

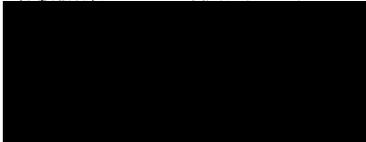


U.S. Department of Homeland Security

Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
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Washington, D.C. 20536



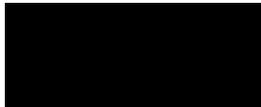
DEC 03 2003

FILE: SRC-02-188-50695

Office: TEXAS 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

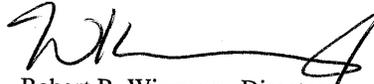
INSTRUCTIONS:

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, 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 the state of Florida and engaged as a wholesale distributor of jewelry displays. The petitioner currently employs the beneficiary as president of the company and seeks to extend the beneficiary's employment in the United States for an additional two years. The director denied the petition for the beneficiary's L-1A status concluding that the petitioner did not establish that the beneficiary's duties in the U.S. entity are of a managerial or executive capacity.

On appeal, the petitioner's counsel asserted: (1) that the director erred as a matter of law in her finding that the beneficiary did not function as a manager or executive because of the limited number of individuals employed by the petitioner, and (2) that the beneficiary is working in a managerial capacity because he supervises and controls the work of a professional employee. Counsel also submitted a brief in support of these assertions.

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 (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 address the issue of whether the beneficiary is performing as a manager or executive in the petitioning company as defined in the regulations.

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 a letter submitted with the petition, and written by the beneficiary as president of the company, the petitioner describes the beneficiary's duties as follows:

[H]iring and firing employees, as well as supervising other professional employees, including a General Manager and an accountant. In addition, as President he will plan, develop, and establish company policies and objectives in accordance with board directives and the corporation charter; confer with company officials to plan business objectives and develop organizational policies to coordinate functions and operations between divisions and affiliates; establish responsibilities and procedures for attaining objectives; review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions; and hire and fire employees.

In a request for additional evidence, the director asked that the petitioner submit information pertaining to the staffing of the U.S. operation. Specifically, the director asked for the name, job title, duties and educational level of each employee;

the number of days and hours during the week the petitioning business is open; the work schedules of all employees; and, which employees are responsible for inventory, shipping and unloading merchandise, and contacting the buyers and sellers. The director also requested tax forms related to any contract employees, the hours and job duties of each, and the Employer's Quarterly Federal Tax Return ending June 30, 2002.

In response to the director's request, the petitioner listed the same duties of the beneficiary as those outlined above, and added that the beneficiary "directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity." An organizational chart indicated two other employees, a marketing and sales director with a bachelor's degree in International Business, and a college student who works as a sales associate. Each employee was listed as having an open work schedule throughout the week; the beneficiary worked Monday through Friday, 9am - 5pm. The petitioner noted that the marketing and sales director was responsible for directing the marketing function of the company, including sales, while the sales associate handled the sale of the company's services and inventory, customer service, and completing orders. The petitioner also submitted a copy of the sales and marketing manager's college diploma, and a copy of the Employer's Quarterly Federal Tax Return ending June 30, 2002.

The director denied the petition, concluding that there was insufficient evidence that the beneficiary had the requisite qualifications for an executive or manager as defined in the regulations. The director noted that the descriptions provided of the beneficiary's position and the subordinates' duties indicate that the beneficiary is likely "called upon to perform many duties associated with running a business that are not managerial or executive." As the beneficiary was not currently working in a position that was primarily managerial or executive, the petition was denied.

On appeal, counsel asserted that the director erred as a matter of law in finding that the beneficiary was not employed as a manager because (1) the director considered the limited number of individuals employed by the petitioner, and (2) the beneficiary supervises a "professional" employee. In the brief submitted by counsel, counsel highlighted section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C) to establish that the number of employees supervised shall not be determinative of

whether an individual is a manager or executive.¹ Counsel further asserted the following:

The position qualifies as an executive position since it requires the management of a major component or function of the company. In addition, [the beneficiary] will be supervising the activities of two (2) other individuals, to wit: the Marketing and Sales Director who holds a Bachelors of Science in International Business and the Sales Associate. The Beneficiary supervises and/or manages the activities of the Marketing and Sales Department of the Company. The Sales and Marketing Director[, who] possesses a Baccalaureate Degree in Business Administration from Ft. Lauderdale College[,] is a professional. This individual is a 'professional' within the meaning of the Immigration and Nationality Act due to his job description and his U.S. educational level.

The record does not establish that the beneficiary is working in a primarily managerial or executive capacity as defined in the regulations. 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. In the instant case, the beneficiary's L-1A status was approved for the period of June 1, 2001 through June 1, 2002. Therefore, according to the regulations, on June 1, 2002, the petitioner must have been able to support a manager or executive.

In examining the managerial or executive capacity of the beneficiary, the AAO will first consider the petitioner's description of the day-to-day job duties. 8 C.F.R. § 214.2(1)(3)(ii). As of June 2002, the petitioning organization employed the beneficiary, a sales and marketing manager, and a sales associate. The petitioner outlined the duties performed by the beneficiary including hiring, firing and supervising employees; planning, developing and establishing company objectives; conferring with company officials; and, reviewing activity reports and financial statements. These statements do not provide a comprehensive description of the beneficiary's duties and the nature of the petitioner's business. Rather, the

¹ Reference is made to the correct cite in the Act, as counsel incorrectly referred to "8 USCA §110(a)(44)(C)."

petitioner has provided a restatement of the regulations in which managerial and executive capacity are defined. 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).

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, 15 (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.* The petitioner in the present case employs a sales and marketing manager and a sales associate. However, the petitioner fails to give more than a general description of each individual's function in the company. As noted by the petitioner, both subordinates have an open work schedule. In addition, there is no indication of the amount of time the manager and sales associate devote to each of their specific job duties. Therefore, it is reasonable to assume, and has not been proven otherwise, that when neither the manager nor the sales associate are at work, the beneficiary must perform their duties, including the marketing and sales of the company's services and products, and customer service. 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 regards to the beneficiary supervising a professional, petitioner's counsel seems to believe that satisfying this one prong of the definition is sufficient for establishing managerial capacity. Counsel claims on appeal that because the beneficiary manages the Marketing and Sales Department, as well as the sales and marketing director, he is employed as a manager or executive. This analysis ignores the requirement that the record adequately establish what daily activities the beneficiary performs, that those activities are primarily managerial in nature, and that the beneficiary is not himself performing the daily services of the company. In fact, the beneficiary is performing the services of the company. For the above-stated reasons, the appeal will be dismissed.

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.