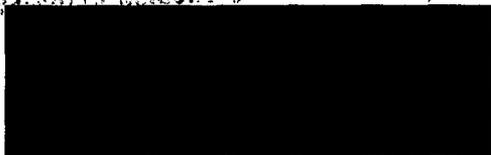




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U.S. Department of Justice
Immigration and Naturalization Service

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

File: EAC-00-208-50907 Office: Vermont Service Center Date: **MAY 09 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)

PUBLIC COPY

IN BEHALF OF PETITIONER:



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

Myra L. Rosewell
for 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 engages in the business of retailing and wholesaling French footwear. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its boutique manager. It claims three (3) employees and an estimated gross annual income of \$1,000,000. The director determined that the petitioner had not established that the beneficiary has been or will be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary has been and will be employed in an executive or managerial capacity.

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.

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

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(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 beneficiary has been or will be employed in the United States in a primarily executive or managerial 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 petitioner initially describes the beneficiary's duties for the United States entity as follows:

- 1) to supervise the installation of the U.S. operation;
- 2) to set up presentations of Louboutin merchandise to U.S. customers;
- 3) to market the Louboutin items to interested American parties, and organize both advertising and public relations campaigns;
- 4) to make regular reports to CLS on developments; and
- 5) to build a permanent staff for Petitioner, so as to handle the regular day-to-day activities when he returns to France.

On July 20, 2000, the Service sent the petitioner a Form I-797 Notice of Action. In that notice the petition was asked to submit, along with other documentation, the following:

Submit evidence that establishes the duties performed by the beneficiary in the past year and the duties he/she will perform if the position is extended.

Submit a comprehensive description of the beneficiary's duties. Also indicate how the beneficiary's duties have been, and will be, managerial or executive in nature. For executive or managerial consideration, you must also: (1) demonstrate that the beneficiary functions at a senior level within an organizational hierarchy as well as in position title; (2) demonstrate that the beneficiary has been and will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him/her from performing non-qualifying duties, if appropriate.

In response to a request for additional evidence, the petitioner, through counsel, submitted the following description of the beneficiary's duties:

6. The description provided of beneficiary's duties are exactly those he has performed to date and continues performing, namely: to open the already successful boutique on Madison Avenue; to establish the correct inventory make-up; to hire appropriate sales staff; to prepare and submit for approval to its French Parent regular budgets. Beneficiary is sole executive at petitioner's present boutique. He is responsible for every facet of the operations of the boutique.

7. As indicated in the original letter, petitioner has three (3) employees. Only beneficiary is full time as shown on the attached Form 941. The other two are in-store sales help...and the hours they work are on an average of 20 to 30 hours a week. Beneficiary devoted his entire time to the operations of the boutique.

On appeal, Counsel asserts that the Service's denial of the petition "apparently rests on the fact that the business is "small". Counsel further asserts that there is no difference between "running" and "managing" a business and that "running" a business of any size means managing and directing the business. Counsel states that the beneficiary is therefore, in managing a small company, managing an "essential function" within the Petitioner's organization. Counsel cites several un-published Service decisions as evidence in support of his conclusion.

In summation, counsel states that:

...Beneficiary is responsible for every aspect of Petitioner's operations: he hires and trains the staff, he prepares the budgets, he seeks out customers, he engages professional help-including the undersigned, and he must regularly report back to petitioner's parent in France.

With respect to counsel's assertion that the Service has approved similar petitions in the past, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, while 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. The evaluation of this petition for benefits will be based on its own record of proceedings.

The fact that an individual oversees a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(44)(A) and (B) of the Act. The record does not establish that the majority of the beneficiary's duties would be primarily directing the management of the organization. In fact, as there is no subordinate management personnel, it is reasonable to conclude that the beneficiary is performing many aspects of the day to day operations of the company.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. Although requested, there is insufficient detail regarding the actual daily duties to be performed by the beneficiary, and the percentage of time devoted to these duties. None of the evidence submitted includes the necessary in-depth description of the beneficiary's duties with the U.S. entity. It must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities would be managerial or executive in nature.

The record is not persuasive in demonstrating that the beneficiary meets regulatory requirements that he also function at a senior level within an organizational hierarchy. The petitioner states that it has three (3) employees, two (2) of which are part time sales persons. Therefore, the petitioner's evidence is not persuasive in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing nonqualifying duties. Based on the evidence presented, it is concluded that the petitioner has not established that the beneficiary has been or will be employed in the United States in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

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.