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File: SRC 04 199 51157 Office: TEXAS SERVICE CENTER Date: **OCT 04 2008**

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


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, Texas 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 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 is a corporation organized in the State of Florida that is engaged in the import, international marketing, and distribution of Peruvian arts and crafts. The petitioner claims that it is a subsidiary of [REDACTED]

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Specifically, the director found that the beneficiary does not supervise professional employees.

The petitioner subsequently filed an appeal on Form I-290B as well as a motion to reopen and reconsider. 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 contends that the director's decision is in error. Counsel claims that the petitioner's business has expanded in scope and it now has five employees. Counsel also claims that two of the employees under the beneficiary's management have baccalaureate degrees. In support of these assertions, the petitioner submits additional evidence.¹

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

¹ The AAO notes that counsel requested, and was granted, an additional 30-day period in which to submit a brief. However, to date no brief has been received by the AAO with regard to this matter.

- (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.

At issue in the present matter is whether the beneficiary would 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.

In a letter dated June 7, 2004 accompanying the initial petition, the petitioner stated that "the [b]eneficiary's duties will continue to include overseeing the daily activities of the U.S. based expansion, hiring and firing personnel, exploring marketing possibilities in the U.S., and overseeing the investment of the parent company." Additional evidence submitted with the initial petition lists the beneficiary as president/executive officer, and describes his job duties as follow:

- In charge of expanding the business in the United States. Introduce the Latin American product [REDACTED]
- Order Merchandise, Sales (Wholesale & Retail), Manage the office, store & warehouse in the United States. [sic]
- Import product and work with Customs. Conduct all Banking. [sic]

The petitioner indicates that in addition to the beneficiary, the petitioner employs an accountant whose duties are to "[k]eep [b]ooks, calculate [t]axes, [and] create document with [p]rofit and loss [i]nformation;" a sales manager with high school level education whose duties are to "[c]ontact and negotiate with potential [b]uyers and process sales in the United States [and c]reate [a] strategy to introduce the product in the American [m]arket;" and a sales representative with a baccalaureate degree whose job is to "contact potential clients in order to sell wholesale [and] expand marketing of products in the local market."

On August 18, 2004, the director requested additional evidence. Specifically, the director requested a detailed organizational chart for the U.S. company, showing the relationship of each position to one another, setting forth the title, description and requirements for each position, and listing the names of the individuals filling the positions and their duration of employment. The director also requested a copy of the stock ledger for the U.S. company showing all stock shares issued and currently outstanding.

In response, the petitioner resubmitted the list of employees previously provided, with the additional information that the president and accountant have been employed by the petitioner since 2001, the sales manager since 2003, and the sales representative since 2004. The list does not include a description of duties and job requirements for each position, nor does it show how the positions relate to one another, as the director requested.

On December 7, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Specifically, the director found that the beneficiary does not supervise professional employees.

On appeal, counsel for the petitioner contends that the director's decision is in error. Counsel claims that the petitioner's business has expanded in scope and it now has five employees. Counsel also claims that two of the employees under the beneficiary's management have baccalaureate degrees. In a motion to reopen and reconsider submitted after the appeal was filed, counsel further asserts that in the fourth quarter of 2004, the petitioner hired an additional professional employee in the capacity of business analyst. Counsel submits additional evidence in support of this assertion.

Upon review, the AAO concurs with the director's conclusion that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. 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.*

On review, the AAO finds that the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner's description of the beneficiary's duties include general phrases such as "overseeing the daily activities of the U.S. based expansion," "exploring marketing possibilities in the U.S.," "overseeing the investment of the parent company" and being "in charge of expanding the business in the United States." 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 answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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).

In addition, the petitioner indicates that the beneficiary's job includes such tasks as ordering merchandise, wholesale and retail sales, importing products and working with customs. If the beneficiary is directly involved in the purchasing and sale of the products and getting the products through customs, he is performing tasks that are necessary to provide the company's service or product, and as such, these tasks would not be considered managerial or executive in nature. Because the beneficiary's job involves tasks that are not executive or managerial in nature, and the job description provided by the petitioner is insufficiently detailed, the Citizenship and Immigration Services (CIS) cannot determine what proportion of the beneficiary's duties would be managerial or executive in nature and what proportion would not qualify as such. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, as is the case here, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. On appeal, counsel claims that the beneficiary manages two employees with baccalaureate degrees, implying that those employees qualify as professionals. Counsel further seeks to introduce evidence relating to a new employee who counsel claims is employed in a professional capacity. The evidence of record is insufficient to support counsel's claim. First, the AAO notes that in response to the director's request for further evidence, the petitioner did not provide a description of duties and job requirements for each position, nor did the petitioner show how the positions relate to one another, as the director requested. The regulation states that the petitioner shall submit additional evidence as the director, in his discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Moreover, in evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The petitioner's response to the request for further evidence indicates only that the sales manager has a high school education and the sales representative has a "bachelor degree education" with no further information or evidence to support these claims.² The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not provided any evidence to establish that an advanced degree is actually necessary to perform the work of the sales representative, or even that the employee's "bachelor degree education" was in a relevant field of study. Absent further evidence, the record is insufficient to support the claim that the beneficiary supervises professional employees.

With respect to the new employee introduced in the motion to reopen, counsel states that her employment began in the last quarter of the year 2004, after the petition was already filed. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). As such, evidence submitted in regard to this employee cannot be considered in determining whether the beneficiary was managing professional subordinates at the time the petition was filed.

Finally, the record does not indicate that any of these employees supervise subordinate staff members, such that they could be classified as managers or supervisors. In all, the record does not support the conclusion that the beneficiary supervises subordinate employees who are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

In light of the foregoing, the AAO finds that the evidence is insufficient to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the director's decision, the petitioner has not provided sufficient evidence to establish that a qualifying relationship exists between the U.S. and foreign entities. The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 593; see also *Matter of Siemens Medical*

² The AAO notes that the accountant appears to be providing accounting services to the U.S. company on contract and is not actually an employee of the company.

Systems, Inc., 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

On the Form I-129, the petitioner indicated that the foreign entity owns 51%, and the beneficiary owns 49%, of the U.S. entity. In support of this claim, the petitioner submits a copy of share certificate number 1 of the U.S. entity indicating that the foreign entity owns 51 out of 100 authorized shares of the U.S. entity, and a copy of share certificate number 2 indicating that the beneficiary owns 49 out of 100 authorized shares of the U.S. entity. Both share certificates are dated December 15, 2000. In response to the director's request for a copy of the stock ledger for the U.S. company showing all stock shares issued and currently outstanding, the petitioner did not submit an official share ledger for the company, but instead provided an undated list of shareholders for the U.S. and foreign entities. The petitioner also submitted more copies of the two share certificates of the U.S. company, but this time the copies of the certificates are visibly altered on their face – the numbers of shares held by the respective shareholders appear to have been whited out and retyped on the copies. In addition, The AAO notes that contrary to the information presented by the petitioner regarding its ownership, the U.S. entity's federal income tax return for 2003 indicates that it is 100% owned by the beneficiary. The petitioner has made no attempt to explain or account for this inconsistency or its action in altering the copies of the share certificates. 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). Moreover, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Further, as general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. The petitioner has failed to provide the U.S. company's stock ledger as requested, and it also has not provided any of the above mentioned documentation relating to the ownership and control of the U.S. company. In light of these deficiencies in the record, CIS is unable to determine the elements of ownership and control, and therefore cannot conclude that a qualifying relationship between the U.S. and foreign entities exists as claimed. For this additional reason, the petition will be denied.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.