

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

JUN 20 2003

File: EAC 02 176 51197

Office: VERMONT 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)

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 the Bureau of Citizenship and Immigration Services (Bureau) 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition (L-1) was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation established in September 1998. It is engaged in the printing and advertising industry. It seeks to employ the beneficiary as its vice-president. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity.

The AAO notes that the petitioner also filed an immigrant worker petition pursuant to section 203(b)(1)(C) of the Act for this same beneficiary, receipt number EAC 01 108 50665. The Director, Vermont Service Center denied that petition on March 19, 2002. The director determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer; and also, had not established that the beneficiary had been or would be employed in a managerial or executive capacity for the United States employer. The petitioner appealed the decision and the appeal was dismissed.

On appeal, counsel for the petitioner asserts that the director misconstrued the beneficiary's duties and responsibilities and erred in denying the 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 meet certain criteria. 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. Furthermore, 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.

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.

The issue in this proceeding is whether the beneficiary has been and will continue to perform primarily managerial or executive duties.

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.

It is noted that the petitioner did not initially clarify whether the beneficiary was claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. However, based on counsel's response to the director's request for evidence and the appeal it appears that the petitioner is seeking to employ the beneficiary in a primarily managerial capacity.

The petitioner initially stated that the beneficiary would be responsible for "supervising and directing project development," and "managing daily operation in connection with marketing and distribution," and "developing and implementing company policies in connection with customer relations, product development and distribution." The petitioner indicated that the beneficiary would supervise and monitor all aspects of the petitioner's operations through a subordinate manager and staff. The petitioner further indicated that the beneficiary was essential to contract negotiations and made discretionary decisions as to implementation and scheduling of specific transactions and deadlines.

The director requested a comprehensive description of the beneficiary's duties and a complete position description for each of the petitioner's employees.

In response, the petitioner provided a description of the beneficiary's duties as vice-president as follows:

Responsible for the daily activities of the corporation, including but not limited to, implementing President's directives of company polices [sic] and objectives. Assist the President in establishing company sales objectives and strategies. Supervise and manage both operations and administration department at the company. Coordinate company strategies with that of Korea parent company. Review performance of operation and administrative staff and report directly to the President.

The petitioner also provided position descriptions for a president, an operations manager, an administrative person, and three independent sales representatives. The petitioner indicated that the president was responsible for establishing and implementing corporate goals and for overseeing the duties of the vice-president as well as coordinating objectives with the parent company. The duties of the operations manager included responsibility for the "technical aspect of company's activities involved in all printing coordination and sales coordination" as well as "establish[ing]

quality control guidelines for company's services." The duties of the administrative person included administrative "activities involving sales, billing, shopping, and account receivable and payable." The duties of the independent sales representatives included "obtaining and coordinating sales from customers" and "coordinating printing orders." The petitioner indicated that the sales representatives worked on a part-time commission basis.

The petitioner also provided the State of New Jersey Employer Report of Wages Paid for the year 2001 as requested by the director. The report depicted the beneficiary and the petitioner's president as the petitioner's two employees for each of the four quarters in 2001. No other employees were listed.

The director determined that the description of the beneficiary's duties was not comprehensive and that it appeared that the beneficiary would be involved in the day-to-day operations of the business. The director also determined that the job descriptions for the positions subordinate to the beneficiary's position were vague and did not assist the director in determining if the positions were managerial, supervisory, or professional positions. The director concluded that the petitioner had not established that the beneficiary had been and would be involved primarily in general operations oversight rather than performing the daily duties of the business.

On appeal, counsel asserts that the beneficiary manages the operations and administrative departments. Counsel also asserts that the beneficiary manages the essential function of operating and managing the processing of all the major transactional activities of the company's business activities. Counsel also references company documents attached as "Exhibit 3" that support this statement. However, the documents submitted on appeal do not include an exhibit 3. Counsel further asserts that, although the essential management personnel of the petitioner may take on the responsibility of day-to-day operations, these duties do not take away from the fact that they are still performing at an executive and managerial level.

Counsel's assertions are not persuasive. As determined by the director, the description of the beneficiary's job duties is vague and general and does not convey an understanding of the beneficiary's actual daily duties. In addition, it appears that the beneficiary's position and the president's position contain overlapping duties. The petitioner has provided insufficient detail to allow the Bureau to conclude that the beneficiary is primarily performing in a managerial or executive capacity. Further, as determined by the director, the descriptions of the duties for the positions subordinate to the beneficiary do not assist the Bureau in determining if the subordinate positions are managerial, supervisory, or professional positions. At most, it would appear that the beneficiary is a first-line supervisor over non-professional, non-managerial, and non-supervisory employees.

Of further note, the petitioner has not provided independent evidence that the petitioner employs individuals in positions subordinate to beneficiary's position. The AAO notes that the petitioner claims to employ two individuals in full-time positions subordinate to the beneficiary's position, but the record does not contain documentation that verifies this employment. Likewise, the record does not contain independent documentation of the employment of the part-time sales representatives. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel's assertion that the beneficiary manages an essential function also is not persuasive. First, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, the nature of the essential function appears to involve the beneficiary's processing of sales transactions. Processing of transactions is more indicative of an individual performing a function for the petitioner rather than managing a function. 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). Third, the petitioner has not presented documentary information evidencing the beneficiary's management of an essential function. See *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999) *supra*.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a managerial or executive capacity. The descriptions of the beneficiary's job duties are indicative of an individual performing the operational tasks associated with the ongoing sales transactions of the petitioner. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager simply because the beneficiary possesses a managerial title. The petitioner has not established that the beneficiary has been or will be employed primarily in a managerial capacity.

Moreover, also as the director determined, the petitioner has neither provided a comprehensive description of the beneficiary's duties for the overseas employer nor provided documentary evidence

of the employment of individuals subordinate to the beneficiary's overseas position. As previously stated, going on the record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999), *supra*.

Beyond the decision of the director, the petitioner has not provided documentary evidence of a qualifying relationship with a foreign entity. Again, assertions that such a relationship exists are not sufficient for the purpose of these proceedings. As the petition will be dismissed for the reasons stated above, this issue is not examined further.

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.