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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

[redacted]

File: EAC 00 166 50613 Office: VERMONT SERVICE CENTER Date: JAN 21 2002

IN RE: Petitioner: [redacted]
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: [redacted]

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, 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 an auto parts and car export company. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its purchasing and shipping 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 asserts that the director erroneously based the denial on the size of the petitioning organization.

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 U.S. petitioner states that it was established in 1984 and that it is a branch of Bristol American Auto Parts, located in Jbeil, Lebanon. The petitioner declares two employees and $78,770 in gross revenues. The initial petition was approved in 1993 and was subsequently extended. The most recent extension was valid until May 3, 2000. The petitioner seeks to extend the petition's validity and the beneficiary's stay for two years at a salary of $100,000 per year.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a 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 provides the following description of the beneficiary's duties in the United States:

> Will oversee and develop purchasing strategies foe [sic] auto parts business, develop used and reconditioned auto business in the US, hire and fire employees, make loans, apply for credit, and develop, letters of credit with US and foreign banks.

On May 25, 2000, the Service sent a letter instructing the petitioner to submit additional information regarding the beneficiary's duties in the United States, the petitioner's staffing organization, and any evidence of the petitioner's use of outside contractors, including the number of contractors used and the types of duties they performed.

In response to the above request, the petitioner provided the following description of the beneficiary's duties:

> [redacted] is the president of the corporation and as such, he makes decisions concerning of the type of inventory to stock, he makes corporate decisions as when or what to ship to Lebanon, which types of auto parts are needed in Lebanon, warehouse and distribution facilities, when to ship. In addition, [redacted] makes decisions as to the direction of the business for example: [redacted] has recently decided that the company will sell used auto parts on a retail basis in the United States, where as currently all auto parts are sold overseas. [redacted] makes decisions as to the transfer cash between the United States and Lebanon, which contractors to hire and which to fire, when to employ day labor and when not to.

In addition to the above statement, the petitioner also submitted several bills of sale of automobiles, all signed by the beneficiary as the petitioner's buyer, several of the petitioner's sales invoices containing the beneficiary's signature on the line titled "salesman," several shipping invoices indicating the petitioner's use of a shipping company to transport its automobiles overseas, two invoices regarding auto repairs done for the petitioner, and a 1999 income tax return showing $78,770 in gross sales.

In the denial notice, the director specifically noted the fact that the beneficiary was listed as a "buyer" on the bills of sale for the used automobiles purchased by the petitioner, and that he was listed as the "salesman" on the bills of sale for automobiles sold by the petitioner. The director concluded that the petitioner

failed to provided sufficient evidence that it required a full-time employee to perform primarily managerial or executive duties.

On appeal, counsel asserts that the director misapplied the relevant law by failing to acknowledge that the beneficiary manages the sales and distribution of used auto parts, the petitioner's essential function. Counsel states that the petitioner hires contractors to perform day-to-day operations, including auto repairs and shipping.

However, the record clearly indicates that the beneficiary purchases automobiles for later resale, and acts as the sales person in the subsequent resale transactions. Thus, at least two of the petitioner's essential functions are performed by the beneficiary rather than an outside contractor. The appellate brief also indicates that the beneficiary "makes loans and decides letters of credit" and where necessary "he helps customers finance the car and creates the conditions of the payment plans." These customer service functions, which the beneficiary regularly performs, are also nonqualifying.

While counsel cites a number of nonprecedent Service decisions, 8 C.F.R. 103.3(c) provides that only Service precedent decisions are binding on all Service employees in the administration of the Act. Unpublished decisions are not similarly binding.

Counsel also points out that the beneficiary is at the highest level of the petitioner's staffing hierarchy. However, the beneficiary is also the petitioner's only employee, contrary to the petition which indicates two employees. The petitioner has submitted no evidence that it employs anyone other than the beneficiary. Simply 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). While the number of employees is not the determining factor in deciding whether to approve or deny a petition, the fact remains that the petitioner must establish that the beneficiary does not perform its essential functions.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner did not provide a comprehensive description of the beneficiary's routine duties. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record indicates that a significant portion of the beneficiary's duties have been and will

be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner's 1999 tax return indicates that the petitioner's gross revenues were just under $80,000. However, the petition indicates that the beneficiary's annual salary will be $100,000 annually. According to these two documents, the beneficiary's salary exceeds the petitioner's gross yearly revenues. Therefore, there is no clear evidence to indicate that the petitioner can sustain itself while still paying the beneficiary a salary that is clearly disproportionate to its earnings. As the appeal will be dismissed on the grounds discussed, these issues need not be addressed 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.