

U.S. Department of Homeland Security
Citizenship and Immigration Services

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

DEC 03 2003

FILE: WAC-02-068-51343 Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for 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:

PUBLIC COPY

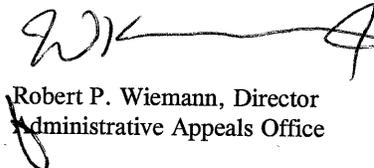
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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, California 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 is located in California and engaged in importing and exporting lighting, and most recently began also operating as a catering business. The petitioner seeks to extend the beneficiary's L-1A status for an additional three years to be employed as President of the company. In a decision dated May 30, 2002, the director denied the petition stating that the beneficiary has not been and will not be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserted that the director incorrectly concluded that the beneficiary was not performing in a managerial or executive capacity because of the small size of the staff, and that the director failed to consider the management functions performed by the beneficiary. Counsel also indicated that a detailed brief would be submitted to the AAO within thirty days of the appeal, which was filed on July 2, 2002. No subsequent brief or evidence has been submitted by either counsel or the petitioner. As it is now more than a year later, the record will be considered complete.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. In addition, 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.

The issue in the present case is whether the beneficiary will be employed in a primarily 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.

In the instant case, on the petition to extend the beneficiary's L-1A status, the petitioner noted that the beneficiary, as director of the company, was responsible for implementing corporate goals, hiring managerial staff, negotiating contracts, establishing management and operational procedures, and devising

marketing strategies. The beneficiary also submitted a letter with the petition noting that she has "overall responsibility for management in the executive capacity for the operations of the subsidiary organization," "evaluate[s] operation guidelines and procedures and formulate[s] new business goals as needed," "develop[s] the North American market by implementing the hiring practices for local sales representatives and set[s] up import/export lighting and catering businesses." The beneficiary further stated that she would have final approval on budgets, purchasing, and management of personnel hiring decisions.

In a request for additional evidence, the director asked that the petitioner submit the following evidence: a detailed description of the beneficiary's specific job duties, including percentage of time to be spent on each duty; evidence that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees, including the employees' educational levels and salaries; and, the job duties and educational levels of two named employees. The petitioner responded to the director's request noting the same job duties of the beneficiary as already provided on the petition for an extension; the petitioner failed to provide any information pertaining to the subordinates' job duties, educational levels, or salaries.

In his decision, the director denied the petition, indicating that the beneficiary has not been and will not be employed at the petitioning organization in a primarily managerial or executive capacity. As indicated in the evidence submitted, the petitioning organization has three employees: the beneficiary, a supervisor without supporting staff, and a part-time secretary. The director determined that the petitioner did not establish that the beneficiary had supervised a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties. In addition, the petitioner failed "to demonstrate how the beneficiary's daily activities or the specific scope and nature of the beneficiary's activities are primarily managerial or executive capacity." As such, the director denied the petition for an extension.

On appeal, petitioner's counsel asserted that the director "erred as a matter of law and in fact" in concluding that the beneficiary was not employed in a managerial or executive capacity due to the beneficiary's small staff. Counsel further stated that "this conclusion flies in the face of reason as all

a manager or executive needs is one capable assistant to do the clerical duties. Moreover, the Director failed to consider the management functions of the beneficiary's [sic] position." As previously noted, counsel failed to submit a brief in support of his assertions as indicated on the appeal form.

The record does not support a finding that the beneficiary has been or will be employed in a primarily managerial or executive capacity as required in section 101(a)(15)(L) of the Act. In examining the managerial or executive capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(1)(3)(ii). The petitioner has not provided a sufficient in-depth description of the beneficiary's job duties to support a conclusion that the beneficiary has been or will be working in a managerial or executive position. Rather, the evidence submitted contains very vague and broad descriptions that the beneficiary will "implement corporate goals," "hire managerial staff," "negotiate contracts," "establish management/operational procedures," and "devise marketing strategies." These statements do not provide enough information to establish the daily managerial or executive duties of the beneficiary. In addition, although the petitioner had an opportunity to submit a more detailed description of the beneficiary's position, the petitioner simply reiterated in its response to the director's request for evidence the same job duties as it provided in the petition. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

There are also several inconsistencies throughout the record that preclude a finding that the beneficiary is a manager or executive. First, although the beneficiary was employed at the U.S. company since 1999, the salaries and wages of the petitioning organization for the year 2000, as reflected on the U.S. Corporation Income Tax Return, are zero. The amount provided on the same tax return for "compensation of officers" is \$12,000, yet the AAO cannot assume, absent further evidence, that the beneficiary is considered an officer, and that she was compensated as such rather than receiving a salary. Schedule E of the tax return, which applies to the compensation of officers, does not list any officers and contains only "zeroes." The petitioner did not provide any explanation of the tax

return; nor did the petitioner submit the beneficiary's form W-2 for the year 2000. 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).

Secondly, the director specifically asked the petitioner to indicate whether the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees. The petitioner, in its response to the request for evidence, named a supervisor whom the beneficiary "supervises and control[s]." Yet, in the following sentence, the petitioner indicated that this individual has been replaced. It is unclear why the petitioner would name a person as the beneficiary's subordinate, and then claim that the individual was replaced. It seems reasonable to assume that when directly asked about the beneficiary's subordinates, the petitioning organization would provide the names of those who are *currently* employed. Again, 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*, supra at 591-92.

Finally, throughout the record the beneficiary is referred to as the President, the Director, and a manager. Yet, as stated earlier, the petitioner has failed to provide sufficient evidence as to why the beneficiary should be classified as such. The petitioner identified a supervisor, who does not have supporting staff, and a part-time secretary, as the beneficiary's only subordinates. As there are no lower-level employees, it is questionable whether the individual identified as a supervisor is actually employed in a supervisory position. Therefore, there is insufficient evidence in the record to support a finding that the beneficiary supervises the work of other supervisory, professional, or managerial employees. In addition, the petitioner has not provided comprehensive information to establish that the beneficiary directs the management of one or more functions, and establishes the goals and policies of the organization. Therefore, the AAO is not compelled to deem the beneficiary to be a manager or executive simply because she possesses a managerial or executive title.

In regards to counsel's assertion on appeal that the director incorrectly considered the small size of the petitioning

organization when making his determination, it is clear from the above discussion that this is not the sole factor taken into account in dismissing the petition. Although the number of employees supervised or the size of an organization alone is not determinative of whether an individual is functioning in a managerial or executive capacity, either factor may be considered when other irregularities exist. See *Systronics Corp. v. I.N.S.*, 153 F.Supp. 2d 7, (D.D.C. 2001). The size of the personnel staff is especially important when determining whether the petitioner has sufficient staff to relieve the beneficiary from performing non-qualifying duties. *Id.* As there are several other irregularities addressed above, including the lack of support staff to perform the non-qualifying duties, the size of the petitioning organization is but one factor, and not the sole reason, for dismissing the petition.

For the foregoing reasons, the AAO cannot conclude that the beneficiary has been or will be employed in the United States in a primarily managerial or executive capacity.

Although not addressed by the director, a remaining issue is whether the petitioner was required to file an amended petition indicating that it began doing business as a catering company, in addition to importing and exporting lighting, in or around January 2001. Pursuant to the regulation at 8 C.F.R. § 214.2 (l)(7)(i)(C), the petitioner must file an amended petition to reflect changes in approved relationships or in the capacity of employment, or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act. The record does not reveal any documentation submitted by the petitioner reflecting a change in its services. As the appeal will be dismissed, this issue need not be further addressed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.