

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D7



File: WAC 08 041 52017 Office: CALIFORNIA SERVICE CENTER Date: **SEP 30 2008**

IN RE: Petitioner:
Beneficiary:



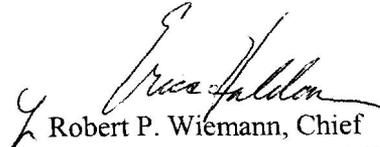
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned
to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of the beneficiary as its president 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 corporation organized in the State of California, is engaged in the import and export of diesel engine parts. The petitioner claims that it is the subsidiary of B & J Trading Co., SRL, located in Bucharest, Romania. The beneficiary was initially granted one year in L-1A status in order to open a new office and the petitioner seeks to continue the beneficiary's employment for two additional years.¹

On May 1, 2008, the director denied the petition, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted that the beneficiary appeared to be engaged primarily in the performance of marketing functions for the petitioner, duties which were traditionally not deemed to be managerial or executive in nature. Consequently, the director concluded that the beneficiary was performing many non-qualifying, day-to-day tasks of the business, and was thus not acting primarily as a manager or executive as required by the regulations.

On appeal to the AAO, the petitioner contends that the director's decision in this matter was erroneous, and contends that the approval of the initial petition for this beneficiary warrants approval of the request for extension. Counsel focuses on the position description of "president" as outlined in the petitioner's by-laws, and submits a brief in support of the beneficiary's eligibility.

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:

¹ In the present case, the beneficiary's authorized period of stay expired on September 30, 2006. However, the petition for an extension of the beneficiary's L-1A status was filed on November 26, 2007, over one year following the expiration of the beneficiary's status. Although counsel claims to have filed a timely extension request with CIS on September 29, 2006 and that the filing was lost, CIS had no record of such a filing made by the petitioner in 2006.

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (I)(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 (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The 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.

The request for extension, filed on Form I-129 on November 26, 2007, indicated that the petitioner currently employed one person, and that the beneficiary, in addition to acting as president, would serve as the petitioner's marketing director. In a letter of support dated October 22, 2007, the petitioner provided a brief overview of the beneficiary's position in the United States. The petitioner stated as follows:

[The beneficiary] is continually striving to set up channels of distribution and marketing for Mefin and Hidrojet products, as their exclusive distributor in the U.S. His plans are to continue establishing distribution agreements with the various manufactures of the American-made road construction machinery which exist in Romania and UAE in order to supply parts for the machinery. As promised, [the beneficiary] is also endeavoring to establish repair and service facilities for the repair of injection pumps for diesel engines at appropriate locations in the U.S.

* * *

[The beneficiary] has had a key role in the expansion plans, and his continuing presence is essential to [the petitioner's] continued establishment and expansion into the projected areas. It is anticipated that establishing [the petitioner] successfully and fully operational will be completed by November 2009. At the time of completion, [the beneficiary] will be transferred back to the parent company to resume his important role as Marketing Director . .

The petitioner also submitted copies of its Forms 1120, U.S. Corporation Income Tax Return for the years 2005 and 2006, both of which indicated that no salaries or wages had been paid in either year.

On January 2, 2008, the director issued a request for evidence. Specifically, the director requested additional evidence to establish that the beneficiary will be employed in a managerial or executive capacity, including but not limited to a comprehensive overview of the beneficiary's duties, an organizational chart for the petitioner, and position descriptions and job titles for all of beneficiary's subordinates, and the amount of time the beneficiary allocated to managerial/executive functions in comparison to the time allocated to non-qualifying functions.

In a response dated March 25, 2008, the petitioner submitted an updated overview of the beneficiary's duties. Specifically, the petitioner stated:

[The beneficiary] will devote virtually all of his time in the United States to the management of the U.S. business (he has already setup office operations and a business location and conducted limited business), research and continue to establish relationships with various parts suppliers and parts distributors in the U.S. He will continue his endeavor at setting up channels of distribution and marketing for Mefin and Hidrojet products. He will also establish contacts in North Carolina and implement various marketing techniques in order to supply parts for the Fiat tractors in North Carolina. He will be seeking to establish distribution agreements with the various manufacturers of the American-made road construction machinery which exist in Romania and UAE in order to supply parts of the machinery. He will also be hiring and overseeing employment of additional sales personnel if needed.

The petitioner also claimed that it employed [REDACTED] as the secretary of the corporation. The petitioner claimed that her duties included secretarial work such as handling sales calls, tax and IRS paperwork and corporate filings.

On May 1, 2008 the director denied the petition. The director noted specifically that the primary focus of the beneficiary's duties was on marketing, duties which are not traditionally included in the realm of managerial or executive duties. The director concluded that the beneficiary was thus responsible for the performance of the services of the company and therefore was not qualified for the benefit sought.

On appeal, counsel relies on the title and description of the duties of president as set forth in the petitioner's by-laws. In addition, counsel paraphrases the regulatory definitions in this context to show the similarities in the descriptions of positions. Finally, counsel questions why the extension was subject to denial when the initial petition was approved based on the same set of facts.

Upon review, the AAO concurs with the director's findings.

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(1)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In this matter, the petitioner provided a basic description of duties for the beneficiary, which essentially state that he is the marketing director of the petitioner and is responsible for securing distribution agreements for various Mefin and Hidrojet products. His stated goals are to continue negotiating marketing agreements and eventually create repair and service facilities in the United States for these products. While the beneficiary clearly has a large amount of responsibility for the petitioner, the tasks he performs are not managerial or executive as contemplated by the regulations. 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). In this matter, the petitioner does not dispute that these marketing functions are the beneficiary's primary focus in the United States. The actual duties themselves 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).

Moreover, although the petitioner claims to employ a secretary, there is no evidence such as payroll records or W-2 forms evidencing wages paid to this employee. Nevertheless, the secretarial duties described in her brief job description indicate that even if the evidence established her current employment with the petitioner, she would serve merely as secretarial support for the beneficiary, and not act as a sales person or marketing consultant such that the beneficiary could be relieved from performing the non-qualifying marketing tasks that are identified in the petition.

On appeal, the petitioner relies upon the position descriptions for president and chief financial officer as outlined in the petitioner's bylaws. However, these generic position overviews do little to illuminate the true nature of the beneficiary's position that counsel alleges the director to have overlooked. Instead, they merely address the similarities in the position descriptions and the regulatory definitions, but do little to convince the AAO that the beneficiary will refrain from performing non-qualifying marketing tasks. 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).

Finally, counsel alleges that the extension request should be approved in accordance with the initial new office petition previously approved for this beneficiary. The AAO disagrees. In the prior petition, the petitioner indicated that it was a new office, and the petition was adjudicated under the relevant regulations for new offices. See 8 C.F.R. § 214.2(l)(3)(v). In the present matter, the petitioner is no longer a new office, and the regulation at 8 C.F.R. 214.2(l)(3)(v) does not apply. As the petitioner is requesting a first extension after the opening of a new office, the petitioner must now satisfy its burden under the regulation at 8 C.F.R. 214.2(l)(14)(ii) in order to establish eligibility. Accordingly, the fact that the petitioner is no longer a new office, and is now requesting a first extension after opening a new office, represents a changed circumstance. In fact, the director had a duty to carefully examine the present petition and render a full adjudication, as the petitioner has new regulatory requirements in the present proceeding that did not apply to the prior petition. See 8 C.F.R. § 214.2(l)(14)(ii). The director's close analysis and detailed request for evidence were appropriate in light of the petitioner's evidentiary burden.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional sales persons and employees. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. The approval of an initial new office petition anticipates that a petition will grow to the point where it can employ the beneficiary in a qualifying capacity. In the instant matter, however, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

Moreover, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner claims that the business dealings of the petitioner were put on hold for the past year due to the fact that CIS allegedly lost the petitioner's request for extension. The petitioner has submitted insufficient evidence to establish that such a petition was filed, and even if counsel's assertions are true, a normal business would not suspend its dealings for more than a year due to a lost file. There is no evidence that the petitioner made inquiries as to the status of this allegedly lost filing, and the AAO does not accept that a newly-established fledgling business would elect to suspend its operations voluntarily for over one year.

Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business for the previous year. In the instant case, there is no evidence that the petitioner was doing business during 2007. In fact, the evidence indicates that the beneficiary was not present in the United States during 2007. 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.

ORDER: The appeal is dismissed.