



U.S. Department of Justice  
Immigration and Naturalization Service

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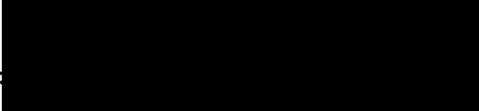
OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: SRC 00 056 51813 Office: Texas Service Center

Date: MAR - 7 2001

IN RE: Petitioner:  
Beneficiary:



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)

**PUBLIC COPY**

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

Robert P. Wiemann, Acting Director  
Administrative Appeals Office

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

The petitioner, a company that imports and exports auto parts and fruit pulp, seeks authorization to employ the beneficiary temporarily in the United States as its vice president. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner argues 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(1)(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 (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, a 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

(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.

The U.S. petitioner states that it was established in 1998 and that it is a wholly-owned subsidiary of [REDACTED] located in Bogota, Columbia. The petitioner declares two employees and an estimated gross annual income of approximately \$150,000. It seeks authorization to employ the beneficiary for three years at an annual salary of \$30,000.

At issue in this proceeding is whether the beneficiary 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 petitioner describes the beneficiary's proposed duties with the U.S. entity as follows:

To act as Vice President and General Manager of the company, including monitoring daily operations, hire and fire personnel, and negotiate business contracts on behalf of the corporation.

In a letter dated December 23, 1999, the Service requested that the petitioner respond to the following:

1. Submit a statement describing the staffing of the U.S. entity. This statement should clearly indicate the number of employees, the exact position held by each employee, [and] should be accompanied by evidence of wages paid to the employees.
2. Are any of the current employees of the U.S. entity in a nonimmigrant status? If so[,] what is their current status including when the status expires.
3. Submit an organizational chart for the foreign and U.S. entity.
4. Submit a complete copy of the 1998 corporate take [sic] returns for the U.S. entity.
5. Submit a copy of the State Quarterly Report (including wage report) for the last six (6) quarters. **This must be the State Quarterly Report.**

\* \* \*

7. Submit evidence establishing that the beneficiary is to be employed in an executive or managerial

position[.] This statement should provide the following:

- A. number of subordinate managers, supervisors or other employees who report directly to the beneficiary'
- B. brief description of their job titles, and duties; if the beneficiary does not supervise other employees, specify what essential function within the organization the beneficiary manages.

In response, counsel stated that "there are no formal U.S. employees," but that the petitioner will hire two U.S. employees when the instant petition is approved. Counsel explained that the two employees working in the United States are actually paid by the foreign entity. Counsel did not submit a description of the beneficiary's proposed duties, explaining that "[t]he exact job duties of each employee are obvious by the title of their respective position[s]."

On appeal, counsel claims that the director did not take into account that the beneficiary would be employed in a managerial capacity, rather than an executive capacity. Counsel claims that the beneficiary will be the U.S. entity's sole employee and describes the beneficiary's duties as follows:

As sole, employee, Beneficiary will be responsible for the management of the entire business, which is in the development stage. As Vice President, Beneficiary will establish all the goals and policies of the business, and will have complete discretion in decision-making regarding the development of the venture.

Counsel argues that the Service should consider the fact that the U.S. entity is a new office, that it is in the "startup phase" and that no additional employees are needed. In fact, the U.S. entity was established in April of 1998, and invoices contained within the record show that it was doing business in 1999.

8 C.F.R. 214.2(1)(1)(ii)(F) states:

*New office* means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

The petitioner was established in April of 1998. The petition was filed nearly two years later on December 20, 1999. The petitioner claims that it has been doing business, and submits statements of cash flow from January 1, 1999, as well as invoices and billing statements to support this claim. Accordingly, the petitioner shall not be considered to be a new office.

Counsel further argues that the AAO 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.

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. Counsel admits that the beneficiary will be the U.S. entity's sole employee. 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)).

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 acting as vice president and general manager, monitoring daily operations, negotiating business contracts, establishing all goals and policies, and having complete discretion in decision-making, are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as hiring and firing personnel are of questionable weight in this proceeding considering the fact that the beneficiary is and will be the U.S. entity's sole employee. The use of the position title of "vice president" is not sufficient.

The record contains insufficient evidence to demonstrate that the beneficiary 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 will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary 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 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 will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that there is a qualifying relationship between the U.S. and foreign entities, or that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

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.