



U.S. Department of Justice
Immigration and Naturalization Service

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

Public Copy



File: EAC 00 094 51840 Office: Vermont Service Center Date: JAN 18 2001

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)

Identifying data removed to prevent clear identification of persons.

IN BEHALF OF PETITIONER:
[Redacted]

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

Mary C. Mulrean, Acting Director
Administrative Appeals Office

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

The petitioner, a company engaged in international transactions, cargo shipping, storage and distribution, seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily executive capacity.

On appeal, counsel argues that the petitioner has submitted sufficient evidence to establish that the beneficiary is employed in a primarily executive capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) 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 U.S. petitioner, [REDACTED], Inc., states that it was established in 1994 and that it is owned in equal amounts by [REDACTED] (Ptd.), Ltd. (a South African company) and [REDACTED]. (an American company). The petitioner declares two employees and a gross annual income of approximately \$1,500,000. It seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$35,000.

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

Section 101(a)(44)(A) of 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 petitioner describes the beneficiary's duties as follows:

As Director of the company for well over a year, Mr. [REDACTED] had been the senior person responsible for running the Division. He has overseen preparation of the budget. He has made recommendations to the Board for expansion. (The facility has grown from 70,000 square feet to its present size of 190,000 square feet, or in terms of cargo value from \$3 million to \$10 million). Mr. [REDACTED] has been responsible for the development of the facility. He has had full and complete authority to make the business decisions necessary for the running of the division. He has obviously done quite well.

Upon his transfer to the U.S. facility, Mr. [REDACTED] has been the President and the Director of US operations of [REDACTED]. In such positions Mr. [REDACTED] has held and continues to hold the topmost position in the company. He will continue to be responsible for directing all operations of the company. He will review all financial and operational information and make recommendations to the company's Board of Directors. As the company's President[,] he will answer to no one other than the Board members. He will be solely responsible for running the subsidiary company. His function will be similar to what he had done at the [REDACTED] Facility in South Africa, in that he will have absolute discretion to make the day to day business decisions in running the company - answering of course to the [REDACTED] Board, and thus indirectly to the Board of the parent company, [REDACTED]. Mr. [REDACTED] will also

continue to hold his position on the Board of Directors of Greystones, in South Africa.

In his position in the United States[,] Mr. [REDACTED] will have full authority to act as he sees fit in managing this program. He is charged with the powers and responsibility to hire anyone he needs to get the job done. In such capacity[,] he will be expected to set appropriate policies for the operations of the office[']s activities to best suit the needs of the company. Mr. [REDACTED] shall continue to have wide latitude in making major management decisions for that office. As the top executive[,] Mr. [REDACTED] will be making all major business decisions in selecting companies to carry out functions of the company. He will hire or retain the appropriate staffing or subcontractors to carry out his orders. In short, as he has successfully done at the [REDACTED] Facility and at [REDACTED] since his transfer to the U.S., Mr. [REDACTED] will hold the highest-level responsibilities for evaluating the markets and thereupon determining the goals and directions of [REDACTED] as he sees fit.

In a letter dated February 28, 2000, the Service requested that the petitioner respond to the following:

Submit evidence of the staffing of the United States organization. Indicate the number of employees, the duties performed by each employee or each section, as well as management and personnel structures of the United States firm.

You listed only two employees for the U.S. office. With such a small office it does not seem feasible for the beneficiary to act in a managerial capacity primarily. Rather, such a small business would force the beneficiary to spend the majority of his time in production of goods and service.

Submit a complete position description for all of your proposed employees in the United States, including one for the beneficiary's position. Submit a breakdown of the number of hours devoted to each of the employees' job duties on weekly basis.

In response to the request for additional information, counsel argued that the beneficiary had been and would be employed in a primarily executive capacity not, as the director stated, in a managerial capacity.

The beneficiary's duties were further described as follows:

1. Overseeing the financial well being of the organization including the reviewing all audit papers for the financial reports, evaluating the revenue and expenses with the corporate CPA, reviewing of the taxation exposures of the organization in the tax return assemble [sic] and signing off on the Federal and State Tax Returns.
2. Communicating with the Board of Directors of the [REDACTED] Enterprises on [REDACTED] performance, contracts and revenue streams.
3. Strategizing with the other board Members re[:] the organizational's Growth Direction, encompassing all facets of organizational marketing and market exposure for [REDACTED]
4. Recommending to the Board of Directors complementary activities that have fundamental benefits and rewards to the South African divisions as well as to [REDACTED]
5. Holding Executive and Managerial duties at the [REDACTED] Facilities - with about 50+ workers there, including first and second level Managers and Professional personnel. He will continue to evaluate and provide recommendations on the Capital Expenditure projects, reviewing and approving annual budgets for the division and reviewing staffing requirements and staff duties for the [REDACTED] Division. The rate negotiating and appointing of contractors for the organization, including the evaluating of these contractor's previous performance.
6. Liaising with [REDACTED] clients on cargo volume forecasts to be moved including ensuring that problems were handled timely and properly.
7. Staffing the [REDACTED] organization. The various contractors that we appoint and co-ordinate to perform the various logistical movements of the cargoes that GMI handles. (See discussion above.)
8. Overseeing the directing [of] the coordination of all aspects of the company's organization including its operations in the Port of Houston, Port of New Orleans, Port of Camden/Philadelphia, and operations in Decatur, Al., and Pittsburgh, PA., Nashville, TN., Memphis, TN., St. Louis, MI. [sic], Chicago, IL.

9. Directing the coordination of all aspects of the company's organization internationally with the Parent company's operation in South Africa, Namibia, and Mozambique.

On appeal, the petitioner claims that the beneficiary is employed in an executive capacity even though there are only two employees.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. Although the petitioner's descriptions are lengthy, there is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as overseeing preparation of the budget, making recommendations for expansion of facilities; making business decisions necessary for the running of the division; being responsible for directing all operations of the company; having absolute discretion to make day-to-day business decisions; being responsible for hiring; setting policies for the operations of the office's activities; having wide latitude in making management decisions; communicating with the board of directors on performance contracts and revenue streams; and recommending complementary activities that have benefits and rewards, are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as liaising with clients on cargo volume forecasts including ensuring that problems are handled timely and properly have not been demonstrated to be executive in nature.

It is not even clear to what extent the above duties relate to the beneficiary's work in behalf of the U.S. entity. In response to the request for additional evidence, the petitioner stated that the beneficiary "retains his responsibilities with the Parent company and with the [REDACTED] Division in addition to [REDACTED]. He holds the topmost position in the company [as] he is its President." Many of the beneficiary's duties appear to relate to the running of the foreign entity, and its overseas operations. The use of the position title of "president" is not sufficient.

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a primarily executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than in position title.

Further, the petitioner's evidence is not sufficient in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory

personnel who relieve him from performing nonqualifying duties. The petitioner claims that the petitioner "utilizes many different companies to get the work done" and "deals not with laborers, but he contracts the work to be done by the Directors of the various companies." The petitioner claims that [REDACTED] International, Inc. is the primary contractor and that there is a "5 tier operation, with over one hundred workers involved." The petitioner has not named any of the workers involved, described their duties and their positions within the organizational hierarchy, or provided evidence of payment for services rendered. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel further argues that the Administrative Appeals Office has found that a person may be a manager or executive even if he is the sole employee of the company where he uses outside independent contractors or where the business entity is complex.

When managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function performed. The petitioner must demonstrate that the function is not directly performed by the executive or manager. Although counsel argues that the beneficiary controls an essential function, the record does not demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. The record must further demonstrate that there are qualified employees to perform the function so that the beneficiary is relieved from performing non-qualifying duties. Absent details concerning the position descriptions and wages of subordinate or independent contract employees, as well as the company's managerial structure, the record fails to establish that the beneficiary will be managing rather than performing the function.

Counsel refers on appeal to an unpublished appellate decision in a case involving an employee of the Irish Dairy Board. In that decision it was held that the beneficiary satisfied the requirements of acting primarily in a managerial capacity because his primary assignment was the management of a large organization using multiple subcontractors to carry out its functions, even though he was the sole direct employee of the petitioning organization. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the Irish Dairy Board case. Moreover, an unpublished decision carries no precedential weight. See Chan v. Reno, 113 F.3d 1068, 1073 (9th Cir. 1997) (citing 8 C.F.R. section 3.1(g)). As the Ninth Circuit says, "[U]npublished precedent is a dubious basis for demonstrating the type of inconsistency which would warrant

rejection of deference." Id. (citing De Osorio v. INS, 10 F.3d 1034, 1042 (4th Cir. 1993)).

Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily executive capacity. For this reason, the petition may not be approved.

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.