On appeal, the petitioner asserts that the beneficiary's duties are primarily those of an executive or manager.

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

Title 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 Citizenship and Immigration Services (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 United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. As indicated above, the petitioner ascribed five categories of duties to the beneficiary. However, categories (i), (ii), and (iii) appear to be primarily related to the establishment of the "new office." The only duties that appear applicable to the business after its establishment are "exercising ultimate discretion over the day-to-day operations" and "performing business development activities such as reviewing potential property and business acquisitions and negotiating partnerships." However, the petitioner does not explain what, exactly, the beneficiary will do in "exercising ultimate discretion" or describe with any specificity the potential acquisitions or partnerships being reviewed and negotiated. The petitioner also does not explain what the beneficiary will do in "managing all aspects of the company's administration functions." The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes lofty duties does not establish that the beneficiary is actually performing managerial 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, the petitioner did not provide a breakdown of how much time the beneficiary will devote to the many duties ascribed to him. This is particularly important in this matter because some of the duties listed by the petitioner appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary will be "performing business development activities such as reviewing potential property and business acquisitions and negotiating partnerships." However, business development activities constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the job descriptions for the subordinate employees fail to identify any employees or contractors who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to these duties, it must be concluded that he will perform these tasks. As the petitioner has not established how much time the beneficiary will devote to such non-qualifying tasks, it cannot be confirmed that he will be "primarily" employed as a manager. 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).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the job descriptions for the subordinate staff members, it appears that the beneficiary will directly supervise a "manager" who, in turn, will supervise approximately four workers, two of which are seasonal/part-time employees. However, the petitioner has not established that the "manager" is truly engaged in performing supervisory or managerial duties. An employee will not be considered to be a supervisor simply because of a job title or because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. See generally *Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). To the contrary, it appears that the "manager" is also performing the tasks necessary to produce a product or to provide a service, e.g., selecting merchandise, pricing, promotions, and store arrangement. Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. The petitioner has not established that the reasonable needs of the United States operation compel the employment of a managerial or executive employee to oversee one or more subordinate supervisors. To the contrary, it is more likely than not that both the beneficiary and his staff are all primarily performing non-qualifying tasks. See generally *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006).

In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. 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 professional. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner did not establish the skill level or educational background required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will manage professional employees.¹ Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.²

Beyond the decision of the director, the petitioner has also failed to establish 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

¹In evaluating whether the beneficiary manages professional employees, 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).

²While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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 will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line manager of non-professional employees and/or will be engaged in performing non-qualifying operational or administrative tasks. 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 will primarily perform 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).

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 beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, it appears that the beneficiary will be primarily employed as a first-line supervisor and will perform tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

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). Moreover, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d at 1316 (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, it is noted that the initial "new office" petition was approved from February 28, 2003 until February 28, 2004. The instant extension petition was filed on March 5, 2004. In that petition, the petitioner clearly indicates that its basis for the classification sought is the "continuation of previously approved employment without change." The petition also seeks to "extend or amend the stay of [the beneficiary] since [he] now hold[s] this status." Title 8 C.F.R. § 214.2(l)(14)(i) clearly states that an extension petition may only be filed if the validity of the original petition has not expired. In this case, since the validity of the original petition expired on February 28, 2004, the instant extension petition filed on March 5, 2004 must be denied as untimely. Therefore, the AAO will dismiss the appeal for this additional reason.

Beyond the decision of the director, the petitioner has failed to establish that it still has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by "[e]vidence that the United States and the foreign entity are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section."

Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." A

"subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity." "Doing business" is defined in pertinent part as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization."

In this matter, the record is devoid of any evidence that the foreign entity owns or controls the petitioner. The petitioner did not submit stock certificates, organizational documents, or other evidence of ownership or control. Furthermore, the record does not persuasively establish that the petitioner or the foreign employer was doing business at the time the instant petition was filed. While the petitioner submitted business documents for both the United States operation and the foreign entity, these documents do not establish that these businesses are operating in a regular, systematic, and continuous fashion. Virtually all of the documents submitted concern business activity in 2003 or earlier. The instant petition was filed on or about March 5, 2004. Absent evidence establishing that both the petitioner and the foreign entity were doing business at the time the instant petition was filed, the petitioner has not established that either of these employers is a qualifying organization.

Accordingly, the petitioner has not established that it and the foreign entity are still qualifying organizations. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has failed to establish that it has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). As explained above, the record is devoid of evidence from 2004 that the petitioner is engaged in doing business. Accordingly, the petition may not be approved for this additional reason.

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the 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). 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.

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 it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc.*, 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.