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

D7

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
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Washington, DC 20536

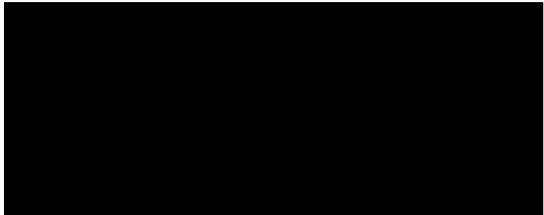


File: LIN 02 062 51451 Office: NEBRASKA SERVICE CENTER Date: NOV 21 2003

ON RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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, Nebraska Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is engaged in the design, creation and marketing of software products for the animal feed, human food, pet food and other related industries. It seeks to employ the beneficiary temporarily in the United States as its "Director of Business Development - U.S.A." The director determined that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity.

On appeal, counsel states that the director erred as a matter of law in concluding that the petitioner did not establish that the beneficiary is eligible for L-1A status, and that the evidence submitted was insufficient to satisfy the petitioner's burden of proof. Counsel states that the denial was based on a misinterpretation of the law and appropriate regulations. Counsel further states that the director failed to consider evidence submitted for the record, specifically, a statement by the company's president verifying eligibility for L-1A status.

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.

The regulations at 8 C.F.R. § 214.2(1)(1)(ii), in part, state:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

The petitioner is a corporation that originated in the State of Delaware on January 24, 2000. The petitioner filed its petition on December 14, 2001. 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.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed in a primarily 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.

The petitioner describes the beneficiary's job duties abroad as those of a commercial manager. The duties of the position abroad are described as follows:

As Commercial Manager, Mr. [REDACTED] is generally responsible for managing the company's business development. Moreover, Mr. [REDACTED] is in charge of business development in the Americas. Among his specific accomplishments in this position, he has increased the company's business in the Americas to 30% of company exports. In addition, he has managed five major system implementations with more than five hundred users and has generated significant paybacks for U.S. clients. Mr. [REDACTED] manages a budget of \$450K. Mr. Fountain is compensated at the annual rate of 50,880 pounds plus usual company fringe benefits offered to our executive personnel.

In an affidavit dated April 17, 2002, Mr. [REDACTED] the managing director and president of Format International, Ltd., the parent company abroad, further describes the duties of the position the beneficiary held abroad as follows:

Mr. [REDACTED] reports only and directly to me and functions at a senior executive level within the company's organizational hierarchy. As Commercial Manager, Mr. Fountain is primarily responsible for managing Format International, Ltd.'s business development, including analyzing the company's options for expanding into foreign markets. Mr. [REDACTED] also identifies new markets for penetration and develops marketing strategy. These duties involve analysis of competition as well as defining processes for researching new markets, new products and special projects including international processes and programs for execution. Mr. [REDACTED] responsibilities also include oversight of customer service operation, customer relations, marketing, and system evaluation. These duties entail working with high-level client managers to prepare client-specific business plans related to the implementation of the company's software. It also includes planning and coordinating the roll-out of the software in coordination with client managers. Furthermore, it involves the development of a plan to ensure that staff training, data conversion, and troubleshooting are implemented

effectively. These areas of responsibility are extraordinarily complex, involving the simultaneous implementation of software for sometimes hundreds of users in twenty or more countries.

Moreover, Mr. [REDACTED] is involved in public speaking as the company's representative in several important events such as international forums. For example, in 1999, Mr. [REDACTED] attended the Formulation Symposium organized by the Department of Agriculture in China, and in 2000, he attended the Formulation Symposium organized by the California Polytechnic.

Mr. [REDACTED] works directly with the Board of directors and me to establish the company's policies, goals and business objectives. Managing effective coordination of the number of concurrent demanding projects that the Commercial Manager position involves requires extensive and very detailed knowledge of all aspects of the Business Development function of the company.

Mr. [REDACTED] exercises complete day-to-day discretionary authority over his area of responsibility. He manages a budget of \$450,000.00. Our company's agents who are all professional (all with degrees, many with Ph.D. degrees), also indirectly report to Mr. [REDACTED]. This means that Mr. [REDACTED] is not primarily responsible for evaluating the performance of the sales agents, nor is he primarily responsible for recruiting, hiring and firing them. However, Mr. [REDACTED] input is sought when personnel decisions are made regarding the agents as he has personal knowledge as to whether or not an agent is capable of performing his or her duties. Mr. [REDACTED] acquires this personal knowledge based on his interactions with them and their supervisors while coordinating their efforts to implement the company's business development policies, objectives and plans.

Based upon the additional information provided on appeal, it is determined that the beneficiary occupies a qualifying executive position abroad.

The petitioner describes the beneficiary's prospective job duties in the United States as:

In this position, Mr. [REDACTED] will play a key role in the company's expansion plans. Mr. Fountain will report directly to Format International-UK's Managing Director and will be primarily responsible for U.S. marketing services. Specifically, Mr. [REDACTED] will undertake the following duties:

- Developing software sales and support services in Canada, USA and Latin America;
- Developing and implementing a marketing plan and strategy;
- Establishing a North American software User Group;
- Establishing a U.S. support team to provide front-line assistance;
- Overseeing high-profile projects;
- Promoting the company with national and international trade organizations; and
- Recruiting Agents to support the Latin American Business.

On December 14, 2001 when the petition was filed, the record shows the United States corporation employed five persons, its president, vice-president of research & marketing, a marketing director, a part-time administrative assistant and a part-time research analyst. As the director of business development - U.S.A., the beneficiary would be employed in an independent staff role and report directly to the managing director of Format International Ltd., UK. The record does not clearly show that the petitioner had sufficient staff to relieve the beneficiary from performing non-qualifying duties. Without more compelling evidence, the record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization, and that he is not directly providing the services of the business. 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). Consequently, 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.