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

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

APR 18 2003

File: SRC 01 256 50886 Office: TEXAS SERVICE CENTER Date:

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)

ON BEHALF OF PETITIONER:



PUBLIC COPY

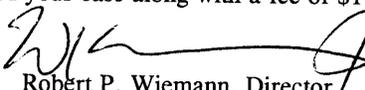
INSTRUCTIONS:

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 nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a jewelry retailer and wholesaler. 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 has been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the Bureau's conclusion is erroneous and submits a brief in support of that claim.

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.

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 U.S. petitioner states that it was established in the year 2000 and that it is an affiliate of [REDACTED] located in Mexico. The petitioner declares six employees and \$210,000 in gross revenues. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$36,000.

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.

In support of the petition, the beneficiary's duties were described as follows:

[The beneficiary] will be completely responsible for all the business functions of the San Antonio stores and the Wholesale trade shows as well. As part of his responsibilities, he will supervise six (6) employees. He will have the ability to hire and fire those under his supervision. He will continue to accomplish his supervision through the following department heads: Management, Sales and Shipping.

[The beneficiary] is ultimately in charge of the entire business and he receives reports from each of the Department heads. He is very familiar with the policies and procedures of the business and his services are critical to the continued success of the business.

On October 30, 2001 the director requested that the petitioner submit additional evidence. Namely, the petitioner was instructed to submit a list of its employees, along with their job titles and the number of hours each employee works on a weekly basis.

The record contains a facsimile, dated October 31, 2001 which lists the petitioner's six employees, including the beneficiary. The list indicates that the beneficiary is the only full-time employee, with the remaining five working 30 or fewer hours per week. Of the five employees, not including the beneficiary, three are listed as sales people, one is listed as the manager of one of the store locations, and one is listed simply as "shipping department." It is noted that due to the Bureau's failure to organize submitted documentation in chronological order, the record initially appeared to be void of a response to the request for additional evidence. Only after repeated review of the partially visible date on the petitioner's response was this office able to ascertain that the petitioner did not fail to respond to the Bureau's notice.

Nevertheless, the director denied the petition, concluding that the beneficiary does not perform primarily executive duties.

On appeal, counsel asserts that the beneficiary has the following executive duties:

[The beneficiary] has signatory power to enter into binding contracts Additionally, it is [the beneficiary] who has directed the management of the organization, has set the goals and policies of the company, and has exercised wide-latitude in discretionary decision-making. . . .

The contracts and agreements, submitted both on appeal and previously in these proceedings, clearly indicate that the beneficiary possesses a great deal of discretionary decision-making power. However, simply because the beneficiary has discretionary power does not indicate that he functions primarily as a manager or executive.

While counsel is correct in asserting that the size of an organization does not determine whether a beneficiary is performing primarily qualifying duties, the size of a petitioner's work force is a relevant in determining whether the beneficiary is relieved of having to perform nonqualifying duties. In the instant case, counsel states that the petitioner has two functioning store locations. Yet the petitioner's work force includes only three sales people, none of whom are employed on a full-time basis, one person who handles the shipping, and only one person, other than the beneficiary, who has a managerial title. With a staff this small, it appears inevitable that the beneficiary is, at the very least, supervising non-professional personnel which consists of part-time sales people and what appears to be a shipping clerk. Furthermore, it is likely that the beneficiary performs the daily operational tasks of the petitioner's business, given the size of and work hours of the staff. 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 Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Contrary to counsel's apparent misconception of the language in the denial, the director did not fail to consider the beneficiary in the role of an executive. It is the Bureau's standard practice to consider each beneficiary under both, the definition of manager and executive. In this instance, the director concluded that the beneficiary did not qualify under either definition. Counsel's language in the appeal statement regarding the beneficiary's role as both president and general manager clearly instructs the director to consider the beneficiary under both statutory definitions, not just one or the other. Therefore, counsel's subsequent argument in his brief is simply inconsistent with his earlier statement.

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. 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. While counsel repeatedly restates the beneficiary's duties, his statements merely paraphrase the statutory definitions of executive. There is no clear indication as to what the beneficiary actually does on a daily basis.

The petitioner has not demonstrated that the beneficiary will be primarily supervising or directing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. Furthermore, the petitioner's failure to provide even a brief description of the 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 nonqualifying duties. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that the term "profession" includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teacher of 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 a baccalaureate level. 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. Nor does

the record demonstrate that the beneficiary primarily manages an essential function of the organization. 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.

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.