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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services



D7

FILE: EAC 09 006 51112 Office: VERMONT SERVICE CENTER Date: NOV 03 2009

IN RE: Petitioner: [Redacted]
 Beneficiary: [Redacted]

PETITION: Petitioner 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. 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 extend the employment of its operations 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 New York corporation, states that it is an international transportation and trading company. The petitioner claims to be a subsidiary of Sable International GmbH, located in Germany. The beneficiary was initially granted L-1A classification for a one-year period in order to open a new office in the United States, and the petitioner now seeks to extend his status for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director misread and misinterpreted the evidence submitted, and erroneously concluded that the beneficiary will not be employed in a qualifying managerial or executive capacity. Counsel submits a brief and additional evidence 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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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 petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 petitioner filed the nonimmigrant petition on October 7, 2008. The petitioner stated on Form I-129 that it has six employees in the United States and 600 employees worldwide. In a letter dated October 2, 2008, counsel for the petitioner stated that the beneficiary "is a Managing Director and will head up the U.S. operation and be responsible for the activities of the parent company in Germany [v]is-a-vis the United States." No other description of the beneficiary's current role and responsibilities was provided.

Counsel further stated "[w]e submit an agreement dated January 2nd, 2008 by and between the corporate entity in NY whose shares were purchased by the petitioner herein, and the parent company in Germany." The attached agreement was made between the petitioner, its foreign parent company, Lybel Forwarding Co., Inc. (LFCI), MDL International, Inc. (MDL), [REDACTED] (a sole proprietor doing business as "Lybel Customs Broker"), and [REDACTED] ("a key employee of LFCI.") The agreement indicates that LFCI is a licensed freight forwarder, [REDACTED] is a licensed customs broker, MDL is an international logistics company, and the petitioner "intends to apply for, and become licensed as a freight forwarder and/or NVOCC (non-vessel operating common carrier) and customs broker." All four U.S. businesses are located at the same U.S. address. The agreement indicates that the petitioner "desires to acquire the assets and hire the employees of

LFCI, MDL and [REDACTED] and further desires to engage the services of [REDACTED] as officer and consultant, respectively."

Under the terms of the agreement, [REDACTED] and [REDACTED] agree to be employed by the petitioner; however, they also agree to continue doing business and operating their respective customs broker and freight forwarding businesses while the petitioner awaits approval of its own licenses. The agreement is valid through December 31, 2009, during which time the parties agreed that LFCI and MDL will provide freight forwarding, logistical and related services to the customers of the petitioner and the foreign entity. The agreement further states:

[The petitioner] and [the foreign entity], as appropriate, shall receive a commission that is equal to fifty percent (50%) of any and all fee amounts that are collected by LFCI and/or MDL from said customers for said services, but not including any expenses incurred by LFCI and/or MDL and collected from said customers in connection with said services, and not including any fees or expenses from the following customers: EMAG LLC and Trumpf Inc. Said commissions shall be paid on a monthly basis unless the parties mutually agree otherwise.

The parties also agreed "that [REDACTED] shall provide customs broker and related services to customers of [the petitioner] and/or [the foreign entity] as requested by [the petitioner] and/or [the foreign entity]," in exchange for a referral fee equal to 50 percent of fees collected by [REDACTED]

The petitioner further agreed that, notwithstanding approval of its freight forwarding and license applications, "neither [the petitioner] nor [the foreign entity] shall commence any business or operation under either said license until January 1, 2010," provided that the agreement is still in place. The agreement provides that the petitioner would have the right to provide services to MDL, [REDACTED] and LFCI customers and hire employees of LFCI, MDL and [REDACTED] on January 1, 2010.

The petitioner submitted an organizational chart which depicts the beneficiary as "branch manager" of the U.S. company, responsible for supervising an import manager, an export manager (who holds the concurrent title, "President, 'MDL'"), a clerk and an accounting employee. The chart also shows that the beneficiary monitors the directors of "Lybel," [REDACTED] and [REDACTED], reports to the three managing directors of the foreign entity, and supervises 12 subordinates within the German company.

The director issued a request for additional evidence (RFE) on October 20, 2008, in which he requested that the petitioner submit, *inter alia*, the following: (1) evidence that establishes the duties performed by the beneficiary in the previous year and the duties he will perform if the petition is extended; (2) evidence documenting the number of contractors utilized by the U.S. company and the duties performed, if applicable; (3) the number of subordinate supervisors the beneficiary manages, including their job titles and job duties; (4) the amount of time the beneficiary spends on executive/managerial duties versus non-managerial functions; and (5) complete copies of the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Return, for the last three quarters of 2008.

In response to the RFE, counsel for the petitioner, in a letter dated November 21, 2008, stated that the beneficiary will supervise seven subordinate supervisors, including four staff based in Germany: an airfreight manager, an ocean freight manager, an import manager, and an accountant. The petitioner stated that the beneficiary will supervise the following U.S.-based staff:

██ - Supervising the import department, arranging clearance for incoming shipments in accordance with U.S. Customs and Border Protection's rules and regulations.

██ - Supervising the export department, arranging pick-up and delivery of ocean- and airfreight shipments leaving the U.S., documentation and export according to the rules and regulations of U.S. Customs and Border Protection, dealing with our agents overseas for clearance and delivery.

██ - Supervising the sales department, domestic and international sales, consulting worldwide.

Counsel described the beneficiary's proposed duties under the extended petition as follows:

The beneficiary is supervising all of the above-mentioned staff, coordinating their work from and to overseas and domestic. He is responsible for customers that have shipments from and to the U.S. He must be able to supervise his staff to ensure a smooth workflow throughout the whole shipping process. He has to be trained for all needs concerning freight forwarding such as: oceanfreight import and export, airfreight import and export, Customs regulations worldwide, documentation, negotiating rates and tariffs with ocean- and airfreight carriers, maintain and improve customer relations as well as worldwide agents relations.

Counsel stated that the beneficiary devotes 90 percent of his time to managerial and executive functions and "will have complete authority over the whole operational process and staff."

The petitioner did not submit copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return, noting that "New York State Insurance Fund was having difficulty in setting up worker's compensation and unemployment insurance schedules because of the foreign officers." The petitioner annotated its monthly profit and loss reports to reflect wages paid to the beneficiary. There is no indication that the petitioner has paid other employees.

The director denied the petition on December 10, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director observed that the petitioner's descriptions of the beneficiary's position are vague and do not specify what duties he performs on a day-to-day basis. The director acknowledged the petitioner's claim that the beneficiary directly supervises seven subordinates, but observed that four employees are located in Germany, and therefore not directly under the beneficiary's management, while the petitioner failed to provide evidence of payments made to the three U.S.-based subordinates. The director

concluded that the petitioner did not demonstrate that the beneficiary will supervise a subordinate staff who will relieve him from performing non-qualifying duties associated with operating the petitioner's business.

On appeal, counsel for the petitioner asserts that the petitioner's previously submitted evidence has been "misread, and misinterpreted." Counsel asserts that the petitioner has established itself as a viable entity over the previous year under the beneficiary's direction and management. Counsel asserts that "the beneficiary is the key officer in the U.S. operation who has spearheaded the commencement of the U.S. business and now is directing its development. He is directing the merger and purchase of the now U.S. affiliate, as its CEO."

The petitioner further states that the beneficiary "directs the U.S. employees as stated and those whose duties interface with the U.S. operation, who remain in Germany." Counsel states that the beneficiary's supervision of the German employees is required "due to the nature of the business." In addition, counsel asserts that the petitioner is fully operable and expects to acquire "licenses for IATA and FMC" in 2009, while continuing to use partners to provide certain services.

In support of the appeal, the petitioner submits a copy of its Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2008, and a copy of the beneficiary's Form W-2, Wage and Tax Statement, as well as documentation establishing that the petitioner was doing business as a freight forwarder during the fourth quarter of 2008.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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 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 show 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). Here, while the beneficiary would evidently exercise discretion over the business as its operations manager and apparently its only employee, the petitioner has not established that his actual duties will be primarily managerial or executive in nature.

As noted by the director, the beneficiary's job description is too general to convey any understanding of what he will do on a day-to-day basis. The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(C) requires the petitioner to submit a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition. Given this evidentiary requirement, counsel's initial statement that the beneficiary "will head up the U.S. operation and be responsible for the activities of the parent company in Germany vis-à-vis the United States," was plainly insufficient to meet the petitioner's burden. 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).

Accordingly, the director advised the petitioner of this deficiency and provided the petitioner an opportunity to provide the detailed position description required by regulation. In response, the petitioner stated that the beneficiary is supervising seven subordinate employees, and "is responsible for customers that have shipments from and to the U.S." The petitioner stated that the beneficiary allocates approximately 90 percent of his time to managerial or executive functions, but did not provide the requested evidence of the beneficiary's duties performed during the previous year and proposed duties under the extended petition. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner's statement that the beneficiary will devote 90 percent of his time to managerial duties is of limited probative value as it is not accompanied by a description of his specific duties. 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Despite the director's finding that the petitioner failed to provide an adequate description of the beneficiary's duties, the petitioner has not sought to clarify the nature of the beneficiary's day-to-day duties on appeal. Counsel indicates that the beneficiary is "the key officer in the U.S. operation," responsible for "directing its development." However, a beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to his position merely on the basis of broadly-cast job responsibilities. Overall, the position descriptions provided fall significantly short of articulating the beneficiary's day-to-day responsibilities, such that they could be classified as primarily managerial or executive in nature. The petitioner cannot rely on vague characterizations and conclusory assertions to establish the beneficiary's employment in a managerial or executive capacity.

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other factors contributing to a complete understanding of a beneficiary's actual role in a business. As observed by the director, the record does not demonstrate that the petitioner has direct or contracted employees who could perform the non-managerial duties associated with operating the petitioner's business on a day-to-day basis.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D) requires the petitioner to submit 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. At the time of filing, the petitioner claimed that the U.S. company has six (6) employees. The petitioner submitted an organizational chart indicating that the beneficiary supervises four U.S. employees: an import manager [REDACTED], an export manager ([REDACTED]), a clerk

██████████ and an accountant ██████████ while also monitoring the activities of ██████████
██████████ and ██████████

In response to the RFE, in which the petitioner was instructed to provide additional explanation regarding the staffing of the U.S. company and evidence of wages paid to employees, the petitioner stated that ██████████ ██████████ manages its import department, ██████████ manages its export department, and ██████████ holds the position of sales manager. The petitioner did not provide any explanation for the changes in position titles for ██████████ and ██████████. 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).

Regardless, as noted by the director, the record is devoid of documentary evidence that the petitioner currently employs anyone besides the beneficiary. Pursuant to the January 2008 agreement the petitioner made with LFCI, MDL International ██████████ and ██████████ the planned "merger" with the petitioner would not take place before January 2010. Assuming that the agreement remains in place, ██████████ and ██████████ are continuing to operate their respective customs broker and logistics businesses, have their own customers, and are obligated to pay the petitioner commissions and/or referral fees for services provided to the petitioner's customers. The agreement gives the petitioner the right to review the records of LFCI and MDL, but does not appear to give the beneficiary supervisory authority over ██████████ or the employees of their respective companies. Based on the evidence of record, the petitioner's employment of the staff of LFCI and MDL is prospective and conditional upon all parties choosing to adhere to the terms of the agreement. 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 AAO acknowledges the petitioner's claim that the beneficiary also oversees four managers who work for the petitioner's German parent company. However, as discussed above, the petitioner has not adequately explained the nature of the beneficiary's actual duties in the United States, nor explained the extent and scope of his interaction with the foreign office and its staff in carrying out his duties as operations manager of the U.S. entity. Absent some description of how the beneficiary exerts authority over the foreign-based employees, how such employees are integrated into the daily operations of the U.S. entity, and how the foreign employees relieve the beneficiary from performing non-managerial duties associated with the petitioner's business, the AAO is not persuaded that the beneficiary acts as a bona fide manager vis-à-vis the German-based staff, or that the foreign employees would obviate the need for the beneficiary to perform a number of non-managerial tasks as the sole employee of the petitioning organization in the United States. 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)).

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of

the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and **staffing levels of the petitioner**. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 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 USCIS 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.

Furthermore, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "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 1313, 1316 (9th Cir. 2006) (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)). Furthermore, it is appropriate for USCIS 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).

Here, counsel concedes on appeal that the petitioner "got behind the timeframe it originally forecast," in terms of obtaining required licenses. There is no indication in this matter that the director did not consider the reasonable needs of the organization in making his determination that the beneficiary would not be employed in a primarily managerial or executive capacity. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act. Contrary to the petitioner's assertions, the record does not establish how the beneficiary, as the sole documented U.S. employee, was relieved from primarily performing non-managerial duties associated with the day-to-day operational and administrative functions of the petitioner's business.

Collectively, the lack of any documented subordinate staff brings into question how much of the beneficiary's time can actually be devoted to the claimed 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.

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in a managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

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.