

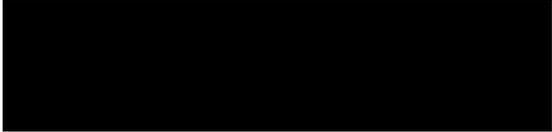
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U.S. Department of Homeland Security  
Citizenship and Immigration Services

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



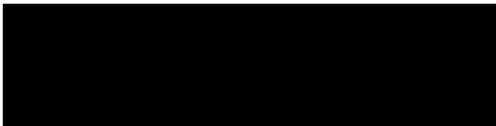
**DEC 22 2003**

File: SRC 01 198 52898 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:   
Beneficiary:

Petition: Petition for a 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 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 nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as a jewelry business. It seeks to employ the beneficiary temporarily in the United States as its vice president. The petitioner filed a nonimmigrant visa petition for an L-1A for the beneficiary on September 4, 2001. Since the U.S. entity had been "doing business" for less than one year, the Citizenship and Immigration Services (CIS) stated that the petition would be considered under the criteria for new offices. On September 20, 2001, the CIS requested additional evidence. The petitioner was given 30 days to respond to the request for evidence. The petitioner did not respond to the request, therefore, the petition was considered abandoned and was accordingly denied.

On February 27, 2002, counsel for the petitioner filed a timely Motion to Reopen and Reconsider and stated that the previous representative for the petitioner abandoned the case and failed to respond to the request for evidence. Counsel for the petitioner responded to the request for evidence and asked to be excused for not providing the translation of some documents because counsel had only two days to prepare the motion before the deadline. Upon review of the motion to reopen, the director determined that the petitioner had not established that the beneficiary had been or would be employed primarily in a qualifying managerial or executive capacity and therefore denied the petition.

On appeal, counsel argues that the beneficiary qualifies as an executive under the definition contained in 8 C.F.R. § 214.2(1)(1)(ii)(C) and under a CIS non-precedent decision.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(1)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization

which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

Furthermore, the regulation at 8 C.F.R. § 214.2(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:

((1)) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

((2)) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

((3)) The organizational structure of the foreign entity.

The United States petitioner was incorporated in October 2000 and states on the Form I-129 that it is a subsidiary of Mondragon Joyas S.A., located in [REDACTED]. The petitioner declares three employees. The petitioner requests the petition's validity and the beneficiary's stay for one year at a weekly salary of \$400.00.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed primarily in a 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.

The director issued a notice that requested evidence that would demonstrate that the alien's prior year of employment abroad was in a position that was managerial or executive and that the alien's prior education, training and employment qualifies him/her to perform the intended services in the United States. The petitioner was requested to provide evidence of employees the beneficiary supervised, their job titles, their duties and their educational level.

The director requested a definitive statement describing the proposed U.S. employment of the beneficiary, including:

- A. position title
- B. list all duties;
- C. percentage of time to be spent on each duty;
- D. number of subordinate managers/supervisors or other employees who will report directly to the beneficiary;
- E. a brief description of their job titles and duties; if the beneficiary will not supervise other employees, specify what essential function within the organization he/she manages;
- F. Indicate the qualifications required for the position;
- G. Indicate the level of authority held by the beneficiary;
- H. Indicate whether or not the beneficiary functions at a senior level within the corporation;
- I. Specify his/her position within the organizational hierarchy.

The director requested a description of the proposed staff level of employees who will be employed by the end of the one-year start-up as well as their position titles and proposed duties.

Counsel provided a statement from the president of the petitioner as a response to the request for evidence. The letter from the petitioner indicates that the beneficiary will be the vice-president of the U.S. company and is also the co-owner. The petitioner lists the duties of the beneficiary which include but are not limited to the following:

1. Financial planning, accounting and auditing of the business in both Mexico and USA;
2. Purchasing of Jewelry in both Mexico and USA;
3. Monitoring the sales in both countries;
4. Management of the corporation and documentation of business activities;
5. Acting as the president when the president of the corporation is out of town for jewelry shows; and
6. Monitoring all employees in both countries.

The petitioner provided the percentage of time spent on each duty by the beneficiary as follows:

1. Financial, accounting and auditing 50%;
2. Purchasing 5-10%;
3. Sales 15%; and
4. Management and documentation, monitoring the employees 20-25%.

The petitioner states that one supervisor will monitor the two branch stores in Mexico and that each store has a manager and two salespersons. The U.S. store has one manager and two salespersons. The petitioner states that the managers and supervisor will report to the beneficiary.

The director determined that the duties "monitoring the Sales in both countries" and "Management of the corporation and documentation of business activities" are vague and do not adequately describe the day-to-day duties of the beneficiary. The director determined that purchasing jewelry is not a managerial function. The director determined that the petitioner has not established that the beneficiary meets all four criteria for a manager or executive as defined above and has not established that she is coming to work in a primarily managerial or executive capacity. The director found that the beneficiary's duties are nearly identical at the foreign company, therefore the beneficiary has not been employed abroad for at least one continuous year in a managerial or executive capacity. In her decision, the director concluded that the petitioner failed to demonstrate that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

On appeal, counsel states that the CIS "erred in its decision." Counsel asserts that the supporting documents filed in response to the request for evidence support that the beneficiary has been employed abroad for at least one year. Counsel states that the beneficiary "had been employed in the executive capacity in her Mexico family jewelry business for years before she entered the United States." On appeal counsel submits an affidavit by the president of the petitioner. The affidavit states in part:

My wife Blanca has been working for Mondragon Jewelry Corp in Mexico before 1999. We have no business records to prove that my wife or I worked in the Mondragon Jewelry Corp. in Mexico. However, I can provide witness[es] who observed my wife working for our business. I am willing to provide affidavits from Mexico to support my claim that my wife Blanca did work for our business in Mexico for more than one year before she came to work for our business in Houston, TX.

Counsel states that although the petitioner and the beneficiary

maintained a small family business in Mexico for years, "they did not document their business activities in the same way American businessmen would do. Documentation of certain business activities are not available. INS should not deny the application based on lack of certain documentation." However, no objective documentation has been submitted evidencing the beneficiary's position in the foreign 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 (Reg. Comm. 1972).

Additionally, counsel requests "that the INS accept the factual elements in the affidavit and statement provided by the president of the petitioner and grants [sic] full consideration of these factual elements in the review of the appeal. Counsel cites *Limisco v. U.S. INS*, 951 F.2d 210, 213 (9<sup>th</sup> Cir. 1991) as finding that INS must accept facts as true unless 'inherently unbelievable'." Counsel misconstrues and misquotes this decision. The *Limisco* decision refers to whether an alien has established a prima facie case of statutory eligibility for suspension of deportation in which the Board of Immigration Appeals must look at evidence in its entirety, and must accept as true facts stated in aliens' affidavits unless they are inherently unbelievable.

Counsel refers on appeal to an unpublished appellate decision in a case involving an employee of the Irish Dairy Board. In that decision it was held that the beneficiary satisfied the requirements of acting primarily in a managerial capacity because his primary assignment was the management of a large organization using multiple subcontractors to carry out its functions, even though he was the sole direct employee of the petitioning organization. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the Irish Dairy Board case. Moreover, unpublished decisions are not binding in the administration of the Act. 8 C.F.R. § 103.3(c).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner is a jewelry store. The record indicates that a preponderance of the beneficiary's duties have been and will be directly performing the operations of the organization, that is, buying and selling jewelry. 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). The petitioner has not demonstrated that the beneficiary has been or will be directing the management of the organization or a major component or function of the organization. The fact remains that the description of the beneficiary's primary duties indicates that they have not been in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

The director determined that the petitioner had submitted evidence that a qualifying relationship exists between the U.S. entity and the foreign entity. However, upon review of the record as presently constituted, the AAO has determined that the petitioner did not submit sufficient evidence to demonstrate that a qualifying relationship exists. In the motion to reopen, as a response to the request for evidence, counsel provides documents in Spanish and states that these demonstrate evidence of ownership of the foreign entity. Counsel asked to be excused for not providing the translation of some documents because he had only two days to prepare the motion before the deadline. Also submitted was an English translation of a Registration Certificate of Mondragon Joyas S.A. de C.V. These documents are insufficient evidence to demonstrate that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section. The director's decision on this issue will be withdrawn.

The AAO notes that the Form I-129 states that the U.S. entity is a subsidiary of the foreign company. The Form I-129 also describes the stock ownership and managerial control of each company as "100% ownership & managerial control by husband [REDACTED]. The stock certificate numbered "00" indicates that [REDACTED] owns 9,000 shares of the petitioner yet counsel and the petitioner state in the appeal that the beneficiary is co-owner of the petitioner. 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). Again, as the appeal will be dismissed, this issue will not be examined further.

The AAO also notes that the lease for the U.S. entity's office space begins January 1, 2002, which is more than three months after the initial petition was filed. This does not fulfill the requirement listed in the regulation at 8 C.F.R. § 214.2(1)(3)(v) (A) which states that sufficient physical premises to house the new office have been secured. As the appeal will be dismissed, this issue will not be examined further.

Additionally, the petitioner describes the beneficiary as a co-owner of the petitioning company. The regulation 8 C.F.R. § 214.2(1)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this case, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period

and that the beneficiary will be transferred abroad upon completion of the assignment. As the appeal will be dismissed, these issues need not be examined further.

The AAO notes that if this record of proceeding contains the same documents that were the basis of the L-1A nonimmigrant visa granted to the spouse of the beneficiary, the president of the petitioner, the CIS should review the existing L-1A visa classification granted on behalf of the petitioner for possible revocation.

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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.