

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: EAC-02-062-53147 Office: VERMONT 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, Vermont 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 limited liability company located in Vermont and engaged in the production and distribution of dairy products. The petitioner has employed the beneficiary as an administrative manager for one year and seeks to extend the beneficiary's nonimmigrant visa for an additional two years. As such, the petitioner filed a petition seeking to extend the beneficiary's temporary employment in the United States. The director denied the petition indicating that the beneficiary was not employed in the U.S. entity as a manager or executive.

On appeal, the petitioner submitted a letter written by the owner of the company indicating the daily functions performed by the beneficiary, and asserted that these duties substantiate the beneficiary's role as a manager. In addition, petitioner's counsel indicated that a brief or additional evidence would be submitted to the AAO within thirty days of the June 20, 2002 appeal date. To date, a thorough review of the record has revealed no subsequent submission 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.

In addition, pursuant to the regulation at 8 C.F.R. § 214.2 (1)(14)(ii), a visa petition involving the opening of a new office may be extended by filing a new Form I-129 and submitting the following evidence:

- (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 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.

On the petition, the petitioner noted the beneficiary's job duties as managing the administrative department of the company, including establishing budgets, market and sales strategies, and selecting and contacting suppliers. An accompanying letter from the petitioner further indicated that the beneficiary was transferred to the U.S. company to implement the activities and new techniques of the foreign subsidiary so that both companies could better understand the other's transactions. A more detailed list of the beneficiary's job duties included:

- Administrate through subordinate supervisory personnel, farm and milking of cows, storage of milk, and sterilizing and maintaining facilities and equipment
- To manage the dairy division of the company
- To hire and dismiss at [the beneficiary's] discretion
- To create and install organizational structures to import and export
- To implement systems and methods for work optimization
- To establish goals, policies and administrative rules

- Directs conversion of products from foreign to American standards and specifications to ensure efficient operation under foreign conditions

The director requested additional evidence noting that (1) the record did not establish that the majority of the beneficiary's time would be spent directing a subordinate staff of professionals who would relieve the beneficiary from performing non-qualifying duties; and, (2) that the size and scope of the U.S. operation does not warrant the services of an L-1A manager or executive. The director requested that an organizational chart be submitted as well as evidence supporting the beneficiary's role as a manager.

In its response to the director's request for evidence, the petitioner submitted a chart that designated the beneficiary as administrative manager of the dairy department with two subordinates, a supervisor of the dairy department and a supervisor of distribution and transport. Reporting to these two supervisors are a contract veterinarian, a seller/purchaser, a machinery maintenance employee, and fifteen farm workers who are independent contractors. A brief description of each employee's job was provided. In addition, the petitioner further described the beneficiary's job as directing and coordinating the farm activities, including breeding and rearing livestock, feeding and milking cows, storage of milk, and sterilizing and maintaining facilities and equipment, through subordinate supervisory personnel; reviewing breeding and milk production to determine whether certain animals are unproductive and should be sold; and, planning and implementing policies and procedures to ensure compliance of the dairy department with the company's standards and agency regulations.

In a decision dated May 20, 2002, the director denied the petition concluding that the beneficiary's duties did not appear to be managerial in nature. The director found that it was not reasonable to infer that the beneficiary will spend the majority of his time overseeing two supervisors, and will not be involved in the daily operation of the petitioning organization. In addition, the director determined that according to the organizational chart, the beneficiary did not supervise a subordinate staff of managers or professionals, and therefore, the petitioner had failed to provide sufficient evidence of the beneficiary's managerial or executive role.

On appeal, the petitioner submitted an additional letter written by the owner of the petitioning entity, which included a summary

of the beneficiary's daily duties, in pertinent part, as follows:

Because [the beneficiary] has a total responsibility [of] overall work performance of the company, he starts his workdays reviewing, gathering, adapting, storing and distributing information within the company. That will include returning of important phone calls or email messages, [and] review[ing] policies and budgets. [The beneficiary will] [g]ather with supervisors in order to control a master daily labor log of all employees, to discuss quality and cost control, sales and purchase processes.

* * *

Not later than 3:00 PM, he offers his total concentration on the revision of business plans; on studies of market, solutions, network, and establish[es] output goals; determines financial constraints and confers with other farm[] managers in charge of various activities to exchange information.

The petitioner further noted that the beneficiary is also in charge of the import and export of the petitioning company's dairy products.

On review, the record is not sufficient in proving that the beneficiary is functioning in a primarily managerial or executive capacity. 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.

Pursuant to 8 C.F.R. § 214.2(1)(14)(ii), when filing a petition for a visa extension, the petitioner must provide a statement of duties performed by the beneficiary for the previous year and under the extended petition, as well as a statement describing the staffing of the new operation when the beneficiary will be employed in a managerial or executive capacity. The description must be sufficient to determine that the duties to be performed are primarily managerial or executive in nature.

The descriptions provided by the petitioner do not sufficiently establish that the beneficiary, in the one year since the U.S.

company's establishment, has been or will be working as a manager or executive. As of December 2001, the petitioning organization must be able to support the beneficiary working in a managerial or executive capacity. However, it appears that the beneficiary is instead performing more as a first-line supervisor than a manager. The duties of the beneficiary, including directing and coordinating the farm activities, reviewing breeding and milk production, and planning and implementing policies and procedures, imply that the beneficiary is supervising and planning the day-to-day work of the nonprofessional subordinates. The beneficiary's other activities of returning phone calls or e-mails, reviewing policies and budgets, revising business plans, and determining financial constraints are not analogous to those duties performed by a manager as defined in the regulations. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In addition, the AAO is not compelled to deem the beneficiary to be a manager or an executive simply because he possesses a managerial or executive title. Therefore, the AAO concludes that the beneficiary is not performing as a manager or executive.

Beyond the decision of the director, the petitioner has not established that the U.S. and foreign companies are qualifying organizations. The petitioner asserted that it purchased 100 percent of the foreign subsidiary's capital stock in July 2000, yet no evidence was submitted to substantiate such. As the appeal will be dismissed on other grounds, this issue need not be further discussed.

An additional issue not considered by the director is whether the beneficiary was employed abroad in a primarily managerial or executive position. The minimal amount of evidence submitted by the petitioner indicates that the beneficiary may have been performing non-qualifying duties, such as planning budgets for the dairy division, or analyzing financial projections. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is executive or managerial in nature, and what proportion is actually non-executive. See *Rep. Of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Again, as the appeal will be dismissed on other grounds, this issue need not be addressed further.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.