



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: WAC 98 090 53458 Office: California Service Center

Date: JAN 29 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)

IN BEHALF OF PETITIONER:



identification 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

Mary C. Mulrean, Acting Director
Administrative Appeals Office

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

The United States company, [REDACTED] Inc., is stated to be engaged in the business of toolmaking/injection moulding and extrusion blowmoulding. It seeks to employ the beneficiary temporarily in the United States as production manager of its new office. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity, or that the United States operation, within one year, would support a managerial or executive position.

On appeal, counsel argues that the "application of existing law & regulations applied in error."

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.

8 C.F.R. 214.2 (1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

A) Sufficient physical premises to house the new office have been secured;

B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The United States company was established in 1997 and states that it is a wholly owned subsidiary of Blowtwin Containers CC, located in Malver, South Africa. The petitioner seeks to employ the beneficiary for one year at a yearly salary of \$18,000.

In her decision, the director concluded that the U.S. company could not support a managerial or executive position within one year of its operation because of the nature of its business and the size of the company. The director further concluded that the petitioner had not established that the beneficiary's day to day activities would be primarily managerial or executive in nature.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in the proposed position in the United States in a primarily managerial or executive capacity, and whether the United States operation would support such a position within one year.

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 record contains a description of the beneficiary's duties in the proposed position in the United States as follows:

The beneficiary, as Production Manager, will be responsible for the development of the office in Utah. As such, he will hire and train staff which is estimated to include a toolmaker, receptionist/clerk, and a (sic) assistant manager (to run the office upon his return to South Africa at the conclusion of the first year). The progress of the business in the first year will ultimately dictate the level of employees and the rate of hiring. Note also that the initial space for the petitioning entity is temporary and it will be the beneficiary's decision to relocate soon after his arrival. He will have the unfettered decision making authority in this regard, as well as how to expend company funds to establish the business. He will decide on the purchase of equipment and will establish the budgetary restraints in conjunction with these expenditures. Also, he has the unfettered discretionary authority to structure the company to fit in homogeneity

with the principal operations in South Africa. His management level position emanates from his authority over the daily operation of the business as well as his function as the principal in all matters relating to the production department of the new business.

The petitioner described the beneficiary's duties with the foreign entity as follows:

The beneficiary has been employed, as Managing-Member by BLOWTWIN CONTAINERS C.C., the parent company since its inception on May 1996. As Managing-Member of the business, he handles all policy and business decisions such as purchasing, pricing, banking and credit terms and its approximately fourteen (14) employees. He is also responsible for insuring that profit goals are met each quarter, has the discretionary authority to reduce costs as he sees fit. His management level position emanates from the senior level position he holds in the company. His senior level is established since his function within the organization includes the decision making authority over salary increases, hiring staff and contract workers (including temporary help and project workers), firing and/or disciplining and training of staff, budgetary concerns, capital expenditures, negotiation of pricing for equipment and supplies, government fees, and the like. He has the authority to bind the company contractually in these matters. He receives an annual salary and dividends from the shares he owns in the company. Note that [the beneficiary] will maintain certain responsibilities and contact with the South African office since both office (sic) will function in tandem. In South Africa, his position was fully executive in nature since his responsibilities and duties were limited to executive level activities, while the daily tasks of running the departments were left to the other fourteen (14) employees including a sales and production manager.

The director noted in her decision that it appeared that the beneficiary would be duplicating the duties of the general manager and that it seemed highly unlikely that two executive/managers would be needed to run the company in the first year.

On appeal, counsel argues that:

It is well established that the petitioner in the context of a new office may petition for more than one manager and will be granted this opportunity, since the infant business enterprise will quite often have a significantly higher percentage of managers in the first year. The

reasoning for the petitioner's need for these two managers is sound and based on legitimate business pursuits. The restrictions placed on this category (namely the limitation of one initial year) was designed to force the business to reach a level of development during the first year so as to enable this new business to function independently of its parent company, and support the two positions offered presently.

Counsel further argues that the petition should be approved because the need for two managers is "genuine and legitimate," as the diverse responsibilities for each position were clearly set out and carry with them "distinct management level responsibilities."

Despite counsel's contention, the additional information provided on appeal is not sufficient in overcoming the objections of the director. As stated by the director, the description of the beneficiary's duties is too general and vague and does not convey any understanding of exactly what the beneficiary will be doing on a daily basis. It must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities will be primarily executive or managerial in nature. The petitioner has provided no comprehensive description of the beneficiary's duties to establish this. Simply stating that the petitioner's need for "two managers" is genuine and legitimate, and that the positions are distinct managerial level responsibilities, is not sufficient in demonstrating the beneficiary's managerial or executive obligations.

Based on the evidence submitted, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity, or that the U.S. company will support such a position within one year of operation. 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.