



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



File: EAC 00 113 50922 Office: VERMONT SERVICE CENTER Date: **AUG 25 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, Vermont 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 import and export company and a retailer of clothes and shoes. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its Chief Executive Officer and General Manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary manages an essential function of the company and qualifies as a manager.

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 1997 and states that it is a wholly-owned subsidiary of [REDACTED] located in San Raon, Costa Rica. The petitioner did not indicate the number of employees on the Form I-129 and listed approximately \$120,000 in gross revenues. The initial petition was approved and was valid from March 2, 1999 to March 2, 2000, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for one year at an annual salary of \$30,000.

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.

The director issued a request for additional evidence to demonstrate that the beneficiary will be engaged in primarily managerial or executive job duties. The director requested:

A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition.

A list of U.S. employees that identifies each employee by name and position title. A complete position description for each employee including the beneficiary. Submit a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis, including one for the beneficiary.

Additional evidence that would show that the beneficiary was employed in a qualifying managerial or executive capacity abroad.

A description of the typical managerial responsibilities that were performed by the beneficiary abroad, such as the method of evaluating the employees under the

beneficiary on behalf of foreign organization.

Counsel for the petitioner responded to the request for evidence. The response included a list of employees with their position titles, description of their duties and the number of hours of work per week. In this list, the beneficiary's position title is president and her position description states "train employees, supervise the jobs done, expand the company's sales, help the company grows [sic]." The remaining six employees are listed with the same position title of operator, working 48 hours per week and the position description states "clothes sewing and clothes alterations including fabric cutting."

The petitioner submitted a statement from the beneficiary describing her managerial duties abroad at the parent company:

Method of evaluating the employee: Each new employee is given two days practice and training. After the two days of training the employees who learn the job are hired, the ones who don't learn are not hired. Each employee is also trained to be come a big production and quality employee in a period of one year. I have also been in charge of the importation and exportation of the company in Costa Rica. Also in Costa Rica I have been doing the following: Trained employees, expanded company sales, verified that all the jobs were in good conditions, supervised employees, made connections of all the purchases and sales of the company.

In the response to the request for evidence, counsel explained that "the beneficiary has been principally involved in establishing a foothold in the U.S. market for its products. At this initial stage of development of the business, the beneficiary is in effect the whole company . . . she is responsible for managing the executive function of making contacts for sales and purchases, expanding sales and growing the company."

Additionally, the petitioner provided a list of the beneficiary's duties for the previous year and under the extended petition. This list states:

Duties performed by Beneficiary for the previous year:

- 1) Trained employees.
- 2) Made connections of all the sales and purchases of the company.
- 3) Verified that all jobs done were in perfect conditions [sic].
- 4) Tried that the company grows each day more.
- 5) Tried to expand the company's sales around the country.
- 6) Designed fashions.

Duties the beneficiary will perform under the extended petition:

- 1) Will train more employees.
- 2) Will make connections of all the sales and purchases of the company.
- 3) Will verify that all jobs done are in perfect conditions [sic].
- 4) Will supervise more employees.
- 5) Will keep trying that the company grow each day more.
- 6) Will keep trying to expand the company grow around the country.
- 7) Will design fashions.

In his decision, the director determined that the record was not persuasive in demonstrating that the beneficiary will be employed in primarily managerial capacity. The description of the duties does not establish that the beneficiary's actual daily activities will be managerial as set forth in section 101(a)(44) of the Act.

On appeal, counsel states that the director's decision is not substantiated by facts of the case or by applicable law. Counsel states that the director failed to consider and give due consideration to applicant's particular circumstances which evidence a continuing need for her services which consist of managing an essential function of the company. Counsel asserts that the decision is therefore arbitrary and capricious and fails to give due consideration to the evidence submitted.

It is noted that the petitioner never effectively clarified whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. Regardless, the petitioner must establish that the beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the two diverse statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

On appeal, counsel states that the beneficiary "exercises wide latitude in discretionary decision making, establishes goals and policies, and directs the management of the organization." Counsel did not enumerate any goals or policies and is restating language describing duties of an executive under section 101 (a) (44) (B) of the Act.

Additionally, counsel also appears to assert that the beneficiary qualifies as a functional manager. Counsel insists that the

beneficiary's duties listed are "consistent with the managing of the function of growing the company." However, based on the record of this proceeding, the petitioner has not clearly identified the function that the beneficiary manages and if that function is essential. Counsel cites two unpublished AAO decisions that address the issue of functional manager. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to these two decisions. 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 Service employees in the administration of the Act, unpublished decisions are not similarly binding.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner is an import and export company with a focus on designing and selling clothing. The fact that an individual operates a business does not necessarily establish eligibility for classification 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 will be directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties will be directly performing the operations of the organization, that is, designing and selling clothes. The other six employees actually sew and alter clothing. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing nonqualifying duties. The petitioner has not identified the essential function that the beneficiary manages. The fact remains that the description of the beneficiary's primary duties indicates that they are not 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.