

07

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

**PUBLIC COPY**

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



File: EAC 01 208 53739 Office: VERMONT SERVICE CENTER Date:

ALB 28 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:



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

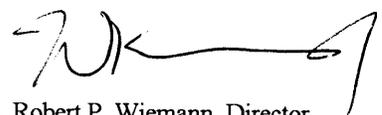
**INSTRUCTIONS:**

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as a business specializing in air conditioning and refrigeration engineering. The petitioner's advertisement in the telephone book states that they are estimators or "sketchers" and sheet metal duct fabricators. The petitioner seeks authorization to extend the employment of the beneficiary as president of the company. The director determined that the petitioner had failed to demonstrate that beneficiary has been and will be employed in either a managerial or an executive 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 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.

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 United States petitioner was incorporated in 1998, and states that it is a subsidiary of GIVRAC Nigeria Ltd, located in Nigeria. The beneficiary has been employed by the petitioner in L-1A status since June 1998 and was previously employed by the foreign company as the managing director. The Form I-129 states that the beneficiary will be employed as President of GIVRAC USA and that GIVRAC USA has more than 10 employees.

The director issued a notice of action requesting several items which included the following:

Submit a comprehensive description of the beneficiary's duties. Also, indicate how the beneficiary's duties have been, and will be, managerial or executive in nature. For executive or managerial consideration, you must: demonstrate the beneficiary functions at a senior level within an organizational hierarchy other than position title, and 2) the beneficiary has been and will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties if appropriate.

Submit a list of your United States employees identifying each employee by name and position title.

Submit copies of 2000 Form W-2s and Form 1099 issued by the United States entity.

The petitioner did not submit all evidence requested in the Notice of Action or explain in its response why it did not submit all the evidence requested. In response to the notice of action, counsel asserted that "the beneficiary's job duties meet the definition of

executive capacity as he is directing the management and a major component of the organization i.e.: the financial agreements and negotiations". As proof of directing financial agreements, counsel provided minutes of a meeting between the petitioner and [REDACTED] dated March 1998.

Counsel's response states that the beneficiary is paid as the managing director. There is no evidence in the record that the beneficiary has been paid beyond a few payments by check that total \$290.00. The U.S. Corporation Short-Form Income Tax Return Form 1120-A states that there was no compensation to officers nor salaries and wages declared. Petitioner did not submit a list of U.S. employees even though petitioner stated it employed more than 10 people on the Form I-129. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In her denial, the director cites 8 C.F.R. § 103.2(b)(14) which states, "When an applicant or petitioner does not submit all requested additional evidence and requests a decision based on the evidence already submitted, a decision will be issued based on the record. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition." Therefore, the director found that the beneficiary does not qualify for classification under Section 101(a)(15)(L) of the Act.

On appeal, counsel stated that she would submit a brief or evidence to the Administrative Appeals Office within 30 days. Counsel dated the appeal March 14, 2002. As of this date, more than one year later, the AAO has received nothing further. Accordingly, the record must be considered complete, and will be reviewed as such.

In an attachment to Form I-290B, counsel merely restates the definition of executive as found in 8 C.F.R. § 214.2(1)(1) and cites *Mars Jewelers v. INS*, 701 F. Supp. 1570 (N.D. Ga 1988) and *National Hand Tool Corp. v. Pasquarell*, 889 F.2d. 1472 (5th Cir. 1989) without relating them to the instant petition. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the above-cited cases. 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).

The petitioner has not provided evidence of any individual providing the services of the petitioning company other than the beneficiary. 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 of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

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. Counsel asserts that the beneficiary plans and develops policies, coordinates financial programs, negotiates contractual agreements, and develops goals for GIVRAC Nigeria Ltd. and GIVRAC USA Inc. 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). The record does not contain a comprehensive description of the beneficiary's duties, or supporting documentation, which would establish that the beneficiary directs the management of the organization or a major component of the organization.

Based on the evidence provided, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. The appeal must therefore be dismissed.

While not directly addressed by the director, the minimal documentation of the petitioner's 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(l)(1)(ii)(G)(2) in that it is engaged in the regular, systematic, and continuous provision of goods or services by a qualifying organization and does not represent the mere presence of an agent or office in the United States. Again, as the appeal will be dismissed, this issue will not be examined further.

In visa petition proceedings, the burden of proving eligibility for the visa 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.