

U.S. Department of Homeland Security

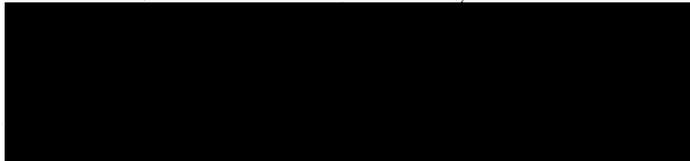
Bureau of Citizenship and Immigration Services

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

AUG 18 2003



OFFICE: EAC 02 008 50326 Office: VERMONT 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:



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

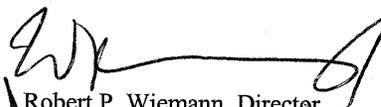
INSTRUCTIONS:

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, Vermont 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 an affiliate of a company headquartered in [REDACTED]. The petitioner imports and exports computer hardware, electronic equipment, office machines, and office equipment. The petitioner seeks to employ the beneficiary's services as the U.S. entity's president and managing director. The director determined, however, that the beneficiary did not qualify as an executive or a manager. The petitioner submitted a brief to the director captioned "Motion to Reconsider/Re-Open and/or Appeal." In accordance with 8 C.F.R. § 103.3(a)(2)(iv), the director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. 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)(A) of the Immigration and Nationality Act ("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.

Furthermore, a beneficiary may either be classified as a manager or an executive for this visa classification. However, a petitioner must also establish that a beneficiary meets each of the four criteria set forth in the statutory definition for an executive and the statutory definition for a manager if it is representing the beneficiary is both an executive and a manager. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

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(1)(3)(ii).

A letter appended to Form I-129 described the beneficiary's proposed U.S. duties:

- Devise and lead business development strategies;
- Plan, organize, control and direct [the petitioner's] major functions;
- Make decisions about the [petitioner's] direction and management . . . ;
- Establish goals and policies [for the petitioner];
- Make adjustments to the [petitioner's] goals and business policies . . . ;
- Monitor budgets for each project;
- Monitor the profitability of [the petitioner's] projects;
- Control [the petitioner's] cash flow . . . ; and
- Generally direct and lead [the petitioner] to achieve its goals.

Additionally, the petitioner submitted a January 22, 2002 letter which stated:

[The petitioner] has only employed the beneficiary up to this date The reason for this has been due to the export-oriented nature of business up to this point which has been handled easily by [the beneficiary]. This has kept low, unnecessary costs [sic] that would have been incurred in obtaining extra employees. However, [the petitioner] will hire additional employees for the planned expansion of business into the local market. Once the mentioned showroom has been set up the [petitioner] will need to employ two or three more people.

The record contains a job application from Nicole C. Lee-Page for an office management or sales support position with the petitioner. Finally, the record includes several testimonials from some of the beneficiary's business associates. The testimonials praised the beneficiary's management skills.

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, a 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).

On appeal, the petitioner's counsel supplied added details about the beneficiary's duties. These duties include:

- Overseeing the renovation and reconfiguration of the petitioner's office space;
- Consulting with business associates to develop strategies;
- Visiting computer showrooms;
- Supplying samples to potential buyers; and
- Potentially purchasing a strip mall in which to house a showroom and retail outlet.

These responsibilities are tasks 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 or an executive, the beneficiary must generally supervise a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing his nonqualifying duties. In this instance, the petitioner admitted that the beneficiary supervises no employees. Furthermore, the record does not state whether the petitioner actually hired Nicole C. Lee-Page. Even if the petitioner had hired Ms. Lee-Page, her experience and education do not reach a professional level. 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 cannot qualify as a manager or an executive because he oversees no subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing his nonqualifying duties.

The petitioner asserts that, at some future time, it may hire two or three employees for the beneficiary to supervise. 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 the Form I-129, the beneficiary did not supervise any employees. Therefore, the director correctly found that the beneficiary did not serve in a primarily executive or managerial capacity.

Moreover, the U.S. entity must within one year of the approval of the petition be capable of supporting an executive or managerial position. Specifically, the regulations require:

The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position . . . supported by information regarding:

- (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and the financial goals;
- (2) The size of the United States investment and the financial ability of the foreign entity to commence doing business in the United States; and
- (3) The organizational structure of the foreign entity.

8 C.F.R. § 214.2(1)(2)(v)(C). Given that the petitioner has been doing business for more than one year, and given that the beneficiary still has no employees to supervise, the record strongly suggests that the U.S. entity is unable to support an executive or managerial position. The inability to support an executive or managerial position supports the director's denial of the petition.

On appeal, counsel maintains that the beneficiary's responsibilities are those of a functional manager. Counsel further asserts that a functional manager who supervises no employees may serve in an executive or managerial capacity. Counsel cites an unpublished AAO case to support this argument. 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. Nevertheless, the AAO acknowledges that a person can qualify as a functional manager without directly supervising other employees. However, as explained above, the evidence demonstrates that, at most, the beneficiary performs tasks necessary to provide a service or produce a product. Consequently, the beneficiary does not qualify as a functional manager.

Beyond the decision of the director, the AAO notes that it is questionable whether, within three years preceding the beneficiary's application for admission into the United States, he was employed abroad in a qualifying managerial or executive capacity for one continuous year with the affiliated employer. See section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L); 8 C.F.R. § 214.2(1)(1)(i).

In a letter appended to Form I-129, the petitioner stated: "[The beneficiary] has been the Managing Director of MTIP LTD from 1990 to October 2000, the parent [sic] company of the Petitioner Company" A resume described the beneficiary's foreign duties as: "Supervise all company affairs such as finance, marketing, shipping, and personal [sic]." These descriptions are vague; therefore, they cannot meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*; see generally *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*. As the appeal will be dismissed, the AAO will not examine this issue any 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; *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.