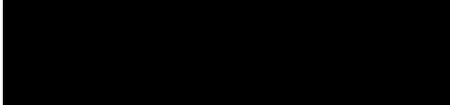


D7

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy



ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

File: SRC 02 072 50484 Office: TEXAS SERVICE CENTER Date: AUG 13 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)

IN BEHALF OF PETITIONER:
[Redacted]

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 described as an export company trading in propane products and a real estate company. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its Vice 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 asserts that the director erred in denying nonimmigrant petition because the petitioner had submitted evidence that shows that the United States company can support an executive. Counsel stated additional financial records as well as a brief would be submitted for the appeal. Counsel filed a notice to appeal dated February 13, 2002. As of this date, more than a year later, the AAO has not received a brief or the additional financial documents. Accordingly, the record must be considered complete.

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.

The regulation at 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.

Furthermore, 8 C.F.R. § 214.2(1)(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 (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 United States petitioner was incorporated in 2000 and states that it is a subsidiary of Velogas, S.A. E.S.P., located in Colombia. In the instant petition, the petitioner declares one employee and approximately \$32,000 in gross revenues. The initial petition was approved and was valid from January 16, 2001 to January 16, 2002, in order to open a new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for two years at an annual salary of \$40,000.

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:

The term "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:

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.

In her decision, the director determined that the petitioner failed to address several issues that were raised in a written request for additional evidence regarding the staffing of the organization and the beneficiary's duties. The regulation at 8 C.F.R. § 103.2 (b)(14) states in pertinent part that, "failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition." The director requested an explanation of how the duties of the beneficiary will be only executive in nature and how she will not perform day-to-day functions of the company. In the response to the request for evidence, counsel asserted that the beneficiary is able to work as an executive, even though she is the only employee, by utilizing contractors. The petitioner submitted no evidence of contractors being utilized in the course of doing business. As proof that the beneficiary had been performing in an executive capacity while using contractors, counsel stated that "the beneficiary utilized a shipping company to handle the logistics of shipping the products

while the beneficiary concentrated on securing and servicing the accounts as well as making sure that the company was in customs compliance with customs requirements for each country". The assertions of counsel 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).

Furthermore, the director reviewed the petitioner's 2000 Corporate Income Tax Return that indicated that gross receipts or sales were \$32,195 for the year and that the U.S. company did not pay any compensation to its officers, did not pay any salaries, and had no cost of labor. The director determined that, based on the information provided by the petitioner, the yearly salary for the beneficiary at \$40,000 could not be paid nor could any payments to contractors be made. The petitioner did not provide information regarding the remuneration of contractors. The director determined that the petitioner failed to establish that the company could support a manager, executive, or contract employees, thus suggesting that the beneficiary is engaged in the day-to-day operation of the business. The director concluded that the petitioner failed to demonstrate that the beneficiary was employed in a managerial or executive capacity.

In the response to the request for evidence, counsel refers to an unpublished decision involving an employee of the Irish Dairy Board. In the Irish Dairy Board case it was held that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee of the petitioning organization. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the Irish Dairy Board case besides stating that the beneficiary uses outside independent contractors. 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 Bureau precedent decisions are binding on all Bureau employees in the administration of the Act, unpublished decisions are not similarly binding.

Moreover, in the response to the request for evidence, in the event that the director found that the duties of the Vice President did not meet the definition of 8 C.F.R. § 214.2(1)(1)(ii), counsel requested the extension of the nonimmigrant petition for an additional one-year period which would "constitute another star[t]-up (sic) phase of the operation. After this start-up phase the company would support an executive position". This request for an extension of a "new office" petition contradicts counsel's assertions that the beneficiary has been and will be employed in a primarily executive capacity.

The regulation at 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Bureau regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant case, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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. Although the petitioner is a company that exports propane gas equipment and supplies, the petitioner has not established who, if not the beneficiary, actually performs the day-to-day tasks of shipping and handling its product. The record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization. For this reason, the petition may not be approved.

While not directly addressed by the director, the petitioner's statements about its business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(G)(2) in that it is engaged in the regular, systematic, and continuous provision of goods and/or services by a qualifying organization. The petitioner is indicated as The Castle's Group, LLC in the initial petition and in this instant petition. In this instant petition, the petitioner refers to the current real estate business as its ongoing business concern but the documentation provided by the petitioner indicates that a separate company, JC Properties, LLC is the actual owner of the real estate. The Castle's Group, LLC is the U.S. company listed as the petitioner, not JC Properties, LLC. Even though the petitioner states that it owns 100% of JC Properties, LLC, this ownership does not provide the necessary qualifying relationship with the foreign company for the purposes of this nonimmigrant visa petition. As the appeal will be dismissed, this issue will not be examined further.

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.