

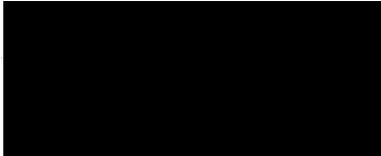
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U.S. Department of Homeland Security  
Citizenship and Immigration Services

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



FILE: LIN 01 037 51153 Office: NEBRASKA SERVICE CENTER Date:

DEC 24 2003

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)

ON 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a radio station operation and radio programming establishment, seeks to extend its authorization to employ the beneficiary temporarily in the United States in a managerial or executive capacity, namely as its general manager. The director determined that the petitioner had not established that the beneficiary would be employed in the United States primarily in a qualifying managerial or executive capacity pursuant to 8 C.F.R. §§ 214.2(1)(1)(ii)(B) and (C).

Counsel has indicated that a brief would be submitted in support of the appeal on or before July 21, 2001. To date, there has been no additional evidence received by this office in support of the statement of appeal. Therefore, the record must be considered complete.

On appeal, counsel asserts that sufficient evidence was submitted to warrant the extension of the L-1 visa, and that the director failed to adequately weigh the evidence, resulting in a wrongful denial of the visa petition.

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 regulations 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.

8 C.F.R. § 214.2(1)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (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.

According to the evidence submitted, the petitioner was established in 1999 as a radio station operation and radio programming business, and that it is an affiliate of Radio Estudio Alfa E.I.R.L. LTDA located in Huanuco, Peru. The petitioner declares three employees and a "projected" \$186,400.00 in gross revenues.

The initial petition was approved and valid from December 28, 1999 to November 1, 2000, in order to open the new office. The petitioner now seeks to extend the employment of the beneficiary as its general manager for a two-year period at an annual salary of \$54,800.00.

The primary issue in this proceeding is whether the petitioner has established that the beneficiary would be employed in a primarily managerial or executive capacity at the Alpha radio station.

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.

See also 8 C.F.R. § 214.2(1)(1)(ii)(B).

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.

See also 8 C.F.R. § 214.2(1)(1)(ii)(C).

In a letter dated October 27, 2000, Mr. Cesar A. Malpartida Visag, President of Alpha Radio, Inc. describes the beneficiary's duties for the preceding year (2000) as follows:

Mr. Malpartida has held the position of General Manager of Alpha Radio since January 2000, in which capacity he has been responsible for planning, directing and coordinating all aspect[s] of radio programming in the Spanish language, including new broadcasts, Salsa Music, talk-shows, sports broadcasts, etc., of interest to an audience . . . recruiting a present staff of three employees . . . and casting radio announcers. Developing, outlining, and editing program scripts to obtain desired productions.

Overseeing marketing and promoting sales of programs and time periods to advertisers. Directing financial operations, including preparation of operating budgets, and monitoring expenses of radio programs. Conferring with ownership on station and program policies and procedures. . . . successfully established radio programming operations . . . generated substantial earnings for Alpha Radio.

In filing the visa petition seeking extension of beneficiary's stay, the petitioner submitted an addendum providing a listing of the beneficiary's proposed duties in the United States as follows:

As General Manager, Mr. [REDACTED] will continue to manage and direct the operations . . . plan and coordinate all aspects of radio programming . . . [r]ecruit staff and cast radio announcers. Develop, outline and edit program scripts to obtain desired productions. Oversee marketing to promote sales of programs and time periods to advertisers. Direct financial operations, including preparation of operating budgets and monitoring of expenses of radio station and programs. Confer with ownership to discuss policy and administrative procedures.

In addition to the addendum listing the beneficiary's proposed duties, the petitioner submitted a copy of a letter dated February 23, 2001, and written by Cesar A. Malpartida, President of Alpha Radio, Inc. in which he lists the three station employee's job descriptions as: "Station Manager-Disc Jockey/Telemarketing-Sales/and General Assistant."

The director, in his denial of the petition, noted that the size of the company is to be taken into consideration, but is not solely determinative of the beneficiary's managerial or executive capacity. He continues by stating "when a company has only three employees, it becomes questionable as to whether the operator of the business is engaged primarily in managerial or executive duties." He concluded by noting that, based upon the evidence presented, the actual time devoted to the day-to-day functions of the radio station would reasonably exceed that which is spent in purely managerial or executive duties.

On appeal, counsel argues that the petitioner submitted sufficient evidence to justify the director granting an extension of the L-1 status, having established that the beneficiary would be employed in a primarily managerial or executive capacity. The petitioner describes the beneficiary's past job title as general manager, and describes his duties as managing and directing radio programming operations, staff, marketing, financial planning, expenses, and investment into the station. The radio station president's letter identifies the beneficiary's job title as "Station Manager-Disc Jockey."

The petitioner has failed to establish any clear distinctions between the proposed qualifying and nonqualifying duties of the beneficiary. Specifically, the petitioner submitted no information to establish the percentage of time the beneficiary actually performs or will perform the claimed managerial and executive duties. It has been noted in the record that there are only three employees working at the U.S. radio station, and that the beneficiary maintains a full-time position. There is no mention in the record of any other disc-jockey working for the station. Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive in nature. See Sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

Moreover, to qualify as a manager, the beneficiary must supervise a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing nonqualifying duties. The petitioner, however, submitted no evidence setting forth the duties the telemarketer or general assistant would perform. Therefore, it is impossible to discern from the record whether the telemarketer or the general assistant would serve in a supervisory, professional, or managerial capacity. *Ikea US, Inc. v. INS*, 48 F.Supp. 2<sup>nd</sup> 22, 24-25

(D.D.C. 1999); see generally *Republic of Transkei v. INS*, supra.; *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Thus, the evidence does not support a finding that the other radio station employees would relieve the beneficiary from performing nonqualifying duties.

Counsel further states that the director placed too much emphasis on the size of the company, and failed to consider the substance of the beneficiary's duties and actions as the radio station's manager. The AAO recognizes that an entity's size does not necessarily decide the question of managerial or executive capacity. See Section 101(a)(44)(C) of the Act, 8 U.S.C. §§ 1101 (a)(44)(C). Instead, the duties of the proffered position must be the critical factor. Sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101 (a)(44)(A) and (B). Based upon the evidence received, the beneficiary is not only performing tasks required to provide a service or produce a product, but has shown no designated staff to relieve him of those duties. Thus, despite the U.S. entity's size, the petitioner has failed to establish that the beneficiary will primarily be functioning as a manager or executive.

On appeal, counsel also argues that the director, in weighing the evidence presented, failed to adequately consider the expense of maintaining a young radio station and the lack of experience and recognition in the United States market held by the beneficiary. He also avers that the company's compliance with all requests made by the director is evidence of the company's desire, dedication, and intent to maintain the business, despite poor profits. The AAO acknowledges that, under 8 C.F.R. § 214.2(1)(3)(v)(C), a U.S. entity must, within one year of opening a new office, be able to support an executive or managerial position as defined at 8 C.F.R. § 214.2(1)(1)(ii)(B) and (C). Also, the AAO recognizes that, during the first year, a beneficiary may perform duties that may include tasks necessary to produce a product or a service.

In this case, the U.S. entity became incorporated in Illinois on June 14, 1999; therefore the first year of operation was from June 14, 1999 to June 14, 2000. During that period the U.S. entity petitioned the director to classify the beneficiary as a nonimmigrant intracompany transferee. The director approved the petition as valid

from December 28, 1999 to November 1, 2000, in order to open the new office. Hence, by October 2000, when the petitioner requested a two-year extension for the beneficiary's stay, the office had been doing business for over one year and should have already been able to support a manager or executive.

Given that the U.S. entity was no longer a new office when the petition for an extension was filed, and that the petitioner specifically checked the box denoting "[e]xtend or amend the stay of the person(s) since they now hold this status," the director properly determined whether the beneficiary would be serving in a primarily managerial or executive capacity. See 8 C.F.R. §§ 214.2(1)(14)(ii)(C) and (D). The director was also correct in accessing the financial posture and growth of the company in its first year in order to determine whether the entity was still a qualifying organization and, if it could support a manager or executive during the upcoming years of operation. There is no provision in the statute or regulations that would allow a petitioner to extend its initial "new office" start-up status beyond one year. The petitioner must present evidence to establish that it is able to support a manager or executive subsequent to its first year in business. In short, the new office statutory and regulatory provisions were not and could not be used in determining the beneficiary's status as manager or executive where the visa petition was for an extension of stay.

On review, the evidence produced by the petitioner is insufficient to establish that the beneficiary qualifies as a manager or executive. The petitioner failed to list the beneficiary's duties with adequate specificity to demonstrate that the beneficiary serves in a primarily managerial or executive capacity. The petitioner submitted no information to establish the percentage of time the beneficiary actually performs or will perform the claimed managerial and executive duties. Additionally, the record does not reflect that the beneficiary manages a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing nonqualifying duties. Finally, the beneficiary appears to be primarily engaged in producing a product or service, namely, acting as a disc jockey and performing the day-to-day functions of the radio station. Therefore, 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.