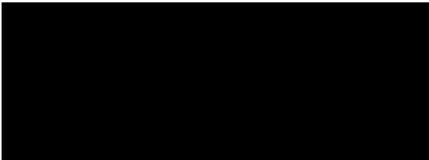


D 7

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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

PUBLIC COPY



FILE: WAC 01 136 58360 Office: CALIFORNIA SERVICE CENTER

Date: APR 08 2003

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)

ON BEHALF OF PETITIONER:



**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, [REDACTED], states that it is a subsidiary of a South African company, [REDACTED]. The South African company is a consultant to the bakery industry. The petitioner planned to operate as a floral and general merchandise store; however, the petitioner now operates a clothing store and a bakery. The U.S. entity was incorporated in the State of California on January 28, 1999. In December 1999, the U.S. entity petitioned the Bureau to classify the beneficiary as a nonimmigrant intracompany transferee (L-1). The Bureau approved the petition as valid from March 15, 2000 to March 15, 2001. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for three years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's business development manager at an annual salary of \$45,000. The director determined, however, that the beneficiary did not qualify as an executive or a manager. On appeal, the petitioner's counsel asserts that the beneficiary works 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 meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

Under 8 C.F.R. § 214.2(1)(3), 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.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization with the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii), a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied by:

(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.

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.

When examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). A summary appended to Form I-129, described the beneficiary's U.S. duties:

Oversees and manages all marketing and business development activities. Manages and develops the conceptual and strategic direction for all activities for the company. Maintains and consistently improves the company's competitive position in the market and is responsible for ensuring maximum growth and profitability. Directs and manages all the activities of a marketing project and maintains a favorable image of the organization.

The summary listed the beneficiary's responsibilities as:

- Determine organization's market research needs and plans and directs the various stages of its marketing research projects.

- Formulates marketing policies and strategies.
- Establishes long and short term goals[,] objectives and strategies.
- Develops and implements annual business plan.
- Manages national and international marketing and business development activities including print advertisements, public relations activities, web site development and trade shows.
- Controls and supervises participation in national and international trade shows.

In response to the director's request for evidence, the petitioner submitted a document listing the percentages of time the beneficiary spends on each of her duties:

1. 9%: The development of new business opportunities[.]
2. 30%: The development of existing business opportunities (e.g., introducing news products to existing customers and developing new products with customers) [.]
3. 15%: Liases with all customers, continually identifying new opportunities and fulfilling their needs.
4. 9%: Another core duty is to seek other avenues of business for the organi[z]ation to pursue[, i.e., t]he opening of new retail stores, locations, costs analysis, logistics and feasibility studies.
5. 17%: The search for fertile leads is another important and time-consuming duty. As she has developed an effective network of friends and associates[,] she is able to do this.
6. 20%: As all of our business needs to be developed, she is of vital importance to the company performing tasks that other executive[s] would have difficulty adding to their already burdensome workload. They would also not be able to afford the important duties [in] the time they

require and therefore dangerously affect the company's effectiveness.

Also, in response to the director's request for evidence, the petitioner submitted an organizational chart. Unlike traditional organizational charts, the chart does not use lines between employees to depict chains of command; instead, names appear in boxes with some of the boxes adjacent to one another. The beneficiary appears below [REDACTED] (CEO), parallel to [REDACTED] (sales director) and [REDACTED] (marketing director), and above [REDACTED] (bakery manager), [REDACTED] (senior cake designer), and [REDACTED] (general assistant).

The petitioner described the beneficiary's duties in extremely broad terms, largely paraphrasing the statutory and regulatory executive and managerial requirements. Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, counsel's assertions 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).

Assuming that the petitioner's job descriptions were adequately detailed, the beneficiary's responsibilities, nevertheless, largely comprise market research which, by definition, qualifies as performing a task necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or 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).

Moreover, to qualify as a manager, the beneficiary must supervise a subordinate staff of professional, managerial, or supervisory personnel who can relieve her from performing her nonqualifying duties. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[T]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools,

colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). In this instance, the beneficiary apparently supervises no employees.

If the beneficiary supervises the bakery manager, senior cake designer, and general assistant, however, she still cannot qualify as a manager. Specifically, the petitioner's failure to provide even a brief description of the bakery employees' duties makes it impossible for the Bureau to determine whether the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel who can relieve her from performing her nonqualifying duties. In sum, the beneficiary's duties demonstrate that she, at most, functions as a first-line supervisor, not as an executive or a manager. See 8 U.S.C. § 1101(a)(44)(a)(ii).

Beyond the decision of the director, the AAO notes that, according to a corporate petition filed with the State of California, the petitioner transferred the beneficiary to the United States to open a floral and general merchandise store. The petitioner never opened the floral and general merchandise store; instead, the petitioner opened a clothing store and leased a bakery. Under the regulations at 8 C.F.R. § 214.2(l)(14)(ii), a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied *inter alia* by: "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."

The petitioner filed corporate tax returns indicating that the planned floral shop paid no salaries, compensated no officers, or earned any income for the period January 28, 1998, through September 30, 1999. Moreover, the record contains a note dated May 27, 2001, admitting that the petitioner originally planned to operate a florist's shop, but decided to pursue other unnamed business interests instead. In short, the record contains no evidence that the petitioner was doing business for one year prior to the requested extension of the nonimmigrant

intracompany transferee visa. Therefore, the beneficiary is ineligible for an extension of her visa.

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; *Transkei*, 923 F.2d at 178 (holding burden is on the petitioner to provide documentation); *Ikea*, 48 F.Supp at 24-5 (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.