

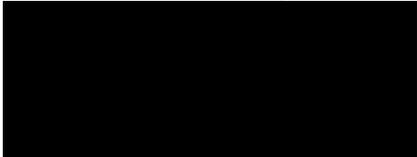
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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



FILE: SRC-02-174-51940 Office: TEXAS SERVICE CENTER

Date: DEC 9 - 2003

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:



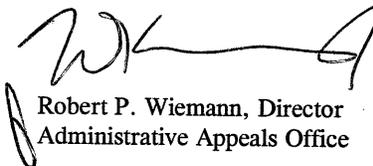
INSTRUCTIONS:

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 located in Florida and engaged in the sale of furniture purchased from wholesalers. The petitioner has employed the beneficiary as president of its new office for one year and seeks to extend the beneficiary's nonimmigrant visa for an additional year. As such, the petitioner filed a petition for the beneficiary's temporary employment in the United States. The director denied the petition, concluding that the petitioner did not establish the need for an executive or manager, and therefore, the beneficiary will not be employed in a managerial or executive capacity.

On appeal, petitioner's counsel asserted that the director erred in her decision as the beneficiary is president of the petitioning company, supervises two individuals, exercises wide latitude in decision-making and establishes the goals of the company. Counsel 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.

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 an extension.

In the petition, the petitioner indicated that the beneficiary's role as president is to develop the goals and strategies of the company. The petitioner further explained in a letter submitted with the petition that the beneficiary's duties in the U.S. company include:

1. setting the goals and standards of [the petitioning organization];
2. monitoring cash flow and cash flow projections for [the petitioning organization];
3. negotiating contracts with customers and suppliers; and
4. supervising the employees and independent contractors of [the petitioning organization].

The director requested further evidence pertaining to the staffing levels of the U.S. company, including the date each individual was employed with the company, their job title and job duties. The director also asked that an allocation be made of the time the beneficiary spends performing each duty. The petitioner was also asked to submit evidence, including income tax returns, invoices, and shipping receipts, that the company is doing business in the United States, and the U.S. company's last two Federal Employer's Quarterly Tax returns.

In response, the petitioner submitted a letter explaining the job duties of each of the two employees, an office manager and an administrative assistant. As the letter is part of the record, a recitation will not be made herein. In reference to

the beneficiary's role as president, the petitioner gave the following list of duties:

- a. Directing, planning, and implementing policies and objectives of the business - 20%;
- b. Directing activities of the business to plan procedures and establish responsibilities - 20%
- c. Analyzing operations to evaluate performance of [the] company and staff and to determine areas of cost reduction and program improvement - 20%;
- d. Reviewing financial statements and sales and activity reports to ensure that the company's objectives are achieved - 20%;
- e. Assigning or delegating responsibilities to subordinates - 3%;
- f. Establishing internal control procedures - 5%;
- g. Negotiating or approving contracts with suppliers and distributors - 10%; and
- h. Hiring and discharging employees - 2%.

Bank statements, invoices, and three Employer's Quarterly Federal Tax returns were also submitted.

In her decision, the director found that the petitioner had not demonstrated that the beneficiary will perform duties which primarily require the beneficiary to plan, organize, direct and control the major functions of the organization. The director noted that as the beneficiary's name is not listed on any of the provided quarterly tax returns, the petitioner has failed to demonstrate that the beneficiary is employed with the U.S. company. Further, the petitioner's mere assertions do not establish the need for an executive or managerial employee. As such, the petition was denied.

In a brief submitted on appeal, petitioner's counsel, focusing solely on the role of an executive, asserted that the director erred in her analysis and finding that the beneficiary was not employed in an executive capacity. Counsel, citing the regulations, explained that the petitioner need only prove that the beneficiary will be performing executive duties during the extension period requested, and need not show that the beneficiary had already been functioning as an executive. Counsel further outlined the definition of executive capacity, and asserted that the beneficiary's position as president satisfies the requirements as follows: (1) the beneficiary directs the management or a major component of the organization by setting and developing the goals and standards of the petitioning organization; (2) the beneficiary sets and develops

the goals and standards of the organization; (3) the beneficiary exercises wide latitude in decision-making by monitoring cash flow and cash flow projections, negotiating contracts with customers and suppliers, and supervising employees and independent contractors of the organization; and, (4) as the beneficiary is the president and highest officer of the organization, there is no one higher in the organization to whom he reports.

In regards to the director's notation that the beneficiary was not listed on any of the quarterly tax returns, petitioner's counsel submitted a letter from the company's accountants explaining that a limited liability corporation, when owned by one person, is a disregarded entity for tax purposes. Because the beneficiary is the sole owner of the petitioning organization, he does not appear on the tax records, and "does not technically receive a 'salary' as other employees."

Finally, the petitioner's counsel cites an unpublished AAO decision in support of a finding that the beneficiary is employed as an executive. Counsel asserts that this decision "makes it evidently clear that one can supervise *no employees* as the President and still act in an executive capacity." (emphasis in original). Counsel further claims that the present case is even clearer because the beneficiary supervises two employees and has executive responsibilities.

The record does not persuasively establish that the beneficiary is performing in a primarily executive capacity as defined in the regulations.

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. In examining the managerial or executive capacity of the beneficiary, the AAO will look first to this description of the beneficiary's job duties. 8 C.F.R. § 214.2(1)(3)(ii).

The descriptions provided by the petitioner in both the petition and the brief on appeal do not sufficiently establish that the beneficiary, one year after the approval of the initial L-1A petition, is working as an executive. First, many of the descriptions provided are vague and broad. Statements such as

"setting the goals and standards," "monitoring cash flow," "negotiating contracts," and "supervising employees and independent contractors" do not provide a sufficient explanation of the beneficiary's responsibilities as required in the regulations. Although the petitioner subsequently provided an allocation of the time the beneficiary will spend on each function, the description of the duties is mostly a restatement of the regulations, and again does not provide a detailed account of the beneficiary's role as president of the U.S. entity. 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, 193-94 (Reg. Comm. 1972).

Also, the evidence submitted does not support a finding that there are subordinate employees who relieve the beneficiary from performing non-qualifying duties. The petitioner provided the names and job descriptions of two other employees: the office manager and the administrative assistant. Neither job description indicated that the manager or administrative assistant was responsible for interacting with customers or selling the furniture. Rather, each seems to be involved with the administrative side of the business, such as maintaining corporate records and reports, and coordinating shipping, receiving, distribution and transportation. In addition, although there is reference throughout the record to independent contractors, clerical employees, and other personnel, the petitioner provided no evidence to substantiate there being more than the three employees. Therefore, it can only be assumed, and has not been proven otherwise, that the beneficiary is assisting in the sale of furniture, the service provided by the company. In fact, a close inspection of the pictures provided in Exhibit Three of petitioner's brief shows the beneficiary presumably assisting in customer service or a retail sale. 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). As such, the beneficiary will not be functioning in a primarily executive or managerial capacity in the U.S. company.

Counsel cited an unpublished AAO decision in which it was determined the president of a company that salvaged scrap metal was acting in a primarily managerial or executive capacity even though he was the sole employee of the organization. In making this determination, the AAO concluded that the beneficiary was not performing any non-qualifying tasks, as the work was carried out by subcontractors, and that the beneficiary performed

significant economic analysis, determined which opportunities to pursue, and negotiated deals for the company. Counsel asserted that the finding in the present case should be the same because the beneficiary has executive responsibilities and supervises two employees.

Counsel has failed to differentiate between the present case and the preceding AAO decision. First, in the cited decision, the beneficiary was found to be a manager, not an executive as argued by counsel in the present case. As the definition of managerial capacity has different requirements than those of executive capacity, the roles of the two beneficiaries in both cases cannot be compared. Also, a review of the cited decision reveals a detailed list of the beneficiary's duties as a manager, unlike the present case, in which the petitioner has submitted a broad restatement of the regulations. Counsel has furnished no further evidence to establish that the facts of the instant petition are in any way analogous to those in the AAO decision. 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, id.* Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Finally, in response to counsel's request for "one more year for the start-up [of the petitioning organization]," the regulations do not provide for such an extension. 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 may not be given an extension of this one-year period to complete its start-up 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 an 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 is dismissed.

For the foregoing reasons, the AAO cannot conclude that the petitioning organization will employ the beneficiary in a primarily managerial or executive capacity.

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.