



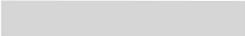
U.S. Citizenship
and Immigration
Services

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JUN 19 2015

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PETITION RECEIPT #: 

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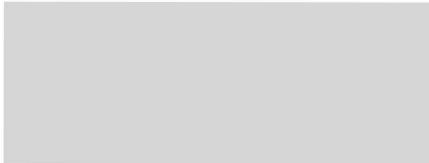
Petitioner:

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)

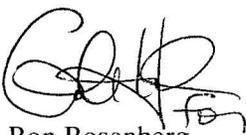
ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,



Ron Rosenberg
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 Petition for a Nonimmigrant Worker (Form I-129) seeking to classify the beneficiary as an 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 Texas corporation, is self-described as a pastry and chocolate holding company.¹ It claims to be a subsidiary of the beneficiary's foreign employer in Venezuela, [REDACTED]. The beneficiary was initially granted L-1A classification for a period of one year in order to open a new office in the United States and the petitioner now seeks to extend his status so that he may continue to serve as its "bread baking teacher."²

The director denied the petition, concluding that the petitioner failed to establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) that it has a qualifying relationship with the beneficiary's foreign employer.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to us for review. On appeal, the petitioner asserts that the evidence of record establishes that the beneficiary will function in a qualifying managerial capacity and that the petitioner is a qualifying subsidiary of the beneficiary's last foreign employer. The petitioner submits a brief and additional evidence in support of the appeal.

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

¹ The petitioner indicated at Part 2, question 2 of the Form I-129 that the basis for classification is "continuation of previously approved employment without change with the same employer." We note that the beneficiary's previously approved L-1A petition was filed by a different legal entity, [REDACTED] and granted for a one year period commencing on December 16, 2012. The petitioner in this matter was established as a Texas corporation on February 20, 2013, after the prior petition was approved. The instant petitioner's certificate of formation indicates that it was established as the holding company to [REDACTED].

² The petitioner indicated at Section 1, question 12 of the Form I-129 Supplement L that the beneficiary is coming to the United States to open a new office. As noted, the beneficiary was already granted L-1A classification to open a new office for a related U.S. entity. This petitioner may not be granted an additional "new office" L-1A visa approval. The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow a beneficiary a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. The regulations allow for a maximum one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii). The director appropriately applied this regulatory provision.

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.

II. The Issues on Appeal

A. Employment in a Managerial or Executive Capacity

The first issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

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.

1. Facts

The petitioner filed the Form I-129 on December 2, 2013. The petitioner indicated that it is a pastry and chocolate holding company, with seven employees and no listed gross annual income. The petitioner indicated the beneficiary's job title as "bread baking teacher" at part 1 of the Form I-129; however, on the Form I-129 Supplement L, the petitioner stated that the beneficiary's role in the company is "pastry chef, sales executive/manager, managing director and container control coordinator."

The petitioner provided documentation in support of the petition including receipts, bank statements, stock certificates and invoices. However, the petitioner did not provide a description of the beneficiary's duties, a statement describing the staffing of the company, or evidence of wages paid to employees. See 8 C.F.R. § 214.2(l)(14)(ii)(C) and (D).

The director issued a request for additional evidence ("RFE") on March 7, 2014 in which she instructed the petitioner to submit evidence to show that the beneficiary will serve in a managerial or executive capacity in the United States. The director also requested, among other items, a description of the beneficiary's duties and a description of the petitioner's staffing, along with a detailed organizational chart and evidence of wages paid to employees.

The petitioner submitted a letter in response, with a multi-page description of the beneficiary's duties. The petitioner stated that as General Manager, the beneficiary would be responsible for starting up the bakery business. The petitioner broke the beneficiary's duties into three categories: the executive area, the administrative area, and the specialized knowledge area.

The petitioner did not provide an organizational chart or statement describing its staffing and organizational structure. A copy of the petitioner's payroll records shows the beneficiary and one other employee, [REDACTED] employed as of the date of filing. The second employee appears to be working on a part-time basis. The petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, indicated that it paid \$15,700 in compensation to officers and \$4,192 in salaries and wages in 2013.

The director denied the petition, finding that the petitioner had not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. The director determined that based on the organizational structure described, the beneficiary would be assisting in the day-to-day non-supervisory duties of the business. The director also stated that the description of the beneficiary's duties indicates that the beneficiary will be delivering the products and services of the company, specifically, baking the goods and instructing the courses offered by the petitioner.

On appeal, the petitioner states that the beneficiary is currently in the process of hiring additional employees. The petitioner states that once additional employees are hired, the beneficiary will be able to devote 100% of his time to managerial duties. The petitioner also states that the beneficiary was first admitted to the United States in L-1 status in April 2014 and therefore had only eight months from the approval of his visa to start up operations. The petitioner attached evidence demonstrating its staffing recruitment efforts. The petitioner also attached a prospective

organizational chart as well as a document describing duties for proposed subordinate positions. The chart shows that three additional positions had been filled and four interns had been hired by August 2014 when the petitioner filed its appeal brief and supplemental evidence.

2. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity each 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 time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary manages a business or a component of a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The position description the petitioner submitted in response to the RFE is insufficient to establish that the beneficiary will be primarily performing managerial duties. Rather, based on the submitted job description, the majority of the beneficiary's day-to-day tasks are not managerial in nature and include duties such as "provide tailor-made catering services," "contact local potential wholesale customers," "contact suppliers to obtain ingredients," "contact suppliers for equipment and maintenance services," "design, develop, and make all baked products," "test the presence of gluten in any new ingredient," and "prepare all teaching material." All of these duties reflect the beneficiary's direct involvement in the day-to-day operations of the petitioner's bakery and the record reflects that he is the employee who is primarily responsible for creating the baked goods and chocolate products sold by the petitioner. 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'r 1988).

Furthermore, the petitioner has not established any distinctions between the beneficiary's proposed qualifying and non-qualifying duties. We note that out of the three job categories provided (executive, administrative and specialized knowledge) two of the categories appear to include primarily non-qualifying duties. The petitioner submitted no information to establish the percentage of time the beneficiary actually performs or will perform any claimed managerial or executive duties. It has been noted in the record that at the time of filing there was only one other employee working at the bakery, and that the beneficiary maintains a full-time position. There is no mention in the record of any subordinate employees to perform the administrative work, sales, teach baking classes, or perform product research and development tasks. Collectively, this brings into question

how much of the beneficiary's time can actually be devoted to 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. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (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 facts that contribute to understanding of a beneficiary's actual role in a business.

Here, in addition to the vague duties submitted by the petitioner, the organizational structure does not support an executive level position. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

At the time of filing, the petitioner employed the beneficiary and one other employee. The petitioner has not shown that the beneficiary is relieved from primarily performing the day-to-day duties associated with operating a bakery, nor has it claimed that his duties are primarily related to directing the management of the company or establishing its goals and policies. As noted, the record reflects that, at the time the petition was filed, the beneficiary was the employee performing the tasks necessary to produce the petitioner's products. Accordingly, the petitioner did not establish that the beneficiary is employed in a qualifying executive capacity.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. §§ 101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

At the time of filing, the beneficiary had one subordinate employee who is identified in the record as the petitioner's "kitchen manager." Based on the kitchen manager's duties as described on appeal, the position is not considered to be a professional level position. Furthermore, the kitchen manager did not supervise any other subordinate employees at the time of filing. On appeal, the petitioner claims that it has hired, and is in the process of hiring additional employees. However, employees hired after the date of the petition filing cannot be used to establish eligibility. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date 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'r 1978).

We acknowledge the petitioner's claim that the beneficiary had only eight months in L-1A status, as he received his L-1A visa in March 2013 and initially entered the United States in April 2013. However, his initial L-1A petition approval was valid for one full year. The regulation at 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 USCIS regulations that allows for an extension of this one-year period. If the business is not staffed and sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

Based on the foregoing discussion, the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

B. Qualifying Relationship

The remaining issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner stated on the Form I-129 that it is a majority-owned subsidiary of the beneficiary's foreign employer and has submitted supporting evidence including its certificate of formation, copies of seven stock certificates, its stock ledger, and board meeting minutes which discuss the ownership of the company. This evidence supported the petitioner's claim that 51 percent of its stock is owned by the foreign entity.

However, the director denied the petition based on a finding that the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2013 indicates at Schedule K that the petitioner is not at least 50% owned by a foreign entity.

On appeal, the petitioner explains that its 2013 corporate tax return contained errors due to a lack of communication with its accountants, who were not aware of the ownership of the company at the time they filed the tax return. The petitioner submits a copy of a Form 1120X, Amended U.S. Corporation Income Tax Return for 2013, which was filed with the Internal Revenue Service on July 31, 2014. The amended tax return shows that the company has seven shareholders and is 51% owned by the claimed foreign parent company in Venezuela.

Upon review of the record as a whole and the disputed tax return in question, the petitioner's explanation is persuasive and we find the petitioner has established by a preponderance of the evidence that it is a subsidiary of the foreign entity. Accordingly, the director's decision with respect to this issue will be withdrawn.

III. Conclusion

The appeal will be dismissed for the above stated reasons. In nonimmigrant visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (AAO 2012). Here, that burden has not been met.

ORDER: The appeal is dismissed.