

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
Date:

FILE: SRC-02-117-54415 Office: TEXAS SERVICE CENTER

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, Texas 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 a new office located in Florida and engaged in the export of industrial equipment. It seeks to extend the employment of the beneficiary as president for an additional three years. As such, the petitioner filed a petition, which the director denied. In her decision, the director concluded that the petitioner had failed to establish the following: (1) that the beneficiary will be employed in a primarily managerial or executive capacity; and, (2) that the U.S. and foreign entities have a qualifying relationship.

In a timely appeal dated June 13, 2002, petitioner's counsel asserted that the beneficiary will be employed in a managerial capacity. Counsel requested an additional sixty days to submit a brief and evidence to the AAO. To date, more than one year later, no such brief or evidence has been submitted by counsel or the petitioner. Therefore, 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.

Further, 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.

The AAO will first address the issue of whether the beneficiary's role in the U.S. company constitutes that of a manager or executive in order to qualify for a petition extension.

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 petition, the beneficiary is described as president of the petitioning organization. The petitioner also submitted a letter describing the beneficiary's proposed duties in the United States. As the letter is part of the record, the duties will not be repeated herein. In addition, it was noted that the beneficiary held a professional degree in marketing and advertising from University Politecnico Grancolombiano, and had completed a course titled Negotiation in International Business.

In support of the petition, the petitioner submitted an additional letter dated February 22, 2002, further outlining the beneficiary's "marketing" duties as follows:

Planning and developing industrial, labor, and public relations policies designed to improve [the] company's image and relations with customers, employees, stockholders, and [the] public.

Developing new customer bases in the United States.

Exporting American products to the Colombian and Latin American market.

Promoting existing and new product lines.

Keeping abreast of new developments in market research techniques, product lines and other relevant factors through seminars, trade shows, periodicals and trade journals.

Analyzing competitive products in terms of design, price and marketability as compared to company position.

Representing company at trade association meetings to promote products sold and to purchase products.

Directing the management and growth of the company.

Directing the day-to-day operations and customer service matters.

Planning, developing, and establishing policies and objectives of business organization.

Planning business objectives, developing organizational policies to coordinate functions and operations between division and departments, establishing responsibilities and procedures for attaining objectives.

Reviewing activity reports and financial statements to determine progress and status in attaining objectives and revising objectives and planning in accordance with current conditions.

Directing and coordinating formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity.

Serving as chairman of committees, such as management, executive, and sales.

Maintaining the excellent support supplied by the company in Colombia, to existing customers, including day-to-day quotation activity and assistance.

Establishing the Company's Web Site and its corresponding procedures.

In her decision dated May 14, 2002, the director denied the petition, concluding that the beneficiary, as the only employee of the company, was not functioning in the U.S. entity as a manager or executive. The director noted that there were no subordinates who could relieve the beneficiary from performing day-to-day operations, and that, as of the filing date, the beneficiary would not function at a senior level within the

organizational hierarchy. Consequently, the petition was denied.

On appeal, the petitioner's counsel asserts the following:

We intend to establish that the beneficiary will in fact serve in a managerial capacity and that the Service has failed to take the continued growth and development of [the petitioner] into its decision-making process. Specifically, we will provide additional documentation which would tend to establish that [the petitioner] is still in a growth phase and it will urgently require the managerial and executive decision making talents of [the beneficiary] in order to successfully accomplish all of its goals.

Counsel indicated that within sixty days of the appeal, a brief and evidence would be submitted. Despite counsel's promise to substantiate the beneficiary's role as a manager, no brief or additional evidence was provided. Therefore, this issue will be reviewed based on the evidence currently in the record.

The record is not persuasive in establishing that the beneficiary is working in the U.S. entity as a manager or executive. In examining the managerial or executive capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. 8 C.F.R. § 214.2(1)(3)(ii). In the present case, the petitioner has submitted a detailed list of duties performed by the beneficiary in her role as president of the company. However, the majority of these duties are not managerial, and therefore are inconsistent with the assignments of a manager, as defined in the regulations.

Specifically, the petitioner noted that the beneficiary exports U.S. products, promotes existing and new product lines, represents the company at public meetings, and maintains customer service, including providing day-to-day quotation activity and assistance. These duties can be classified as non-managerial or non-qualifying duties as they require the beneficiary to perform the service of the U.S. company, rather than only directing or managing the service provided. 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).

In addition, the record is devoid of additional evidence in support of a finding that the majority of the beneficiary's

duties are managerial in nature. The petitioner did not provide a percentage or breakdown of hours assigned to each task performed by the beneficiary. Nor did the petitioner submit a current or proposed organizational chart, which would establish the beneficiary's role as a president in the company hierarchy. Further, although the petitioner asserted that the beneficiary earned a professional degree in marketing and advertising, the petitioner failed to submit a copy of the beneficiary's diploma, transcripts, or any other evidence that might support this claim. 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).

Finally, in regards to the assertions of counsel on appeal, the record does not substantiate a finding that the "continued growth and development of [the petitioner]" will eventually create a managerial position for the beneficiary to assume in the petitioning organization. Pursuant to 8 C.F.R. § 214.2 (1)(3)(v)(C), within one year of the approval of a petition for an individual employed in a new office, the U.S. operation must be able to support an executive or managerial position. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. Contrary to counsel's belief, the petitioner is not given an extension of this one-year period to complete its "growth phase." The beneficiary's petition for L-1A status was approved in May 2001. Therefore, the petitioning organization must be able to support the beneficiary as a manager or executive by May 2002. The petitioner has not reached the point where it can employ the beneficiary in a managerial or executive capacity, and consequently, the appeal will be dismissed.

A second issue raised by the director in her decision is whether the foreign and U.S. entities are qualifying organizations as defined in 8 C.F.R. § 214.2(1)(1)(ii)(G). The director stated that the only indication of a relationship between the two companies was a notation on the petition that the petitioner was a branch of the foreign company and a reference to 1000 shares of stock ownership.¹ Therefore, the director determined that the petitioner had failed to establish a qualifying relationship between the two companies.

¹ On the petition, under stock ownership of each company, the petitioner noted "Disuagraf LTDA," "Pro Scanner Barrera Limitada 1,000 shares," "ABC Scanner Limitada 1,000 shares." It is unclear from the record whether the above-referenced are individuals or companies, and in which entity each owns shares.

On appeal, counsel did not submit additional evidence regarding the qualifying relationship of the foreign and U.S. entities. As petitioner's counsel did not address this issue on appeal, the AAO is compelled to uphold the finding of the director and the appeal will be dismissed on this issue, as well.

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.