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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 99 093 51266 Office: TEXAS SERVICE CENTER Date: 6 - MAR 2002

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:
[Redacted]

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. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the Director, Texas Service Center.¹ On July 12, 2000 the Director, Texas Service Center revoked the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as an aesthetic business. The petitioner seeks to extend its authorization to employ the beneficiary in the United States as its president. The director determined, upon review of the petition and documents submitted in response to the notice of revocation, that the record did not establish that the majority of the beneficiary's duties would be primarily directing the management of the organization.

On appeal, the petitioner disagrees with the director's determination and asserts that the beneficiary's duties are clearly managerial in nature.

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

¹ The petitioner first filed a petition in 1998 for the same beneficiary, receipt number SRC 98 106 50022. The Director of the Texas Service Center denied the petition and the petitioner appealed the decision to the Associate Commissioner for Examinations on appeal. While the petition was on appeal, the petitioner filed the petition currently on appeal. In the matter of SRC 98 106 50022, the Associate Commissioner dismissed the appeal and dismissed a subsequent motion to reopen as well. Failure to make a full disclosure of previous petitioner filed may result in the denial of the petition. 8 C.F.R. 214.2(1)(2)(i).

capacity, including a detailed description of the services to be performed.

The United States petitioner was incorporated in 1996 and is a wholly-owned subsidiary of Nidia Stetic, a company located in Colombia. The petitioner seeks to extend the employment of the beneficiary for a three-year period as its president.

The issue in this proceeding is whether the petitioner has established that 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:

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
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In the petition, the petitioner described the beneficiary's job responsibilities as president as follows:

Plans, develops, and establishes policies and objectives of business organization. Conference [sic] with company officials to plan business objectives, to develop organizational policies [sic] to coordinate functions and operations between divisions, and to establish responsibilities and procedures for attaining objectives. Reviews activity reports and financial statements to determine progress and states in [sic] attaining objectives and revises objectives and plans in accordance with current conditions.

The director in the notice of intent to revoke requested evidence that the beneficiary was employed by the United States entity in a managerial or executive capacity.

In response to the notice of intent to revoke, the petitioner submitted a statement from counsel that described the beneficiary's duties as follows:

As the president and founder of the U.S. entity, she administers and formulates policy. She confers with the accountant and reviews balance sheets. She decides on marketing strategies with public relations representatives. . . . [The beneficiary] supervises the

manager Ms. Gonzalez who is responsible for performing the daily functions of supervising the technician and general bookkeeping. . . [The beneficiary] has the final word on hiring and firing of all employees.

Counsel also contended that the beneficiary did not perform marketing strategies but decided marketing strategies, met with public relations representatives, developed a new sales market, reviewed balance sheets, approved or disapproved the manager's choice of vendors, and found adequate business space. Counsel also provided a brief description of the job duties of the petitioner's manager, technician and part-time bookkeeper.

The director determined that the record did not establish that the majority of the beneficiary's duties would be primarily directing the management of the organization. The director also determined based upon the petitioner's gross and net annual income that the business could not support a full-time management position and additional employees.

On appeal, counsel for the petitioner asserts that several of the beneficiary's duties outlined in the response to the notice of intent to revoke are executive and managerial in nature. Counsel specifically contends that the following duties are performed by the beneficiary and are executive or managerial in nature:

meeting with public relations representatives, reviewing balance sheets, supervising office personnel engaged in keeping records, coordinating the activities of clerical personnel and analyzing and organizing office operations, reviewing product quality, having the final word on hiring and firing, finding adequate business space and developing new sales markets.

Counsel also asserts that the beneficiary supervises a supervisor and thus concludes that the beneficiary is a manager as defined in the Act. Counsel cites several unpublished cases in an effort to bolster her assertions. Counsel also cites Mars Jewelers, Inc. v. INS, 702 F. Supp. 1570, 1574 (N.D. Ga. 1988) wherein it was held that the Service cannot impose a minimum size requirement for a business to qualify in petitioning for a beneficiary. Counsel asserts that contrary to this holding, the Service has improperly found that the petitioner does not have sufficient employees to relieve the beneficiary from performing non-qualifying duties. Counsel finally asserts that the beneficiary as the founder and sole shareholder of the foreign parent company and the president of the United States petitioner is a functional manager operating at a senior level within the organization's hierarchy.

Counsel's assertions are not persuasive. The petitioner has not provided a day-to-day description of the beneficiary's duties and responsibilities. Counsel asserts that various actions taken by the beneficiary are managerial or executive in nature. However,

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). Furthermore, the petitioner does not specify the amount of time these actions take over a weekly period. Finally, neither counsel nor the petitioner have provided documentary evidence that the beneficiary has actually managed or even performed the tasks noted by counsel. 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). Despite counsel's assertions to the contrary, the petitioner has not provided evidence that the beneficiary has been or will be managing or directing the management of the organization.

Counsel's assertion that the beneficiary supervises an employee who supervises the third remaining employee and thus must be considered a manager as defined by the Act is without merit. After a review of the complete record it is noted that many of the duties of the beneficiary and the supervisor overlap. For example, counsel states that the beneficiary meets with public relations representatives. The supervisor is also noted to be "responsible for public relations." Furthermore, the record contains photographs of the petitioner's operations, including pictures of the beneficiary "supervising a technician doing a face treatment" and "supervising and training a new technician." A first-line supervisor is not considered to be acting in a managerial capacity unless the employees supervised are professional. The record does not demonstrate that the United States entity, with its three employees, contains the organizational complexity to support two managerial or executive positions. In addition, counsel's citing of various unpublished decisions does not support her assertion. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to the cases cited. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

Counsel's assertion that the Service cannot impose a minimum staffing requirement on a petitioner requesting classification for a beneficiary as a manager or executive is correct, however, the Service must consider the record in its entirety when making a determination. In this case the record does not support a finding that the petitioner has sufficient employees to relieve the beneficiary from performing non-qualifying duties. The record does not provide sufficient evidence that the beneficiary has been or will be employed in a managerial or executive capacity.

Finally, counsel's assertion that the beneficiary is a functional manager is not supported in the record. The record must demonstrate that the beneficiary will be primarily managing or directing, rather than performing the function. The record must further demonstrate that there are qualified employees to perform

the function so that the beneficiary is relieved from performing non-qualifying duties. As noted above, the record reveals a small business that has employees with overlapping duties and does not contain the organizational complexity to support two managerial/executive positions. The petitioner has not provided persuasive evidence that the beneficiary is a functional manager.

On review of the complete record, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this reason, the appeal is dismissed.

Beyond the decision of the director, there is no evidence in the record to establish that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad on completion of the temporary assignment in the United States pursuant to 8 C.F.R. 214.2(1)(3)(vii). However, as the appeal will be dismissed for the reasons 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.