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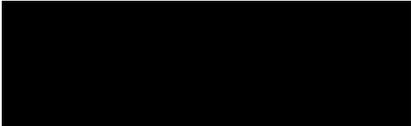
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U.S. Department of Homeland Security

Citizenship and Immigration Services

D7

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



NOV 06 2003

File: WAC 99 181 51665 Office: CALIFORNIA SERVICE CENTER Date:

ON 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, California Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The previous decisions of the AAO and the director will be affirmed.

The petitioner is an import/export and international courier firm that seeks to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel stated that the petitioner had new evidence that would clarify all the issues raised by the director. Counsel indicated that a brief and/or evidence would be forwarded to AAO within thirty days.

The AAO dismissed the appeal finding that no brief and/or evidence had been received to support the petitioner's effort to clarify the issues raised by the director.

On motion, counsel submits a copy of a brief dated January 19, 2000 and evidence that it had been received by CIS on January 31, 2000. Counsel requests that this brief be considered on motion.

On motion, counsel explains that the beneficiary and his partner, Mr. [REDACTED] established the company [REDACTED] in the United States in 1995. Counsel states that at the beginning of the enterprise, the beneficiary resided in Sao Paulo, Brazil and Mr. [REDACTED] managed the company in the United States. Counsel indicates that [REDACTED] hired Mr. [REDACTED] to work on a participant/commission basis in 1995 at Rapid Mex and that he worked for the company through 1997. Counsel further explains that in 1998, business opportunities increased and because of the difficulty in finding properly skilled clerical staff, Rapid Mex engaged the services of many independent contractors.

Counsel further explains that from 1995 to 1999, the beneficiary was in Brazil and therefore was not performing tasks necessary to produce the product nor providing services to the organization in the United States as indicated by the director in her order.

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) state 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 beneficiary and Mr. [REDACTED] filed a fictitious business name statement for [REDACTED] as a partnership on February 20, 1996 in Los Angeles, California. Since the petitioner had been doing business for more than one year at the time the visa petition was filed, it shall not be considered under the regulations covering the start-up of a new business.

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.

The first issue in this proceeding is whether the petitioner has established that the beneficiary has been employed abroad for one continuous year within the three years preceding the filing of the petition in a primarily managerial or executive capacity.

The petitioner describes the beneficiary's job duties abroad as follows:

Since 1994 Mr. [REDACTED] occupied the position of Owner/Director, being responsible for all major decisions such as purchasing and sales, business expansion among others. Mr. [REDACTED] formulated policies such as business development and marketing strategic focusing on the expansion of the company. Mr. [REDACTED] has a Degree in Economics. As Director Mr. [REDACTED] has the discretionary authority to oversee and plan corporate strategies. The overseas parent office is important and essential to the entire concept and development of the U.S. entity and Mr. [REDACTED] has been responsible to render his skills over this essential function.

Mr. [REDACTED] is responsible for all the projects related to the United States market and for the daily operations of the [REDACTED] office in Los Angeles.

This visa petition was filed on June 14, 1999. The petitioner explains that during the period of time since 1994, the company in Brazil has always had employees, and at one point in 1996, it employed five persons. In a letter dated September 28, 1999, in

response to the director's request for additional information concerning the foreign company in Brazil, the petitioner states the following. "After 1997, due to the Brazilian economy, the company decided to hire 3 (three) of its employees as independent contractors." The petitioner then provides the names of these independent contractors and indicates that they worked as a merchandise deliverer, as a general clerk and as an import clerk. It is determined that the record contains insufficient evidence to demonstrate that the beneficiary has been acting in a managerial or executive capacity abroad. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. For this reason, the petition may not be approved.

The next 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.

On appeal, counsel describes the beneficiary's proposed job duties in the United States as follows:

Mr. [REDACTED] will take an integral part in the development and establishment of the U.S. entity and has demonstrated his expertise to direct and integrate the company's services into the community. The petitioning entity is now in the proper position to expand its operations in Los Angeles increasing its freight forward services and export business from California to Brazil and South America. As part of its business plan [REDACTED] intends to market its services, contract supplies and distributors and affiliated companies outside of the United States to help expansion of the business generating jobs through import and export carriers. The alien Beneficiary is now needed to be stationed in the United States to ensure the correct positioning of the U.S. entity and its operation.

Mr. [REDACTED] will continue to focus executive efforts furthering the development of the U.S. business operations. The correct positioning and management in the operations provides an important strategic advantage for its competitiveness in the marketplace. In this position he will establish the goals and policies of the organization, direct the management of the organization, identify and negotiate contracts with major entities.

[REDACTED] is offering Mr. [REDACTED] a full-time, temporary employment at the annual salary of US \$80,000.00 per year. As Director Mr. [REDACTED] will have executive capacity to hire the necessary staff, which include a secretary, an import agent, and a supervisor.

As stated above, this visa petition was filed on June 14, 1999. In a letter dated September 28, 1999, in response to the director's request for an organizational chart, the petitioner states the following. [REDACTED] is a small company with only one employee at the moment and it had been manager (sic) by Mr. [REDACTED] from Brazil, and during his short trips to the United States - Mr. [REDACTED]

The record reveals that at the time of filing the petition, the petitioner did not have sufficient staff to relieve the beneficiary from performing non-qualifying duties. Additionally, the planned addition of new employees sometime after the beneficiary enters the United States does not enhance the beneficiary's eligibility for this classification at the time the petition was filed. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary will be managing or directing the management of a function, department, subdivision or component of the company upon his entry into the United States. The petitioner has not shown that the beneficiary will be functioning at a qualifying senior level within an organizational hierarchy. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the record is not persuasive and does not contain sufficient documentation to establish that a qualifying relationship exists between the petitioner and a foreign firm, corporation or other legal entity. As the appeal will be dismissed on the grounds discussed, these issues need not be 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 decisions of the AAO and the director are affirmed.