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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

D7



DATE: **AUG 08 2012** Office: VERMONT SERVICE CENTER

FILE: 

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:



DALLAS, TX 75231

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew  
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 matter to the service center for entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an intracompany transferee (L-1A) 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 Texas corporation, is engaged in the retail sale and wholesale distribution of pottery and related products. It claims to be an affiliate of Amigos Imports de Mexico, located in Mexico. The petitioner currently employs the beneficiary as its president pursuant to an approved H-1B classification nonimmigrant petition and requests that he be granted a change of nonimmigrant status and a one-year extension of stay.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been or will be employed in a managerial or executive capacity. The director's determination was based on a finding that the petitioner: (1) failed to submit a complete response to a request for evidence (RFE) issued on July 15, 2010; and (2) submitted false information in support of the nonimmigrant visa petition. Specifically, the director questioned whether the petitioner actually filed the submitted IRS Forms 1120, W-3 and W-2 with the Internal Revenue Service.

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 for the petitioner asserts that the director denied the petition, in part, based on the petitioner's failure to provide evidence that was never requested. In addition, the petitioner submits evidence obtained from the Social Security Administration and Internal Revenue Service confirming that the petitioner did in fact timely file all required federal tax documents. Counsel submits a brief and additional documentary evidence in support of the appeal.

Upon review, the AAO agrees with counsel that the director's decision contains errors of fact and provides inadequate legal support for the conclusion that the petitioner will not employ the beneficiary in a qualifying managerial or executive capacity. As the record as presently constituted contains no clear evidence of eligibility, the AAO will withdraw the director's decision and remand the matter to the service center for further action and entry of a new decision consistent with the discussion herein.

## I. THE LAW

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 (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 director denied the petition concluding that the petitioner failed to establish that the beneficiary has been or will be employed 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.

## II. FACTS AND PROCEDURAL HISTORY

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 2, 2010. The petitioner indicated on the petition that the U.S. company was established in 2004 and had seven employees as of the date of filing.

In a letter dated June 27, 2010, the petitioner described the beneficiary's duties as president as follows:

From the shipment of products from Mexico to the distribution center, to the sale and marketing of our pottery and garden products, as President, [the beneficiary] will be in charge of overseeing all operations and making all the major decisions of the company. He will be meeting with all the managers to ensure that they are properly meeting the company's objectives that he has set forth. As such he will be responsible for motivating and communicating with each department head. He will be responsible for improving the distribution of the company's products and to develop a plan in which the distribution of the product is efficient and to feel that "it is within the buyer's reach." As for our products, his objective is to make sure that his pottery products are of high quality and that they will make an impression in the industry. He will be thinking of new ways to sell our products.

Counsel for the petitioner also submitted a description of the beneficiary's duties in a letter dated June 29, 2010:

As President, [the beneficiary] will be responsible for making all major executive decisions concerning the direction of the U.S. company. He will be responsible for creating policies relating to the distribution of [the company's] pottery and outdoor products through its retail stores and wholesale buyers. He will be exercising a wide latitude of discretion over all of the operations of his company and will be overseeing the development of business operations through effective communication with his general manager for U.S. operations, Adela Sandoval, as well as the retail store managers, warehouse manager, and in-house accountant. Additionally, he will be responsible for improving the distribution of [the company's] pottery products by developing a plan by which the distribution of the product will become more efficient than the current process. . . . Most importantly, he will initiate directives to his employees to ensure that his pottery products will be of the highest quality in the market[.]

The petitioner submitted an organizational chart for the U.S. company which identifies the beneficiary as president. The chart indicates that he directly supervises a CPA and the manager of the U.S.A. division. The remaining staff includes two retail store employees (one located at the company's Plano location and the other at its Dallas location), a welding department employee who also serves as a warehouse employee, and a logistics employee, for a total staff of seven, including the beneficiary.

The petitioner indicated that in addition to two retail stores, the company has two warehouses located in Dallas, Texas, one of which includes a welding shop where the company produces wrought iron decorative products. The evidence indicates that the Plano retail store is open seven days per week from 9:00 to 6:00 while the other store operates at a farmer's market six days per week. In addition to retail sales, the petitioner indicated that the company does business with restaurants, hotels, supermarkets and hardware stores.

The petitioner submitted a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, which indicates that the company achieved \$864,432 in sales and paid salaries and wages of \$190,125 in 2009.

The director issued a request for additional evidence on July 15, 2010. The majority of the requests for additional documentation or information related to the beneficiary's employment with the company's claimed Mexican affiliate. With respect to the U.S. organization, the director's requests were limited to the following:

Provide an organizational chart/diagram for the U.S. entity depicting where the position of owner/President fits into your organization.

Provide a copy of 2009's W-3's to include the name and wages paid to all employees.

The petitioner's response included the requested organizational chart for the U.S. company, which depicted the same employees and staffing structure as the chart submitted at the time of filing the petition. The petitioner also submitted:

- A copy of its IRS Form W-3, Transmittal of Wage and Tax Statements, for 2009, which indicates that the company paid \$190,125 in wages and issued a total of seven (7) Forms W-2.
- A copy of its IRS Form W-3 for 2008 which indicates that the company paid \$226,619 in wages and issued a total of eleven (11) Forms W-2.
- Copies of the beneficiary's IRS Forms W-2, Wage and Tax Statement, for the years 2008 and 2009.

The director denied the petition on August 23, 2010. The director's discussion of the submitted evidence was limited to the following:

[T]he record did not establish that the beneficiary met the requirements of an LIA intra-transferee. Therefore, a specific request was made for copies of all pay-stubs for all employees, but you only submitted pay stubs for the beneficiary. You also submitted an organizational chart showing seven other full time workers. The tax returns submitted did not appear to pay the remaining seven workers minimum wages. It is also noted that the W-3 for 2008 and 2009 were both signed on July 22, 2010. The request for evidence was issued on July 15, 2010. The 2008 tax form was signed March 10, 2008 and the 2009 tax return was signed March 8, 2010. Since these dates do not coincide with each other, it is therefore

questionable whether they were actually filed. Upon further review the tax form has the president as [REDACTED], but the petitioner states the president as [the beneficiary].

The director, citing 8 C.F.R. § 103.2(b)(14), observed that failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition. The director further cited 8 C.F.R. § 214.1(f), which provides that a condition of a nonimmigrant's admission and continued stay in the United States is the full and truthful disclosure of all information requested by United States Citizenship and Immigration Services (USCIS).

The director ultimately found that the petitioner failed to establish that the beneficiary has been/will be employed in either a managerial or an executive capacity and cited no other basis for the denial other than the failure to submit requested evidence and the submission of "false information" pursuant to 8 C.F.R. § 214.1(f).

On appeal, counsel maintains that the petitioner did in fact submit all evidence requested in the director's RFE, specifically, an organizational chart for the U.S. company and the petitioner's IRS Form W-3 for 2009. Counsel emphasizes that, contrary to the director's statement in the adverse decision, the petitioner was not, in fact, instructed to provide "copies of all paystubs for all employees."

In response to the director's questions regarding the reliability of the submitted IRS Forms W-3 based on the handwritten date accompanying the beneficiary's signature, counsel notes that the beneficiary simply signed a saved copy of the Forms W-3 before submitting the documents to USCIS. The petitioner provides evidence from an accountant, the IRS, and the social security administration confirming that the petitioner did in fact timely comply with all federal tax requirements in 2008 and 2009, and that it submitted true and correct copies of its IRS Forms W-3 to USCIS. The petitioner also provides copies of the original Forms W-3 signed by the beneficiary in January 2009 and January 2010.

In addition, the petitioner submits its payroll summaries showing wages paid to all employees in 2008 and 2009, copies of its IRS Forms W-2 for both years, and copies of IRS Forms 941, Employer's Quarterly Federal Tax Return, for all four quarters of both 2008 and 2009.

### III. ANALYSIS

Upon review, counsel's assertions are persuasive. As correctly noted by counsel, the petitioner did in fact submit the two pieces of evidence that were requested in relation to the beneficiary's employment with the United States company. The petitioner's failure to submit specific evidence that was never requested by the director cannot be used to discredit a petitioner's otherwise consistent claim.

Further, the petitioner has submitted more than adequate evidence on appeal to overcome the director's finding that the petitioner attempted to rely on false evidence to support its claims. The petitioner has demonstrated that the Forms W-3 submitted in response to the RFE were in fact true and correct copies of the information that was provided to the IRS.

Although the petitioner has overcome the only stated reasons for denial of the petition, the record as presently constituted does not establish that the petitioner will employ the beneficiary in the United States in a primarily managerial or executive capacity. While the director reached this same conclusion, the director failed to provide any valid basis for his determination. When denying a petition, a director has an affirmative duty to

explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). As the petitioner did not have adequate notice of the deficiencies discussed below, the AAO will remand the matter for further review and entry of a new decision.

The petitioner indicates that the beneficiary is the president of the U.S. company and that he performs general managerial or executive responsibilities related to hiring and firing employees, establishing policies and goals, overseeing managerial personnel, and making discretionary decisions related to the management of the company. While the AAO does not doubt that the beneficiary exercises discretion over the U.S. company, the record as presently constituted fails to establish that the beneficiary primarily performs managerial or executive duties as defined at sections 101(a)(44)(A) or (B) of the Act.

The petitioner claims that it operates two retail stores and two warehouses and is also engaged in the wholesale distribution of its products. The evidence of record does not establish how the company's staff of six subordinate employees relieves the beneficiary from participating in the day-to-day operations of the company. For example, the evidence of record indicates that the company's Dallas, Texas retail store is open for business for 63 hours per week and its Plano store is open for 46.5 hours per week. The petitioner indicates that it has assigned only one employee to work at each of these stores, and one of those employees earned less than \$9,000 in 2009. The petitioner claims to operate two warehouses, but has only one warehouse employee who is employed in the dual role of welder. The petitioner does not claim to have any sales, marketing or administrative staff. While counsel has indicated that the beneficiary's subordinates include a general manager, a warehouse manager and two store managers, the petitioner has not established the existence of any subordinate personnel to perform non-managerial duties associated with the warehouse and retail store operations.

Section 101(a)(44)(C) of the Act requires USCIS to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." The AAO has long interpreted the statute to prohibit discrimination against small or medium-size businesses. However, the AAO has also consistently required the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks.

While there is no clear evidence of the beneficiary's ineligibility in the record, the petitioner has not established how it has a reasonable need for the beneficiary to perform primarily managerial or executive duties when the AAO considers the staffing of the company in the context of the scope of its operations. The record contains no detailed description of the beneficiary's day-to-day duties and no position descriptions for the beneficiary's subordinates. As the petition will be remanded, the director should request additional evidence including, but not limited to, a specific description of the beneficiary's actual duties, the percentage of time he allocates to specific tasks, position descriptions for the beneficiary's subordinates, and evidence of wages paid to employees in the second and third quarters of 2010.

Further, another issue not addressed in the director's decision is whether the petitioner has the claimed qualifying relationship with the foreign entity, a sole proprietorship owned by the beneficiary. The petitioner

has consistently claimed that the beneficiary is the sole owner of the U.S. company, a Texas corporation established in 2004. However, the petitioner has not submitted documentary evidence of the ownership of the corporation to corroborate its statements.

At this time, the AAO takes no position on whether the beneficiary qualifies for the classification sought. The director must make the initial determination on this issue. Therefore, the AAO will remand this matter to the director for a new decision. The director should request any additional evidence deemed warranted and allow the petitioner to submit such evidence within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing discussion and entry of a new decision which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.