

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

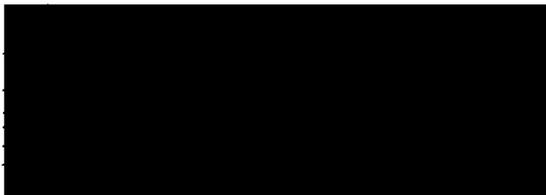
U.S. Department of Homeland Security
20 Massachusetts Ave., NW, Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

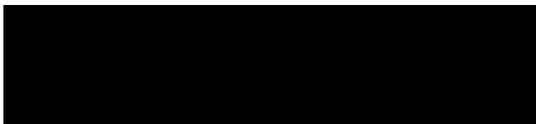
PUBLIC COPY

B7



File: EAC 07 032 51043 Office: VERMONT SERVICE CENTER Date: OCT 04 2007

IN RE: Petitioner:
Beneficiary:



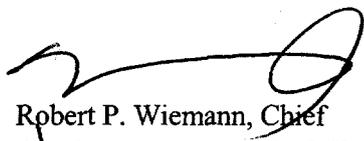
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the petition to the director for further action and entry of a new decision.

The petitioner filed this nonimmigrant petition to extend the employment of its marketing manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida corporation, is described as a real estate developer. The petitioner states that it is a subsidiary of American Service Market, C.A., located in Cabimas, Venezuela. The beneficiary was previously granted a one-year period in L-1A classification in order to open a new office in the United States, and the petitioner now seeks to extend his status for two additional years.

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 director observed that the beneficiary would not supervise any subordinate employees or manage a function of the petitioning organization.

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, the petitioner asserts that due to the nature of its business, it utilizes the services of independent contractors and presented evidence that the company has dealt with more than 28 different companies to complete its real estate projects. The petitioner asserts that the beneficiary manages a function "which is the marketing strategies and everything involved in the marketing process." The petitioner submits a letter in support of the appeal.

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 sole issue addressed by the director 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.

The nonimmigrant petition was filed on November 15, 2006. The petitioner stated on Form I-129 that the beneficiary would continue to serve as the marketing manager of the U.S. company, a real estate development business with two employees. Where asked to describe the beneficiary's proposed duties, the petitioner indicated: "Continuation of previously approved employment without change." The petitioner submitted a letter in support of the petition, but it did not include a description of the duties the beneficiary performs as marketing manager of the United States entity. The letter included a position description for the beneficiary's previous role as marketing manager of the foreign entity, which operates a department store.

The petitioner noted that during its first year of operations, the company purchased a total of four vacant lots, and completed the construction and sale of a single family home on one of the lots. The petitioner stated that two multi-unit dwellings are also under construction. The petitioner provided project summaries and copies of its agreements with a contract company, Gruveco Development Company, LLC, which was retained to perform the construction of the buildings.

The director issued a request for evidence on December 11, 2006. The director instructed the petitioner to submit an organizational chart for the U.S. company which clearly specifies the beneficiary's proposed subordinates. The director also requested a complete position description for the beneficiary's subordinates in the United States, including a breakdown of the number of hours devoted to each of the subordinates' job duties on a weekly basis. The director requested that the petitioner explain how the duties of the beneficiary's

subordinates are "truly managerial or require the expertise of a professional." Finally, the director requested copies of educational credentials for the beneficiary's subordinates.

In a response received on February 15, 2007, the petitioner stated that the beneficiary does not have any direct subordinate employees, but noted that he "manages more than 28 different companies and hundreds of employees." The petitioner provided a letter dated January 25, 2007 from its primary contractor, Gruveco Development Co., LLC, which provided a list of all subcontractors utilized by the petitioner's three construction projects. The list identifies 28 companies specializing in roofing, windows, flooring, air conditioning, painting, stucco, plumbing, electrical, carpentry finishing, security systems, architecture and design, masonry, surveying, etc. The petitioner submitted an organizational chart indicating that the beneficiary reports to the company president and supervises all independent contractors.

The director denied the petition on March 29, 2007, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that the beneficiary does not have any workers employed subordinate to him, and therefore it had not been established that he would be supervising managerial, professional, or managerial employees who could relieve him from providing the services of the corporation. The director further stated: "[A] company comparable to yours in size and nature would normally contract out for the services of a marketing manager on an as-needed basis. Therefore, it appears that the beneficiary would not be employed in a managerial or executive capacity."

In addition, the director determined that the beneficiary would not manage a function or function at a senior level in the petitioner's organizational hierarchy. The director found that the beneficiary's offered salary of \$32,000 is "incongruous with that of an employee who is actually managing other bona fide managers or professionals." Finally, the director concluded that the petitioner's "small, new real estate company does not appear to require a bona fide manager or executive who would perform the tasks you have listed on a full-time basis. Rather, it appears that he would be engaged in the non-managerial, day-to-day operations of your establishment."

On appeal, the petitioner asserts that it provided evidence of the U.S. company's use of a large number of independent contractors, noting that such staffing is typical in its line of business. Additionally, the petitioner states that the beneficiary "manages a function which is the marketing strategies and everything involved in the marketing process." The petitioner emphasizes that the company has invested more than \$1 million in real estate property in Central Florida and is profitable. Finally, the petitioner objects to the director's reference to the beneficiary's salary as being "incongruous" with a managerial or executive position. The petitioner notes that the U.S. company is a family business in its first year of operation which "freely decided to have low salaries."

Upon review, the AAO will withdraw the director's decision and remand the petition to the director for further consideration and entry of a new decision.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence [I]n other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence

As the present petition is a request for an extension of the beneficiary's L-1A status following the opening of a "new office" in the United States, the petitioner was required to submit initial required evidence pursuant to 8 C.F.R. § 214.2(l)(14)(ii). This initial evidence includes a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(C).

Although the director issued a request for evidence, the director failed to request the required description of the beneficiary's job duties. Instead, the director based the decision solely on the fact that the beneficiary would not supervise subordinate managers or professionals, and on his unsupported opinion that the beneficiary's offered salary is "incongruous" with a managerial or executive position. Although the director's decision refers to a list of duties submitted by the petitioner, the AAO notes that no such list of duties was requested or submitted.

The director's decision reflects an incomplete application of the statute and regulations to the facts of this case, as the director restricted his analysis of the beneficiary's eligibility as a manager or executive to whether the beneficiary would supervise subordinate professionals or managers. Furthermore, the director's determination that the beneficiary's salary is "incongruous" with an executive or managerial position is contrary to the statute and regulations, which neither require, nor permit, a beneficiary's salary to be considered as a factor in determining the beneficiary's employment capacity.

However, because of a lack of required initial evidence, the AAO cannot determine that the beneficiary would be employed in a managerial or executive capacity under the extended petition. The AAO agrees that the evidence of record raises underlying questions regarding eligibility. The petition will be remanded to the director, who is instructed to request additional evidence consistent with the discussion below.

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.*

As noted above, the petitioner did not submit a description of the beneficiary's duties as marketing manager prior to the director's decision. On appeal, the petitioner states that the beneficiary "manages a function which is the marketing strategies and everything involved in the marketing process." Based on this vague statement, it is impossible to even speculate, much less determine, what duties the beneficiary performs on a day-to-day basis, such that they could be classified as managerial or executive.

Accordingly, considering the paucity of evidence in the record regarding the beneficiary's actual duties, the director is instructed to request that the petitioner provide a comprehensive, specific description of the duties performed by the beneficiary, including a breakdown of the percentage of time he will devote to those duties on a weekly basis, and a description of the duties he performed on a "typical day," as of the date the petition was filed. If the petitioner indicates that the beneficiary "oversees," "supervises," "directs" or "manages" an activity or function, the petitioner should clearly indicate who among its employees or contract staff performs the routine duties associated with the particular activity or function.

The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; however the petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. The record shows that the petitioner employs a president and a marketing manager, and appears to contract out work associated with construction activities. The record as presently constituted does not establish who performs non-qualifying duties associated with the petitioner's day-to-day administrative, clerical, marketing, and financial functions.

In addition, although the AAO acknowledges the petitioner's claim that it utilizes contractors and subcontractors to complete its real estate projects, the record does not clearly indicate how the beneficiary, as marketing manager, actually supervises these projects and employees on a day-to-day basis. The petitioner should further explain the beneficiary's role with respect to supervision of contractors. Further, the record as presently constituted does not contain evidence of payments to contractors. Accordingly, the director should request documentary evidence of such payments made during the petitioner's first year of operations.

On appeal, the petitioner claims that the beneficiary manages the marketing function for the U.S. company. 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, 8 U.S.C. § 1101(a)(44)(A)(ii). 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. The petitioner's claim that the beneficiary manages "everything involved in the marketing process" is insufficient to establish his employment as a function manager. The petitioner should provide additional evidence in support of this claim in accordance with the requirements set forth above.

In addition, the petitioner is required to submit evidence that it has been doing business for the previous year *See* 8 C.F.R. §§ 214.2(l)(14)(ii)(D). The petitioner states that it has purchased a total of four vacant lots and has developed or is developing residential buildings on three of them. The petitioner should be instructed to provide additional documentary evidence of its purchase, ownership, development and/or sale of the four properties identified, and additional documentary evidence of its business activities, such as evidence of purchases, payments to contractors, applications for permits, etc.

The record also contains insufficient evidence of the financial status of the U.S. company, as required by 8 C.F.R. § 214.2(l)(14)(ii)(D). The petitioner submitted a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2005, which reflects no income. The petitioner should be requested to submit a copy of the financial status of the U.S. company as of November 2006, when the petition was filed, such as its 2006 corporate tax return and/or year-end financial statements for that year.

Finally, the record as presently constituted contains inconsistent evidence regarding the petitioner's ownership that precludes a finding that the petitioner maintains a qualifying relationship with the foreign entity, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The petitioner claims to be a wholly owned subsidiary of American Service Market, C.A., and has submitted a copy of its stock certificate number 1, issuing all 500 of the company's 500 authorized shares to the foreign entity. However, the petitioner has indicated on its 2005 IRS Form 1120 at Schedule K, that no foreign person or corporation owns 25% or more of its stock. 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). The petitioner should be instructed to clarify this discrepancy and to submit additional documentary evidence in support of the claimed qualifying relationship, such as the company's stock transfer ledger, and evidence that the foreign entity paid for its ownership interest in the U.S. company.

It is emphasized that 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). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, November 15, 2006. Documentation of business activity and hiring that occurred after the date of filing is not probative of the petitioner's and beneficiary's eligibility and will not be considered.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the beneficiary meets the requirements for L-1A classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated March 29, 2007 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.