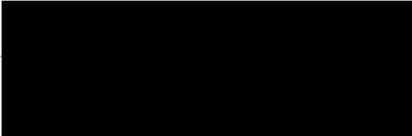


U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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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 01 127 50437 Office: TEXAS SERVICE CENTER

Date: AUG 18 2003

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

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 Director, Texas 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] is a wholly-owned subsidiary of a [REDACTED] food products primarily for sale in South Florida. Additionally, the petitioner exports American made products for use in the Colombian cattle raising and dairy industries. The petitioner seeks to employ the beneficiary's services as the U.S. entity's president. The director determined, however, that the beneficiary did not qualify as an executive or a manager. Consequently, the director denied the petition. On appeal, the petitioner's counsel asserts that the beneficiary works in an executive or managerial 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)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority of the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraph (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

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.

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). On Form I-129, the petitioner described the beneficiary's duties as "responsible for expansion activities including establishing marketing strategies, setting operational goals, hiring employees and the directing the general affairs of the company." Additionally, a February 11, 2002, letter from the petitioner's counsel stated:

As [p]resident, [the beneficiary] will assist Verlix in actively pursuing a greater share of the market of Latin American food products in the South Florida region and throughout the United States. Due to the company's ability to consistently distribute high quantities of coffee from its foreign parent at a consistent price, together with the high demand for premium coffee in the United States, [the beneficiary] will also be responsible for researching the possibility of establishing various coffee shops in Florida.

* * *

[The beneficiary] will be responsible for the overall development and expansion of the subsidiary in the United States. His responsibilities will be to oversee, direct, and control the company's operations and growth, as well as being responsible for personal decisions, including, but not limited to, hiring and training staff to meet demand. [The beneficiary] will exercise all decision-making authority over corporate policy and strategies, including making decisions with regard to marketing, financing and expansion.

* * *

[The beneficiary] will evaluate U.S. market trends and economic conditions in forecasting and in the negotiation of services/sales to domestic and international clients. He will implement the necessary polic[ies] and procedure[s] to ensure growth, train staff, and establish important contacts within a three [year] period.

* * *

[The beneficiary] will implement aggressive policy to market service and increase sales. [The beneficiary] has extensive experience in the food products industry and will be responsible for planning, design[ing], managing and directing the company.

The petitioner's counsel described the beneficiary's duties in general 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).

Even if the petitioner had described the job duties in more detail, the majority of the beneficiary's responsibilities essentially 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).

Petitioner's counsel maintains that, because the beneficiary supervises employees, the beneficiary functions as a manager or executive. In particular, counsel's March 5, 2001, letter, reports that the beneficiary "directly supervis[es] two (2) other employees." The petitioner's January 2001 business plan states, "Our commercial activities only need a few employees, since most of our sales are wholesalers to food distributors. This is why we only have . . . two employees and a CEO" Finally, the petitioner's Florida quarterly wage report for the quarter ending December 31, 2000, reports two employees in addition to the beneficiary:

[REDACTED] The petitioner did not describe [REDACTED] job duties. As previously noted, going on record without supporting documentary evidence is insufficient

for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.*

The petitioner's failure to identify [REDACTED] [REDACTED] qualifications 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 him from performing his 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 sum, the beneficiary's duties demonstrate that he, 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).

On appeal, counsel reports that the petitioner recently hired two additional employees: [REDACTED] graphic/industrial designer; and [REDACTED] an office manager with a college degree. The Bureau may not, however, approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The Bureau will adjudicate the appeal based only on the record proceedings before the director. See, *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). When the petitioner filed Form I-129, the beneficiary did not supervise the two additional employees. Therefore, the director correctly found that the beneficiary did not serve in a primarily executive or managerial capacity.

Nevertheless, even if the petitioner had hired the two additional employees prior to the director's decision, the evidence would have failed to establish the beneficiary is serving in an executive or managerial capacity. In particular, the petitioner did not discuss the two additional employees' duties. As observed above, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure*

Craft of California, supra. Moreover, the petitioner's failure to identify the two additional employees' qualifications 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 him from performing his nonqualifying duties. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), *Matter of Sea, supra; Matter of Ling, supra; Matter of Shin, supra.* Thus, the presence of the two additional employees cannot establish that the beneficiary serves as a manager or as an executive.

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.