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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: EAC 01 080 52987 Office: VERMONT SERVICE CENTER Date: 08 MAR 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:

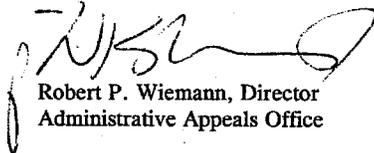
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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. 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 described as an import and export company involved in the distribution of food products. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its 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 submitted a statement asserting that the Service erred in denying the petitioner's request to extend the beneficiary's authorized stay in the U.S.

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 United States petitioner was incorporated in 1994 and states that it is a subsidiary of [REDACTED] de [REDACTED] located in Lisbon, Portugal. The beneficiary is claimed to have been employed by the foreign entity from October 1993 to January 1996 as a commercial director. The petitioner declares that it currently employs six individuals and that it generates approximately \$1 million in gross revenues. The initial petition was approved and was valid from January 13, 1996 to January 13, 1999. The petitioner subsequently sought and obtained an extension of status which was valid until January 13,

2000. The petitioner seeks another extension of the petition's validity and the beneficiary's stay for two more years.

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.

On February 10, 2001, the petitioner was asked for additional information regarding its finances for years 2000 and 2001, as well as specific duties performed by its employees, including the duties of the beneficiary.

Counsel for the petitioner responded by submitting, among other documents, a weekly break-down of hours the beneficiary spends carrying out his various duties. The beneficiary's tasks and time spent performing them were described in pertinent part as follows:

[H]e sets and implements policies, spending approximately 15-20 hours per week on these types of duties. Mr. [REDACTED] also exercises wide latitude in discretionary decision-making within the company, including dealing with domestic and international marketing decisions, personnel decisions, and financial issues, spending 10-15 hours per week on these types of duties. In addition, Mr. [REDACTED] is in charge of all management operations of the company, and spends 15-20 hours per week managing different company departments, including meetings with our company personnel on a daily basis, in order to induce further efficiency in operations

The petitioner also named four employees, [REDACTED] and [REDACTED] whose job titles were identified as warehouse manager, secretary/office manager, sales/marketing manager, and international shipments coordinator, respectively. The petitioner claimed that each of these individuals was employed by Santana Foods on a full-time basis and that each employee spent 10-15 hours per week reporting to Mr. [REDACTED].

A number of documents were also submitted in response to the Service's request for additional information. Such documents include Wage and Tax Statements, the beneficiary's tax returns, and corporate tax returns for years 1999 and 2000, as well as copies of Form I-9s for the petitioner's U.S. employees.

In his decision, the director concluded that based on the size and nature of the petitioning organization the beneficiary was unlikely

to engage primarily in executive or managerial duties, but would instead perform non-managerial, day-to-day operations involved in importing and exporting food products. The director further stated that based on the petitioner's 2000 federal tax return, which showed that Santana Foods generated \$701,757.00 in gross sales and paid \$97,844.00 in wages which included those of the beneficiary, there is no evidence that the U.S. "entity is functioning at a level that would require the service of an individual primarily engaged in executive or managerial activities."

On appeal, counsel argued that the documents submitted thus far, many of which have been listed above, "clearly establish the beneficiary's qualifications to continue as President of Santana for an additional two year period" While counsel may be correct in his assertion, the beneficiary's ability to perform duties which are primarily executive or managerial in nature is not in dispute. However, merely because the beneficiary is capable of performing primarily executive or managerial duties, according to the statutory definition, does not mean that these are the duties he mainly performs.

Counsel also claimed that the petitioner successfully established that the beneficiary has performed duties of a primarily executive capacity and quoted a non-precedent decision in which the Administrative Appeals Office (AAO) reversed a denial which was apparently based on the ground that the beneficiary did not supervise a sufficient number of employees. In the instant case, the director's denial was focused on the determination that too much of the beneficiary's time would be spent performing duties that are considered "non-managerial, day to day operations," rather than primarily executive or managerial. Therefore, the case cited by counsel does not apply in this instance. Furthermore, only those cases that are published as precedent decisions are binding on Service officers. 8 C.F.R. 103.3(c).

Further, in response to the Service's request for additional information, counsel submitted a statement which included the names of four full-time employees (listed above) who were purportedly working directly under the beneficiary's supervision. Yet according to their W-2 tax statements for the year 2000, their combined income totaled approximately \$24,500. Only [REDACTED] whose salary alone was \$21,200, could realistically be viewed as a full-time employee. The salaries of the other three employees, combined, were well below today's standards for poverty level and therefore were unlikely to have been employed by Santana Foods on a full-time basis. Counsel indicated that the only other employees of Santana Foods were accountants whose functions were clearly related to bookkeeping rather than the daily tasks required to maintain the company on a day-to-day basis. The evidence of record indicates that the only obvious full-time employee who has worked under the beneficiary's supervision is [REDACTED] the warehouse manager for Santana Foods. Consequently, it appears

that a great deal of the beneficiary's time is likely to have been spent performing non-managerial, perhaps even administrative, tasks which cannot be viewed as primarily managerial or executive in nature.

Moreover, the aforementioned descriptions of the duties provided by the petitioner are too general and vague to convey any real understanding of exactly what the beneficiary does on a daily basis. Counsel merely restated the broad terms previously used in describing the weekly break-down of the beneficiary's duties. There is still no clear picture of what is involved in overseeing overall operations of Santana, or setting and implementing its policies and goals. These terms are nothing more than mere paraphrasing of the statutory definitions of managerial and executive capacity and are not sufficient to establish what duties were actually performed or that such duties have been or will be of a qualifying managerial or executive capacity.

In fact, the record does not indicate that the duties performed by the applicant were primarily managerial in nature; instead it appears that much of what the beneficiary did would be considered day-to-day operational tasks. For example, a majority of the numerous invoices the petitioner provided documenting the continuous nature of its business transactions contain the beneficiary's initials, JSR, in the space which is meant for the account representative. The fact that the beneficiary's initials appear on nearly all of the invoices implies that he was apparently involved in the routine, non-managerial, task of accepting orders, directly overseeing the accounts, and dealing with customers in regards to the orders he placed. 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 of Scientology International, 19 I&N Dec. 593 (Comm. 1988).

In review, the petitioner is a small company involved in the distribution of food products. The record does not contain a comprehensive description of the beneficiary's duties. The duties described are little more than a mere paraphrasing of the statutory definitions of manager and executive in an attempt to lend credence to the beneficiary's managerial and executive responsibilities. This will not suffice, as it must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities will be managerial or executive in nature. 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). The record does not establish that the beneficiary has been or will be primarily managing the organization, or a department, subdivision, function, or component of the organization. Nor has the petitioner demonstrated that the beneficiary will be primarily supervising a subordinate staff of

professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties, as there appears to be almost no staff to manage. For this reason, the petition may not be approved.

Beyond the decision of the director, the record contains conflicting evidence regarding the claimed qualifying relationship. The petitioner claimed on his nonimmigrant worker petition, Form I-129, that the claimed foreign parent company, [REDACTED] owns 52 percent of the issued stock of the U.S. subsidiary, [REDACTED]

However, Schedule K of the petitioner's 1999 and 2000 corporate tax return, Forms 1120, both declare that the corporation is not a subsidiary or in an affiliated group, and that the beneficiary owns 100 percent of its stock. This directly contradicts the claim on the petition form and raises the issue of whether there is a qualifying relationship with a foreign entity pursuant to 8 C.F.R. 214.2(l)(1)(ii)(G). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant case, petitioner's entire claim is rendered questionable as doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Id.

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.