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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



identification data deleted to prevent clearly unwarranted invasion of personal privacy.

FILE: WAC-99-214-51428

OFFICE: California Service Center

DATE:

IN RE: Petitioner:
Beneficiary:



JUN 18 2001

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 USC 1101(a)(15)(L)

Public Copy

IN BEHALF OF BENEFICIARY



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 decision, 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

Robert P. Wiemann
Robert P. Wiemann, Acting Director
Administrative Appeals Office

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

The petitioner, purports to be a computer hardware/software wholesaler and after-sale support company. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its President and Sales Manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity, or that the petitioner's business would support such a managerial or executive position.

On appeal, counsel argued that the beneficiary is employed in a primarily managerial or 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 states that it was established during 1997 and that it is a subsidiary of Applicom International, S.A., located in [REDACTED] France, which holds 70% of its stock. The petitioner declares two employees and a projected gross annual income of \$500,000. It seeks to extend the petition's validity and the beneficiary's stay for two years at an annual salary of \$150,000.

At issue in this proceeding is whether the beneficiary has been and will be employed in a primarily managerial or 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 petition described the beneficiary's duties as follows:

(The beneficiary is) . . . responsible for organizing and overseeing all aspects of the U.S. operations and has developed a distribution network in North America. His specific duties include setting up and initiating operations of the company's office in San Francisco, promoting the Applicom products by attending professional trade shows and representing the company with professional organizations/committees (e.g. Profibus Trade Organization, OPC Foundation, etc.), negotiated and entered into various manufacturers and distribution agreements, and has handled customer relations with current North American clients.

In a brief submitted on appeal, the petitioner, through counsel, claimed that the beneficiary is employed in a managerial or executive capacity. With that brief, counsel submitted various documents related to the business of the petitioner, including documentation of income and expenses. Most of those documents, however, do not bear directly upon whether the beneficiary's position is managerial or executive, or whether the petitioner's business will support a managerial or executive position. The relevant documents are addressed below.

In the brief, counsel further stated that the applicant manages the business of the petitioner. Specifically, counsel stated that the applicant ". . . manages (the petitioner's) budget and negotiates and maintains (the petitioner's) contracts for professional services and sale of goods."

Included with the brief is a letter, dated November 15, 1999, from [REDACTED] the petitioner's Chief Financial Officer, a

passage from which is cited by counsel. In that letter, Mr. Geffroy stated that the beneficiary:

. . . manages all major functions of the corporation and is ultimately responsible for Applicom International Inc.'s success. He is the most senior Applicom International Inc. employee. [REDACTED] exercises unfettered discretion over all of Applicom International Inc.'s essential operations.

and further:

[REDACTED] developed and implemented Applicom International Inc.'s marketing strategy and is responsible for updating the company's marketing plan. He performs market research, anticipates market trends and has the authority to implement changes in our business plan accordingly. He has been instrumental in developing Applicom Inc.'s excellent reputation for selling cutting edge industrial communication products. Due in large part to [REDACTED] efforts to increase Applicom International's, Inc.'s visibility and competitiveness in the marketplace. Applicom International Inc. expects to double gross annual sales and profits this year.

Another letter included with the brief, from CPA Francois Hechinger, and dated November 9, 1999, is cited by counsel. Counsel notes that the letter states that:

[REDACTED] has contracted with us to provide financial advice and services for Applicom International, Inc. I have worked directly with [REDACTED] regarding all of Applicom's financial needs. [REDACTED] is a very competent and involved manager of Applicom's finances. He is in charge of the company.

In a letter dated November 8, 1999, [REDACTED] president of an Applicom distributor, stated:

I worked directly with [REDACTED] to develop an acceptable distributorship agreement. Negotiations concerning the agreement lasted several weeks. During the negotiations, [REDACTED] established the terms of our agreement and approved the final distributorship agreement. In August, [REDACTED] traveled to our facilities in South Carolina to complete negotiations and sign the contract.

The information provided by the petitioner and counsel describes the beneficiary's duties only in broad and general terms. The

descriptions contain insufficient details of the actual duties of the assignment to overcome the objections of the director. Duties described as being responsible for organizing and overseeing all aspects of the U.S. operations, managing the petitioner's budget, developing a distribution network in North America, managing all major functions of the corporation, being responsible ultimately for the petitioner's success, developing and implementing marketing strategy, being responsible for updating the company's marketing plan, performing market research, and anticipating market trends, are without any context within which to reach a determination as to whether they would be qualifying.

Other duties such as negotiating and maintaining service and sales contracts, promoting the petitioner's products, attending professional trade shows, negotiating and entering into manufacturing and distribution agreements, handling customer relations, and developing the petitioner's reputation for selling cutting edge industrial communication products have not been demonstrated to be managerial or executive in nature. Use of the position title of "President and United States Sales Manager" is also insufficient to demonstrate that the position is managerial or executive within the meaning of Section 101(a)(44) of the Act.

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a primarily managerial or 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.

Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

The remaining issue is whether the business of the petitioner will support a managerial or executive position. The director found that the petitioner is merely an agent of the foreign entity within the meaning of 8 C.F.R. 214.2(1)(1)(ii)(H).

On appeal, counsel stated that the petitioner is not merely an agent, but a reseller, because the petitioner purchases goods from Europe, takes possession, and sells them to United States customers. We note that, if believed, counsel's statement merely

indicates that the petitioner has restructured the role of sales agent in order to skirt the regulations. We note further that counsel's own submission on this matter is not evidence. Petitioner and counsel have submitted no evidence pertinent to that finding of the director.

The petitioner has not shown that the beneficiary has been or will be employed in a primarily managerial or executive capacity, or that the petitioner's business would support such a managerial or executive position. 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.