

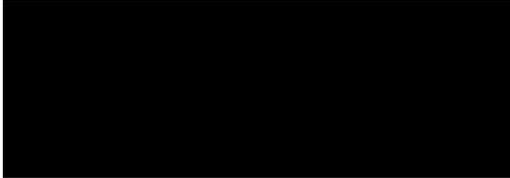
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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



NOV 19 2003

FILE: SRC-02-069-51539 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for 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:
[Redacted]

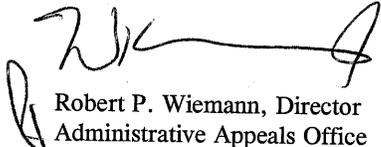
INSTRUCTIONS:

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

The petitioner is a new office located in Texas and engaged in the repair, sales and export of industrial equipment. On October 31, 2000, the U.S. entity petitioned to classify the beneficiary as a nonimmigrant intracompany transferee; the visa was approved and held valid for the period of January 5, 2001 through January 4, 2002. On December 24, 2001, the petitioner filed a petition to extend the employment of the beneficiary in the United States as a manager. The director denied the petition stating that the petitioner had not demonstrated that the beneficiary's duties in the new office are of a managerial or executive capacity.

On appeal, petitioner's counsel asserts that because proof was submitted to show that the beneficiary is a part owner of the petitioning organization, "[i]t stretches [sic] credulity to suggest he, as owner, is not managing this business." Counsel also indicated on the appeal form, filed on June 10, 2002, that a brief and evidence would be submitted within thirty days. To date, a thorough review of the file has revealed no further evidence submitted by counsel or the petitioner.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. In addition, 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.

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

- (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.

The issue in the present case is whether the beneficiary will be employed 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.

In the original petition, the petitioner describes the beneficiary's duties as managing the repair and replacement of machinery, and preparing the machinery for export. The same description was noted on the petition for an extension. As manager, the beneficiary would receive an annual salary of \$43,200. In addition, the petitioner employed three other individuals. No further evidence was submitted to substantiate the beneficiary's role as a manager or executive.

On February 5, 2002, the director requested that the petitioner provide the following information: (1) page three of the I-129; (2) a list of the employees of the United States corporation and their job titles; (3) an explanation of the discrepancy in the petition in which the U.S. company's gross annual income is listed as \$20,000, yet the net annual income is \$300,000; and, (4) a copy of the latest quarterly earnings statement for the U.S. corporation. None of the information requested by the director was provided as part of the record.

In a decision dated May 7, 2002, the director denied the petition for an extension of the beneficiary's L-1A status noting the following:

[T]he beneficiary cannot be said to be engaged in primarily managerial or executive duties a preponderance of the time as the business has not expanded to the point where the services of a full-time, bona fide manager/president would be required. The majority of his work time would be spent in the nonmanagerial, day-to-day operations of the business.

As such, the director determined that the evidence was not persuasive that the beneficiary's duties will be primarily those of a bona fide executive or manager.

Petitioner's counsel asserts the following on appeal:

The extension [sic] of the L1 was denied because it is claimed that [the beneficiary] is not a manager. However, there was proof submitted [sic] which indicated that he was part owner of the business. There are offices, employees and income. It stretches [sic] credulity to suggest he, as owner, is not managing this business.

On review, the record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. Pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C), within one year of the approval of a petition for an individual employed in a new office, the U.S. operation must be able to support an executive or managerial position. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

In the instant case, the beneficiary's petition for L-1A status was approved in January 2001. As stated in the regulations the petitioning organization must be able to support the beneficiary working in a managerial or executive capacity by January 2002. The record is insufficient to establish that the U.S. operation is presently able to employ the beneficiary as a manager or executive. As of January 2002, the petitioner employed only three people; no information was provided as to these individuals' duties within the organization, wages, or educational background. Although the number of employees supervised or the size of an organization alone is not determinative of whether an individual is functioning in a managerial or executive capacity, either factor may be considered when other irregularities exist. See *Systronics Corp. v. I.N.S.*, 153 F.Supp. 2d 7, 15 (D.D.C. 2001). The size of the personnel staff is especially important when determining whether the petitioner has sufficient staff to relieve the beneficiary from performing non-qualifying duties. *Id.* The

petitioner has not submitted any evidence to indicate that the beneficiary will be relieved by the other employees from performing non-qualifying duties as a manager or executive. Therefore, the petitioner has not established the eligibility of the beneficiary, under the regulations, for an extension of the L-1A visa.

Further, pursuant to 8 C.F.R. § 214.2(l)(14)(ii), when filing a petition for a visa extension, the petitioner must provide a statement of duties performed by the beneficiary for the previous year and under the extended petition, as well as a statement describing the staffing of the new operation when the beneficiary will be employed in a managerial or executive capacity. The description must be sufficient to determine that the duties to be performed are primarily managerial or executive in nature. In the instant case, the petitioning organization has provided the same single statement on each I-129 petition maintaining that the beneficiary manages the repair and replacement of machinery and prepares it for export. Contrary to the requirements in the regulations and the request made by the director, the petitioner failed to submit any description of the beneficiary's duties, nor did it provide any evidence regarding the number of individuals employed by the petitioner. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2 (b)(14).

Counsel's assertion that the beneficiary should be deemed a manager solely because he is a 50% owner of the petitioning organization is misplaced. The regulations in which managerial and executive capacity are defined do not confer managerial or executive capacity on a beneficiary simply because of an ownership share in the petitioning organization. Counsel has not provided any evidence that the beneficiary primarily manages the organization, or a department, subdivision, function, or component of the organization; that the beneficiary supervises other professional employees, or manages an essential function of the organization; has the power to hire and fire; or has discretion over day-to-day operations, as required to establish "managerial capacity." In addition, the record does not support a finding that the beneficiary directs the management of the organization; establishes goals and policies; exercises wide-latitude in decision-making; and, receives general supervision only from higher executives, as required to establish "executive capacity." 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).

Further, simply going on the record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has failed to prove that it is capable of employing the beneficiary in a predominately managerial and executive position. Accordingly, the AAO cannot find that the beneficiary will be employed in a primarily managerial or executive capacity.

Beyond the decision of the director, counsel asserts that the beneficiary owns half of both the petitioning U.S. company and the foreign company. The regulation at 8 C.F.R. § 214.2(l)(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 on the grounds discussed, this issue need not be examined further.

Another issue not examined by the director is whether there is still a qualifying relationship between the U.S. entity and the foreign entity as required in the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A). As the appeal will be dismissed, this issue also 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.