



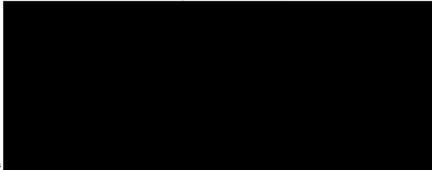
U.S. Department of Justice

Immigration and Naturalization Service

BI

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: SRC 01 192 50616

Office: TEXAS SERVICE CENTER

Date: FEB 27 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)

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 Service 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.

Myra L. Rosenberg
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Acting Director, Texas Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an import/export corporation that seeks to continue to employ the beneficiary in the United States as its president and CEO. The acting director determined that the petitioner had not established that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel states that the acting director erred in failing to take into account an expansion of the business done by the petitioner shortly after the L-1 extension application was filed but before the final decision was made. Counsel further states that the "L-1 status assumes" that a business will continue to grow through its development in the U.S.

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.

8 C.F.R. § 214.2(l)(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 (l)(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(l)(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 (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 issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity

The petitioner was established on December 22, 1999 in the State of Georgia. The petitioner seeks to extend the petition's validity and the beneficiary's stay for an additional three years.

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

iii. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the petition, the petitioner described the beneficiary's proposed job duties as follows:

Establish U.S. subsidiary; direct management of company; administer company finances; develop and implement marketing strategies; normal duties of President/CEO of company.

On appeal, counsel explains that in response to the director's request for additional information, the petitioner provided evidence that it had purchased, as an investment, an additional check cashing and foreign money exchange business for \$50,000 in Orlando, Florida. Counsel states that an additional employee was added to run the new business. Counsel indicates that the firm's total investment in the United States was \$60,000 at that time. Counsel submits documents showing that the firm exported a container of furniture to Nigeria and purchased \$161,000 in jewelry for sale to customers. Counsel also submits a lease showing that the petitioner has secured a furniture showroom for its retail operation.

Counsel cites several unpublished cases in an effort to bolster his assertions. Counsel also cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1574 (N.D. Ga. 1988) wherein it was held that the Service cannot impose a minimum size requirement for a business to qualify in petitioning for a beneficiary. Counsel argues that the petitioner in *Mars Jewelers*, a small retail jewelry store with few employees, had the same duties and responsibilities as the beneficiary in this case and that the petition should be granted.

In the Mars Jewelers decision, it was held that the beneficiary met the requirement of serving in a managerial and executive capacity for L-1 classification even though it was a small jewelry store with few employees. However, counsel has furnished no evidence to establish that the facts of the instant case are in any way analogous to those in the Mars Jewelers case. Simply going on record without supporting documents is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

On appeal, counsel describes the duties of the beneficiary as follows:

1. To establish the U.S. corporation and operations of the company;
2. Research the establishment of the corporation under appropriate state laws;
3. Establish banking relationships;
4. Recruitment, hiring and training of staff;
5. Research U.S. markets and establish contacts with manufacturers and suppliers;
6. Enter into marketing agreements;
7. Negotiate for and establish leases;
8. To serve as the President and Chief Executive Officer of the U.S. subsidiary;
9. To make all company policy;
10. To be in charge of marketing, expansion, and growth of the company;
11. Preside over Board meetings and report to the Board of the parent company;
12. To have full authority to negotiate for and enter into binding agreements on behalf of the company;
13. To be responsible for all corporate finance, banking, management and accounting for the company;
14. To seek out and acquire additional investments for the company;
15. Budgeting;

16. To exercise wide latitude in decision-making on behalf of the company; and

17. To have full executive and management control of the company and all of its operations.

The description of the beneficiary's job duties is insufficient to warrant a finding that the beneficiary will be employed in a managerial or executive capacity. The petitioner's federal U.S. Corporation Income Tax Return for 2000 showed gross receipts of a mere \$14,353, with wages and salaries paid during that period totaling only \$33,750. The record reflects that at the time of filing, the United States company had no employees other than the beneficiary. It appears, at most, the beneficiary will be performing operational rather than managerial duties. The petitioner has provided insufficient evidence to establish that the beneficiary will be managing or directing the management of a function, department, subdivision or component of the company.

Based upon the record, even considering the firm now has an additional employee working for the enterprise, the petitioner has not provided evidence that the beneficiary will be managing a subordinate staff of professional, managerial or supervisory personnel who relieve him from performing non-qualifying duties. The beneficiary is the individual performing the necessary tasks for the ongoing operation of the company, rather than primarily directing or managing those functions through the work of others. The beneficiary has not met the managerial or executive criteria because the petitioning entity is achieving a low gross income, has shown no appreciable growth and has not attained a reasonable level of staffing considering the amount of time it has been in operation. For these reasons, the petition may not be approved.

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.