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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.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



File: SRC 02 088 50633 Office: TEXAS SERVICE CENTER Date:

AUG 26 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)

IN BEHALF OF PETITIONER:



ADMINISTRATIVE APPEALS OFFICE
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prevent clearly unwarranted
invasion of personal privacy

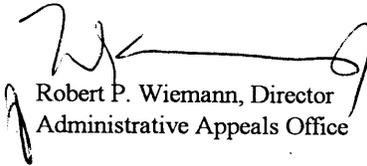
INSTRUCTIONS:

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 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 a general contractor. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its Vice President and Operations Manager. The director determined that the petitioner and the foreign business did not have a qualifying relationship. Additionally, 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 petitioner and the foreign business have a qualifying relationship. Counsel states that beneficiary qualifies as a manager under the definition contained in 8 C.F.R. § 214.2(1)(ii) and under a non-precedent Bureau decision.

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 an affiliate of [REDACTED] located in Valencia, Venezuela. On the Form I-129, the petitioner states that it has two employees and did not indicate its gross revenues. The initial petition was approved and was valid from January 29, 2001 to January 29, 2002, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for two years at an annual salary of \$36,000.

The first issue in this proceeding is whether the petitioner has established that the U.S. company has been "doing business" and thereby meets the definition of "qualifying organization."

The regulation at 8 U.S.C. § 214.2(1)(1)(ii)(G), provides:

The term "qualifying organization" mean a United States or Foreign firm, corporation, or other legal entity which:

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intra company transferee.

In her decision, the director determined that the petitioner had not been doing business for one year, therefore, the company did not meet the definition of a qualifying organization in a qualifying relationship. The beneficiary entered the United States

in L status in January 2001. The petitioner submitted evidence that stated it received its license to do business as a general contractor in June 2001 and was awarded its first contract in October 2001.

On appeal, counsel spends a significant amount of time asserting that the Bureau based its denial on an issue that was not raised in the request for additional information. Counsel cites the regulation 8 C.F.R. § 214.2 (1) (8) that states when an adverse decision is proposed on the basis of evidence not submitted by the petitioner, the director shall notify the petitioner of his or her intent to deny the petition and the basis for denial. However, this regulation does not apply to the instant proceeding. Upon review of the record, the director made her decision based on the evidence that the petitioner provided.

On appeal, counsel explains that due to the nature of the petitioner's business and the need for the petitioner to obtain appropriate licenses the petitioner did not obtain a contract until October 2001. Counsel insists that "practical considerations of operating a business must be factored in when interpreting the law, i.e., it is not normal for a business to open its doors on day one and show positive results, especially in the area of construction". The petitioner has not provided sufficient evidence that demonstrates that the petitioner has been doing business for the duration of the alien's stay as required by the regulations.

The regulation at 8 C.F.R. § 214.2 (1) (1) (ii) (H) defines "doing business" as:

"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.

Furthermore, 8 C.F.R. 214.2 (1) (14) (ii) (B) requires the petitioner to submit evidence that it has been doing business for the previous year. Based on evidence provided by the petitioner, the U.S. company has not been doing business as an employer in the United States for the duration of the alien's stay in the United States as an intracompany transferee and therefore is not a qualifying organization.

The second issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties. 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 (1) (3) (ii). In this instance, the counsel for the petitioner states that the beneficiary is responsible:

for managing the operations of the U.S. Mr. [REDACTED] is responsible for all activities related to new business development. He is in charge of managing the U.S. entity and has discretion over operations decision for the company and to investigate and choose new sources of business. He supervises and executes all the civil works that will be done by the company. He is in charge of creating a network with other companies in the industry. He negotiates contracts on behalf of the corporation and deal[s] with the U.S. supplier of goods.

However, counsel states that "I handle all operational personnel decisions for [REDACTED]. Additionally, counsel restates the regulations when describing the beneficiary's duties:

Mr. [REDACTED] directly supervises and 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, he functions at a senior level within the organizational hierarchy or with respect to the functioned managed. Mr. [REDACTED] also exercises discretion over the day-to-day operations of the activity or function for which he has authority.

The director issued a request for additional evidence on March 11, 2002 that requested the following:

First, regarding the U.S. organization, please submit the following:

1. copies of all pages of form 941 quarterly federal and state tax returns filed for 2001 and 2002;
2. submit form 1099 for the petitioner's contract employees: submit bills, receipts, I-9s etc to establish the salaries being paid to contract employees and the number of hours these employees work and their job titles;
3. evidence of business being conducted by the petitioner during the past year, such as sales contracts invoices bills of lading shipping receipts, orders, US customs forms 301, 7501 7525-V and so forth;
4. evidence of current staffing level in the U.S: give the position titles and duties; give the educational background of the

professionals that are employed.

5. I-797 approval notice for the director's L-1 status.

Second, regarding the foreign business, please submit an organization chart identifying all employees (including any contract employees), their position titles with brief description of duties qualifications and hours worked.

In response to the request for evidence, counsel explained that the foreign entity paid the petitioner's salaries for 2001. Counsel described the staffing level of the petitioner as two employees and that the petitioner has contracted two subcontractors for different projects. Counsel stated that the petitioner did not have I-9's for the subcontractors. Counsel explained that the subcontractors would be paid after the projects had been completed. Based on the evidence provided by the petitioner, the director determined that the petitioner has not demonstrated that the beneficiary had been and would continue to be acting in a primarily managerial or executive capacity.

On appeal, counsel refers several times to an unpublished appellate decision in a case involving an employee of the Irish Dairy Board. In that decision it was held that the beneficiary satisfied the requirements of acting primarily in a managerial capacity because his primary assignment was the management of a large organization using multiple subcontractors to carry out its functions, even though he was the sole direct 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. 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 Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

The beneficiary's duties are described as negotiating contracts, activities related to new business development and dealing with U.S. supplier of goods. These duties primarily appear to consist of marketing tasks. Marketing duties, by definition, qualify as performing a task necessary to provide a service or product. An employee who primarily performs the tasks necessary to produce a product or to 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).

On appeal, counsel states that the petitioner now has five full-

time employees. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In sum, counsel described some of 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). 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, it is not clear if counsel is asserting that the beneficiary is a staff manager or a function manager. Finally, the job description provided is overly broad and vague, so that the Bureau is unable to determine what the beneficiary does on a day-to-day basis.

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. The petitioner is a general contractor. The beneficiary is one of two employees. 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 have been or will be directing the management of the organization. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff who relieve him from performing nonqualifying duties. The fact that the petitioner claims to utilize subcontractors does not alone demonstrate managerial capacity. The description of the beneficiary's primary duties indicates that the beneficiary is not employed 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.