

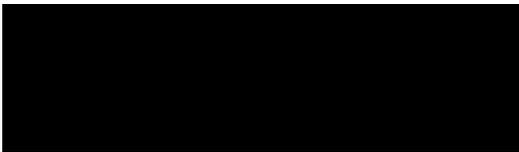
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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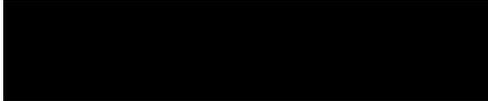
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536



NOV 20 2003

FILE: WAC 01 289 57904 Office: CALIFORNIA 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:



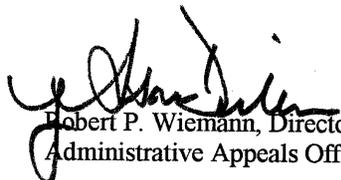
INSTRUCTIONS:

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 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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as an exporter of computer and telecommunications components to India. It seeks to continue the employment of the beneficiary temporarily in the United States as the company manager. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been or would be employed primarily in a managerial or executive capacity with the U.S. entity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will be managerial or executive in nature.

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 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.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization with the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(i) states, in part:

Individual petition. The petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1998 as an exporter of computer and telecommunications components to India. The petitioner states that the U.S. entity is a branch of [REDACTED] LTD, that is located in New Deli, India. The petitioner declares three employees. The petitioner seeks to extend the beneficiary's services as manager for a period of two years, at a yearly salary of \$24,000.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity has been and will be primarily managerial or executive.

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 petition, the petitioner describes the beneficiary's present and proposed job duties as follows:

Establish and manage [REDACTED] USA branch office, supervise branch office employees, establish business' goals, handles daily business matters and decisions, arranges business contracts and facilitates shipping orders for USA to India.

In a letter of support dated August 31, 2001, counsel stated that the beneficiary's job duties included supervision and management of all aspects of the purchasing of computer and telecommunications components from vendors in the United States and other countries, and for arranging for financing and shipment to India. Counsel also contended that the beneficiary's job duties upon his arrival in the United States consisted of establishing the goals of the U.S. entity, prioritizing those goals and implementing them by meeting with manufacturers and soliciting quotes for computer components, entering into contracts for the purchase of components, and arranging for financing and overseas shipment of purchases to India.

The director determined that the evidence initially submitted in support of the petition was insufficient to establish eligibility for the benefit sought, and thereafter requested that the petitioner submit additional evidence. The director continued by specifically requesting the following:

1. The U.S. entity's organization chart showing the beneficiary's position and other named employees in the chart.
2. The beneficiary's job duties in details, including the percentage of time to be spent on each duty.
3. A list of employees currently under the beneficiary's supervision, with details as: name, job title and duties, entry date of employment, education level, annual salaries/wages.
4. Clearly indicate whether the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees. If yes, please provide the name, job title and duties of those employees.

5. Submit DE-6 for the last 4 quarters to show that the U.S. entity has employees.

In response to the director's request for additional evidence, counsel submitted a profile of the U.S. entity that lists three employees. Counsel also lists two of the beneficiary's subordinates as:

Mr. [REDACTED] President of [REDACTED] USA/Director of Accounts Receivable & Payable. Starting date of employment-May 26, 1998. Education-Master's degree program, India. Salary-\$1,500/month.

Ms. [REDACTED] Director of Inventory. Responsible for shipping, receiving, and inventory storage and maintenance. Starting date of employment-May 26, 1998. Education-some college. Salary-\$1,500/month.

Counsel further asserted that the beneficiary supervises and controls the work of the two managerial employees that are mentioned above. It was counsel's position that the beneficiary has the authority to hire and fire and to recommend other personnel actions, and that he exercises discretion over the daily operations of the U.S. entity. Counsel averred that the beneficiary is not controlled or supervised by the other two employees, as he is their supervisor and office manager, in addition to acting as manager of purchasing and sales. Counsel stated that the beneficiary spends 50 percent of his office hours managing the day-to-day affairs of the U.S. entity, including supervising and directing the work assignment of the branch office employees, and establishing and carrying out the business goals of the U.S. branch office. Counsel further stated that the beneficiary spends the other 50 percent of his office hours managing all aspects of telecommunication and computer components acquisition for the U.S. entity, and the financing and arranging of overseas shipments component purchases to the foreign entity in India. Finally, counsel provided an extensive list of the beneficiary's job duties that have been made a part of this record.

The director determined that the record contained insufficient evidence to demonstrate that the beneficiary would be employed primarily in a managerial or executive capacity. The director further maintained that the record indicated that a preponderance of the beneficiary's duties would be directly providing the services of the business including sales and office duties. In conclusion, the director indicated that the

evidence failed to show that the beneficiary managed a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing the non-qualifying duties.

On appeal, counsel asserts its disagreement with the director's decision, and submits a brief in support of her assertion. Counsel challenges the director's decision because of the previous decisions approving L-1A status for the beneficiary. Counsel also challenges the director's use of company size as a determining factor in denying the petitioner's request for an extension of the beneficiary's authorized stay.

Counsel's challenges are not persuasive. The director's decision does not indicate whether she reviewed the prior approval of the other nonimmigrant petitions. The record of proceeding does not contain detailed copies of the visa petitions claimed to have been previously approved. If, however, the previous nonimmigrant petitions were approved based on the same facts that are contained in the current record, the approval would constitute clear and gross error on the part of Citizenship and Immigration Service (CIS). As established in numerous decisions, CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals, which may have been erroneous. See *Sussex Engg. Ltd. V. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988); *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (BIA 1988). The Administrative Appeals Office is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800,803 (E.D. La. 2000), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Although a company's size cannot be the sole basis for denying a petition, that element can nevertheless be considered. This is particularly true in light of other pertinent factors such as the nature of the petitioner's business, which can help to determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant matter, the latter more accurately describes the beneficiary's role. At the time of filing the petition in 2001, the petitioner had been established since 1998 and claimed to have employed the beneficiary as manager and two other employees as president and director. The petitioner did not submit evidence that it employed any subordinate staff members that

would perform the actual day-to-day, non-managerial operations of the company. There was no evidence produced by the petitioner to establish that the president and director had subordinate staff under their direction. In addition, there is no detailed description of job duties provided for the two employees. There is no evidence to show that the two employees are full-time workers for the U.S. entity. There is no evidence to show how the beneficiary supervises or manages the two employees. Furthermore, there has been no evidence submitted to demonstrate that the U.S. entity can remunerate the beneficiary for his services. The record reflects that in 2000 the U.S. entity paid out \$42,109 in salaries and wages, and in 2001 paid out \$23,500 in salaries and wages. Evidence in the record shows that the beneficiary's salary is \$24,000 per year, and that the two other employees combined salary is an estimated \$36,000 per year. Based upon the evidence submitted it does not appear that the reasonable needs of the petitioning company would plausibly be met by the services of the beneficiary as manager or that the entity is in a position to remunerate the beneficiary for his services.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. While it is apparent that the beneficiary's considerable credentials and experience are tremendous assets to furthering the petitioner's business objectives, it does not appear at this time that the petitioner is prepared to sustain the beneficiary in a strictly managerial or executive capacity. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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).

The record does not establish that the beneficiary has been or will be primarily managing the organization, or a department, subdivision, function, or component of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the organization. The petitioner has not demonstrated that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory

personnel who relieve him from performing non-qualifying duties. Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(G). The petitioner has not demonstrated that a qualifying relationship still exists with a foreign entity and has not persuasively demonstrated that that the foreign entity is and will continue doing business during the alien's stay in the United States pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(H). As the appeal will be dismissed, however, 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; *Republic of Transkei v. INS*, 923 F.2d 175,178 (D.C. Cir. 1991) (holding burden is on the petitioner to provide documentation); *Ikea US, Inc. v. U.S. Dept. of Justice*, 48 F.Supp.2d 22, 24 (D.D.C. 1999) (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.