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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



PUBLIC COPY

15 NOV 2001

File: EAC 98 269 52984 Office: VERMONT SERVICE CENTER Date:

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:



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

Robert P. Weimann, 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 is described as a wholesale distribution and sales facility that seeks to continue the employment of the beneficiary temporarily in the United States as its warehouse 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.

On appeal, counsel for the petitioner asserts that the director's denial was improper and submits newly acquired evidence in support of the petition.

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, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

The petitioner is a New Jersey corporation, incorporated in 1991. The petitioner carried on no business activities until March or April of 1997. At that time, the petitioner acquired a warehouse to accommodate its parent company and parent company's affiliate's inventory of automobile parts. In addition, the petitioner engaged in the sale and distribution of the inventory to various retail operations. In September of 1998, the petitioner acquired an additional warehouse to continue the expansion of the export business of its parent company and the parent company's affiliates. In June of 1999, the petitioner leased a third warehouse to house additional inventory for distribution to retail

businesses. At the time the extension petition was filed on September 23, 1998, the beneficiary was employed as an L-1 intracompany manager.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial capacity.

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

The term "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.

The beneficiary was accorded L-1 status on September 30, 1997. The L-1 status expired on September 29, 1998. The petitioner filed the extension petition on September 23, 1998, requesting that the beneficiary's L-1 status be continued to September 29, 2000. In the extension petition, the petitioner provided an organizational chart that indicated the beneficiary directly supervised one warehouse supervisor who in turn supervised seven shipping operators.

The petitioner also described the beneficiary's job position as a manager who plans, schedules and controls the daily operations of the warehouse department, works through his subordinate staff to achieve the petitioner's goals, exercises discretion over inventory control and shipping activities and is authorized to hire and fire or recommend employees.

The petitioner included a description outlining the beneficiary's warehouse management duties as follows:

1. Establishes operational procedures for warehouse activities, such as verification of incoming and outgoing shipments, handles and disposes of materials and keeps warehouse inventory current;
2. Responsible for the periodic inventory count and accounts for all variances, calls warehouse department meetings to discuss previous day's activities, assigns duties to the warehouse supervisor and shipping operators;
3. Reviews and approves all overseas and domestic shipping documents, studies receiving and shipping notices and reports of warehousing space available to arrange receiving schedule for the warehouse, and approves routing slips, shipping requisitions, and job orders;
4. Determines the most efficient and economical delivery routing to minimize operation cost;
5. Listens to customer complaints, examines returned merchandise and resolves problems to restore and promote good public relations;
6. Confers with the marketing manager to ensure coordination of inventory level with sales and purchasing;
7. Works with the parent company's affiliate's management team and reports company's relevant events;
8. Coordinates with parent company's export department to ensure timely deliveries; and
9. Reports and makes proposals to the parent company's board of directors and acts as a liaison between the parent company and the petitioner.

The petitioner also outlined the supervisory and personnel duties of the beneficiary's position as follows:

1. Supervises and directs activities of the warehouse workers engaged in unloading, lifting, transporting, storing, and loading automobile parts and accessories on the warehouse floor and directs traffic to and from the warehouse;
2. Reviews the subordinate's performance and discusses with employees ways to improve their ratings;

3. Recruits warehouse personnel, interviews job applicants, hires, and terminates employees, and reviews work performance of employees;
4. Trains new employees and informs them of all necessary rules and procedures;
5. Participates in planning personnel safety and warehouse protection activities and spot checks the warehouse to ensure organizational and safety integrity.

In response to the director's request for evidence that would demonstrate that the beneficiary is working in an executive or managerial capacity, the petitioner noted the approximate time spent by the beneficiary in each of the above described categories.

The director determined that several of the listed duties of the beneficiary were operational and not managerial in nature. In addition, the director found that the beneficiary was employed as the first-line supervisor of one subordinate manager. Finally, the director determined that the petitioner did not possess a hierarchy of executives, managers, middle managers and first-line production workers that would support the need for an L-1 executive or manager.

On appeal, counsel repeats the petitioner's initial assertion that the beneficiary primarily directs the management of an essential department or function of the petitioner. Counsel submits a similar list of the beneficiary's job duties, changing some wording slightly and adding a few additional duties. Counsel adds that the beneficiary now directs and controls three existing warehouses exceeding 60,000 square feet, provides input to the petitioner's other executive and managerial personnel to implement the needs and long-range plans of the warehouse department, and instructs the assistant warehouse manager on understanding various documents. Counsel indicates that the beneficiary now sets the guidelines for review of all overseas and domestic shipping documents instead of reviewing and approving them. Counsel also references the growth of the petitioner and the addition of a third warehouse as demonstrating that the warehouse department is an essential function of the petitioner. Counsel asserts that with the addition of the third warehouse, the beneficiary has been given wide latitude to restructure the warehouse department by hiring additional employees. Counsel provides an organizational chart showing that in addition to the previous one warehouse supervisor and seven shipping operators, the petitioner now employs an assistant warehouse manager and two warehouse supervisors as well as the seven shipping operators. The additional employees and the restructuring of the warehouse department apparently took place sometime around the time of the addition of the third warehouse in June of 1999.

Counsel's assertions are not persuasive. The record does not contain evidence that the beneficiary has been managing the essential function of the warehouse department. The description of the beneficiary's duties indicates that the beneficiary has been performing the necessary day-to-day activities of operating the warehouse department. In the petition and the subsequent response to the Service request for evidence, the description of the beneficiary's job duties include being responsible for the inventory count, reviewing and approving documents, determining delivery routes, examining returned merchandise, ensuring timely delivery function, among other tasks. These job duties all indicate the beneficiary is performing the tasks necessary to operate the warehouse department. Based on the provided description of the beneficiary's duties at the time the extension was filed, the beneficiary does not have managerial control and authority over a function, department, subdivision or component of the petitioner.

In addition, the petitioner has not provided evidence that the beneficiary has been functioning at a senior level within an organizational hierarchy. The evidence submitted with the petition does not demonstrate that the beneficiary has autonomy and discretion in deciding the organization's goals. At the time the extension application was filed, the beneficiary continued to be primarily engaged in the administrative duties of the warehouse department in its early stage of development. The organization's chart submitted with the extension petition does not reflect an organizational hierarchy that supports an executive or managerial position in the warehouse department.

Though the Service notes the additional duties of the beneficiary outlined by counsel on appeal, these duties pertain to duties that arose with the restructuring of the warehouse department. The addition of the third warehouse and the restructuring of the warehouse department occurred eight to nine months after the extension petition was filed. This new information may be considered only in an amended petition because it does not contribute to the beneficiary's eligibility at the time the extension petition was filed. 8 C.F.R. 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." This new information did not exist at the time the extension petition was filed and will not be considered on appeal.

Counsel also asserts that the beneficiary supervises and controls the work of other supervisory, professional employees. Counsel, on appeal, submits a description of the experience and duties of the new assistant warehouse manager and the new warehouse supervisor to evidence the professional nature of these job positions. Counsel repeats the job duties and experience of the warehouse supervisor and the shipping operators who were employed at the time of the filing of the extension petition. Counsel

notes that because of the evolution of the company since December 5, 1998, the beneficiary has become further relieved from engaging in the few marginally non-managerial duties he engaged in previously.

Counsel's assertions are not persuasive on this point. As noted above, addition of new employees subsequent to the filing of the extension petition can not be used to establish the beneficiary's eligibility at the time the extension petition was filed. The warehouse supervisor and the seven shipping operators are non-professional subordinates. The Act states that "[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)(A)(iv) of the Act. Despite counsel's assertions to the contrary, neither a warehouse supervisor nor a shipping operator may be considered a professional employee under the Act. Section 101(a)(32) of the Act states that the term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers. It is the nature of the position that makes the position professional or not professional, not as counsel appears to claim, the length of time the individual spends in the position. The record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The petitioner has not established that the beneficiary is primarily employed in a managerial or executive capacity.

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.