



D7

U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File: SRC-00-021-50232

Office: Texas Service Center

Date:

IN RE: Petitioner:
Beneficiary:



05 DEC 2001

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:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner engages in cargo and freight forwarding services to Ecuador and other destinations in South America. Information contained in the record indicates that the beneficiary was previously in the United States in L-1A classification from July 1, 1995 until June 30, 1996. The petitioner seeks to employ the beneficiary temporarily in the United States as its president and general manager for three years. The director determined that the petitioner had not established that the beneficiary had been and would be employed primarily in a managerial or executive capacity, or that the United States and foreign entity have been continuously doing business.

On appeal, counsel states that both positions involved managerial duties, including the supervision of subordinate employees.

The regulations at 8 C.F.R. 214.2(l)(1)(ii)(G) states:

Qualifying organization means in pertinent part a United States or foreign firm, corporation, or other legal entity which...

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and...

The regulations at 8 C.F.R. 214.2(l)(1)(ii)(H) states:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The first issue in this proceeding is whether the United States and foreign entity have been continuously doing business.

The Petition for a Nonimmigrant Worker (Form I-129) was filed on October 21, 1999. The petitioning entity's 1997 and 1998 U.S. Corporation Income Tax Returns show gross receipts and sales of \$882,213, and 1,291,400, respectively. The record also contains copies of the foreign companies invoices, financial statement and bank statements for 1999. The petitioner has now submitted evidence which clearly establishes that the foreign and U.S.

entities are involved in the regular, systematic and continuous provision of goods and services.

Another issue in this proceeding is whether the beneficiary has been and will be employed primarily in a managerial or executive capacity.

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

"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:

"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 United States petitioning entity was established on March 16, 1995 and is an affiliate of the parent company, both companies being owned and controlled by the same individual, [REDACTED]. The petitioner seeks to employ the beneficiary for a three-year period at an annual salary of \$48,000.

An attachment to the petition describes the beneficiary's responsibilities in the proposed position in the United States as:

Full managerial responsibilities for the direction and coordination of the U.S. affiliate. He will plan, formulate and implement administrative and operational policies and procedures. Mr. [REDACTED] will also be authorized to implement managerial and non-managerial changes, by hiring and firing personnel. Mr. Artega will continue to direct and manage the freight forwarding function of the enterprise....Mr. [REDACTED] will exercise discretion over the day-to-day operations of the freight forwarding function of the company. This involves communicating with various independent contractors such as airlines, shipping lines, insurance carriers, customs brokers in Latin America, local trucking lines and other independent contractors. Mr. [REDACTED] will also establish policy for the freight forwarding function of the enterprise and will have wide latitude in discretionary decision-making, receiving only general supervision from the board of directors from our Ecuadorian company.

The record indicates that the beneficiary will manage three employees in the U.S. office. Those employees are a logistics manager, a sales person and an administrative secretary. The duties these individuals will perform in these positions have not been stated.

The petition describes the beneficiary's duties in the position abroad as full managerial responsibilities for the coordination and directions of corporate departments, including sales, administrative personnel, financial, formulations and implementations of administrative and operational policies.

The record indicates that in the office abroad, there are three employees, a secretary and two helpers or assistants. There is no position description stating these employees responsibilities.

The petitioning entity's 1997 and 1998 U.S. Corporation Income Tax Returns show that no compensation was paid to officers for 1997 but \$48,000 was paid to the beneficiary in 1998, and \$37,600, and \$74,572 was paid in salaries and wages, respectively. Absent such evidence, such as time and attendance sheets, contracts, wage and earning statements, etc., the Service has no way of knowing whether a subordinate staff was paid the aforementioned wages.

The duties of the employees abroad and in the United States have not been stated. The employees abroad consists of a nonprofessional staff. Absent the duties performed by those individuals claiming to be employed by the U.S. entity, the petitioner has not shown that there is a subordinate staff of professional, managerial, or supervisory personnel who relieve the beneficiary from performing nonqualifying duties. Therefore, the logistics manager, other than in position title, is not functioning in a supervisory, professional or managerial capacity. The petitioner has not demonstrated that the beneficiary will be supervising other managerial or supervisory personnel and will not be primarily involved in performing the day-to-day functions of the petitioning entity.

Upon review of the record, the petitioning entity has not demonstrated that the beneficiary has been functioning or will be functioning at a senior level within the organizational hierarchy other than in position title. It must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities will not be managerial or executive in nature. Both the Act and the Service regulations state that a first-line supervisor is not considered to be acting in an executive capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professionals. Section 101(a)(44)(A)(iv). The record contains no comprehensive description of the beneficiary's duties that demonstrates that the beneficiary will be managing or directing the management of a department, subdivision, function, or component of the petitioning organization. Based on the evidence submitted, it cannot be found that the beneficiary has been or will continue to be employed primarily in an executive or managerial capacity. For this additional reason, the petition may not be approved.

In visa petition proceedings, the burden of proof 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.