



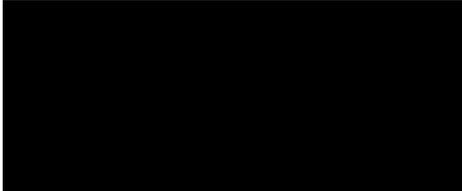
D7

U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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



File: WAC 99 206 51826

Office: CALIFORNIA SERVICE CENTER

Date: 11 JAN 2002

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)

IN BEHALF OF PETITIONER:



Public Copy

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, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as an electrical contractor. The petitioner seeks to continue the beneficiary's employment as its owner and president. 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 discriminated against small business.

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)(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 (l)(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 indicated in its Internal Revenue Service (IRS) Form 1120 that it was incorporated in February of 1998. The petitioner initially requested that the beneficiary be approved for an L-1 classification to start up a new office in the United States. That petition was approved for the period of September 3, 1998 through September 2, 1999. The petitioner now seeks to extend the petition's validity and the beneficiary's stay for an additional three years.

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 (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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 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.

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

The term "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
- iii. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the extension petition, the petitioner described the beneficiary's job duties as "design, develop and install electrical projects, including all conduit and cable systems, HVAC, etc." The petitioner also noted that the beneficiary's job duties in the United States were to, "continue his duties in the following: policy and goal setting; client development; contract negotiations; legal and fiscal compliance; hiring/firing supervision; all managerial duties and responsibilities commensurate with the position."

The petitioner also provided the following documentation pertinent to the issue at hand:

Letters of recommendation from the Perez Business Park property manager and the general manager of Johnson Controls, Inc.;

A letter dated June 15, 1999 offering part-time employment to an individual as an office worker.

Counsel for the petitioner also provided a statement that indicated the beneficiary "has performed to his fullest capacity, and has achieved record profits for this start-up company" and "[the beneficiary] is an outstanding manager and electrical contractor, leading the company to its current state of success."

The director determined that the petitioner employed two individuals. The director concluded based on the small number of employees and the type of business the petitioner was engaged in that the beneficiary would not be primarily serving the petitioner in an executive or managerial capacity. The director determined that the beneficiary would be participating in the day-to-day non-managerial aspects of the business and would not be managing or controlling the work of supervisory, managerial, or professional employees.

On appeal, counsel indicates that she will be sending a brief and/or evidence to the AAU within 30 days. The notice of appeal is dated February 2, 2000. No additional information has been received as of this date, almost two years later. However, counsel, on the notice of appeal, asserts that the Service has ignored the fact that the beneficiary is the president and manager of the company and that the petition included each and every element of the definition of executive and managerial capacity. Counsel also asserts that that the beneficiary oversees the running of the company and works with independent contractors. Counsel also asserts that the start date of July 1999 for the new employee is not relevant to the denial. Counsel further asserts that it is not relevant that the petitioner does not employ many individuals as long as the company is growing, establishing business, and providing employment opportunities to others. Counsel also asserts that the beneficiary has established contracts with key clients, negotiated contracts, and worked with job shops to obtain qualified workers to do the work for the company. Counsel finally asserts that:

[the beneficiary's] day-to-day duties are specifically that of a manager, directing the company, hiring contractors to do the work, and overseeing the important jobs to assure that they meet with the client's demands for excellence. [The beneficiary] has made all the major decisions regarding clients, contracts, who and when to hire personnel, the execution of a joint venture, and many other managerial decisions, including legal and fiscal compliance.

Counsel's assertions are not persuasive. The record does not contain evidence that the beneficiary has been or will be performing managerial or executive duties. The record contains a description of the beneficiary's job duties that essentially paraphrases the essential elements of the statutory definitions of manager and executive. The record does not contain a comprehensive description of the beneficiary's day-to-day activities. The beneficiary's position title cannot be used to substitute for a concrete description of the beneficiary's actual duties. The limited information contained in the record regarding the beneficiary's actual duties indicates that the beneficiary is performing the necessary day-to-day activities of the company. The letter of recommendation from the Perez Business Park property manager essentially states that the beneficiary is performing the electrical work required by its business. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). The beneficiary's job duties must be primarily managerial or executive in nature and not that of an individual primarily performing the work, in order to

qualify for the L-1 classification. In the case at hand the record is insufficient to support such a finding.

The numerous assertions made by counsel in the notice of appeal are not supported by evidentiary facts. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec.533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The assertions of counsel without documentary evidence cannot be used to establish that the beneficiary is acting in a primarily managerial or executive capacity.

On review of the record of this proceeding, the petitioner has not established that the beneficiary has been or will be primarily employed in a managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, there is no information contained in the record that the beneficiary's duties for the petitioner are of a temporary nature. 8 C.F.R. 214.2(l)(1)(ii) requires that the beneficiary of an L-1A petition seek to enter the United States temporarily. To evidence the temporary nature of the beneficiary's services, 8 C.F.R. 214.2(l)(3)(vii) requires that:

If the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and evidence that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States.

It appears from the petitioner's 1998 IRS Form 1120 that the beneficiary is the sole stockholder of the petitioner. The petitioner has not provided evidence that the beneficiary of this petition will be transferred abroad once the beneficiary's temporary services are completed. However, because the petition will be denied for the reason stated above, this issue need not be examined further.

In addition, the petitioner has not established that the petitioner and the foreign entity are qualifying organizations. The record contains little documentary information regarding the foreign entity's ownership and control. It is not clear from the record if the foreign entity continues to operate and if so how it continues to operate and where it continues to operate. Because the petition will be denied for the reason stated above, this issue 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.