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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.
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Washington, D.C. 20536



APR 25 2003

File: SRC-01-166-57403 Office: Texas Service Center Date:

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)

PUBLIC COPY

ON BEHALF OF PETITIONER:



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.

for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a company involved in importing and exporting, and wholesaling and retailing of diesel products. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its manager/administrator. The acting director determined that the petitioning entity had not established that the beneficiary had been or would be employed in the United States in a managerial or executive capacity, or that the petitioner is doing business.

On appeal, the petitioner contends that it is doing business and that the beneficiary's duties are managerial or executive 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.

Regulations at 8 C.F.R. § 214.2(l)(3) state 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 performed.

Regulations at 8 C.F.R. § 214.2(l)(14)(ii) state 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 (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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 first issue to be examined in this proceeding is whether the U.S. entity has been doing business.

Regulations at 8 C.F.R. § 214.2(1)(1)(ii)(H) state:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner has submitted letters of business associates attesting to the petitioner's conduct of business, letters of credit, orders, invoices, packing lists and tax documentation. In considering this documentation, it is determined that the petitioner is doing business. Accordingly, the petitioner has overcome this portion of the director's decision.

The next issue to be examined in this proceeding is whether the petitioner has demonstrated that the beneficiary has been and will be employed in the United States in a primarily 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.

The petitioner initially claimed that it has two employees. The petitioner indicated that the beneficiary would be responsible for

the "hiring and firing of personnel, responsible for establishing new markets, negotiating contracts, administering the office and reporting to the parent company."

In a letter dated February 28, 2000, the foreign entity had described the beneficiary's duties with the U.S. petitioner as follows:

[The beneficiary] will fill the position of General Manager/Administrator in his efforts to conform [sic] a subsidiary of DICO in the United States. This position requires that [the beneficiary] transfers [sic] to the United States in accordance with decisions taken [sic] by the parent company in Colombia. [The beneficiary] will be responsible for establishing the name ARCO GENERAL SERVICES, inc., to be synonymous quality of the service. He will also identify new markets for penetration and act as liaison between parent and subsidiary to assure that prospect markets are accessed; develop marketing strategy to market our services to both retailers and consumers.

The record contains a Form 941 Employer's Quarterly Federal Tax Return, dated January 31, 2001, indicating that the petitioner had one employee and \$13,250 in wages were paid that quarter. A Form 941 Employer's Quarterly Federal Tax Return, dated March 31, 2001, indicated \$3,382.25 in total wages paid for the quarter. A Summary Report of Earnings, also contained in the record, indicated that a total of \$10,602.05 in wages were paid for the first and second quarters of 2001. A separate Florida tax documentation indicated that the beneficiary earned \$6,520 for the quarter ending June 30, 2001 and another individual earned \$700 during that quarter.

In response to a request for additional evidence dated May 21, 2001, the petitioner submitted Florida tax documentation for the period ending March 31, 2001 indicating that the petitioner had five employees including the beneficiary and total earnings of \$3,382.25.

In a letter dated July 5, 2001, the beneficiary described his position as follows:

[The] beneficiary has been managing the entire operation of the company, including the management of the import and export of diesel parts and components, which is essential function of Arco General Services, Inc. The number of hours spent daily by the beneficiary are approximately 8 hours per day. The beneficiary has been responsible for the hiring of personnel and has the authority to fire the same. As the General Manager, [the beneficiary] has been in charge of the day [to day]

operation of the business, responsible for execution of contracts.

This year, the beneficiary will be expected to perform the above described duties as well as establishing new markets and new lines in an effort to expand the company's operation in the Caribbean and Latin America. As per the last Board of Director's meeting of the parent company on Colombia, the beneficiary has been instructed to direct his efforts into establishing new markets and new product lines. Therefore, the beneficiary is expected to spend at least sixty percent of his time fulfilling this task.

In her decision, the director concludes that the beneficiary's duties have not been adequately described, and that the record has not demonstrated that the two U.S. businesses have any employees other than the beneficiary.

On appeal, the petitioner submits the position descriptions for the members of the Board of Directors of the United States entity, which, with the exception of the beneficiary who is president of the board, is of no probative value to the beneficiary's claimed eligibility. The petitioner submitted, among other evidence, Florida tax documentation for the period ending September 30, 2001, which indicates that the petitioner had two employees and that the total wages paid during the period was \$7,201.25. Other evidence submitted, however, indicated for the year ending January 28, 2002, the petitioner had a total of six employees. The record indicates that only one employee, the beneficiary, earned more than \$1,000 during the year. The record further indicates, with the exception of the beneficiary's pay, that a total of \$2,922.53 in wages was paid to five different individuals during the year ending in January 2002. The record contains no other evidence regarding the hiring or firing of any of the purported employees. Nor has the petitioner made any statements regarding the contradictory nature of this evidence. 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.

Further, it is incumbent on 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 (Comm. 1988).

The evidence contained in the record is not sufficient to overcoming the director's objection. The petitioner has not persuasively demonstrated that the beneficiary has been and will be

employed in a primarily managerial or executive capacity. The description of the beneficiary's duties, without elaboration, is simply not sufficient to demonstrate the beneficiary's managerial or executive responsibilities. The description of the duties provided is too general and vague to convey any understanding of exactly what the beneficiary has been and will be doing on a daily basis. It must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities have been and will be managerial or executive in nature. The petitioner has provided no comprehensive description of the beneficiary's duties to establish this. The record indicates that the beneficiary is apparently the only full-time employee of the petitioner. Therefore, the record reflects and logic dictates that the beneficiary has been and will be primarily involved in performing the day-to-day functions of the petitioning entity.

Further, it has not been demonstrated that the beneficiary has been and will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve the beneficiary from performing nonqualifying duties. Based on the evidence submitted, it cannot be determined that the beneficiary has been and 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 proof 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.