

PUBLIC COPY

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

DA

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

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

[REDACTED]

FILE: EAC 03 050 52953

Office: VERMONT SERVICE CENTER

Date **OCT 02 2003**

IN 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:

[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 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.

[Signature]

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, [REDACTED] states that it is the subsidiary of an identically named Philippine business. The petitioner describes itself as a computer-related publishing company. In December 2000, the U.S. entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A). CIS approved the petition as valid from December 1, 2000 until November 30, 2002. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for two years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's president and chief executive officer at an annual salary of \$60,000. On April 21, 2003, the director determined, however, that the beneficiary did not qualify as a manager or an executive. Consequently, the director denied the petition. On appeal, the petitioner's counsel asserts that the beneficiary serves in a primarily managerial or executive capacity.

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.

Under 8 C.F.R. § 214.2(1)(3), 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 within 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 services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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 this matter is whether the beneficiary will primarily work as a manager or an executive. In regard to the issue of whether a beneficiary has been and will be primarily

performing 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.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(1)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are *either* in an executive or managerial capacity. *Id.* In this instance, counsel's brief asserts that the beneficiary will be serving as a manager and an executive; therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of each capacity.

The petitioner did not describe the beneficiary's duties on Form I-129; instead, the petitioner submitted a November 15, 2002 letter that generally described the beneficiary's proposed duties in the United States:

[The beneficiary] will be responsible for managing and directing the [petitioner's] operations, including developing and implementing the company's sales and marketing strategies, developing business opportunities and strategic alliances with other companies and individuals, negotiating contracts with customers and vendors, and ensuring the [petitioner's] products and services are consistent with the [petitioner's] high standards and methodologies. In performing his managerial duties, [the beneficiary] will manage the [petitioner's] professional staff and independent contractors, with the authority to recommend the hiring, promotion, and termination of his staff. [The beneficiary] will exercise near-complete discretionary decision-making authority over the day-to-day execution of his managerial duties.

After reviewing the November 15, 2002 letter and other evidence that the petitioner submitted with the Form I-129, the director issued a request for evidence on April 17, 2003. The director instructed the petitioner to submit:

- a comprehensive description of the beneficiary's duties;
- a breakdown of hours devoted to each of the beneficiary's proposed job duties on a weekly basis; and
- an organizational chart for the U.S. entity, as well as complete position descriptions for the U.S. entity's employees.

On April 2, 2003, the petitioner responded to the request for evidence. The petitioner's response described the percentages of time the beneficiary spends on his proposed duties:

[The beneficiary] spends 70% of his time determining and formulating policies and providing the overall direction of the company. These include developing and implementing the [petitioner's] sales and marketing strategies, and developing business opportunities and strategic alliances with other companies and individuals. [The beneficiary] spends an addition [sic] 20% of his time planning, directing, and coordinating operational activities at the highest level of management with the help of subordinate executives and staff managers. These include negotiating contracts with customers and vendors, and ensuring the company's products and services are consistent with the company's high standards and methodologies. Another 10% of [the beneficiary's] time is spent providing direction to the CTP USA. [sic] in the Philipinnes [sic] regarding financing options, future growth and ventures.

Additionally, the petitioner provided a description of the beneficiary's duties which, in relevant part, states:

[The beneficiary] is charged with determining and formulating policies as well as providing the overall direction of the [petitioner]. Specifically, [the beneficiary] directs and plans the management of the organization, sets the goals and policies of the organization and maintains full profit and loss responsibility. In addition, [the beneficiary] plans the company's delivery of integrated business solutions and the appropriate marketing thereof; develops strategies for cost reduction and growth in a variety of business climate costs; identifies new business goals and formulate [sic] all aspects of service delivery.

Inherent in [the beneficiary's] duties is [sic] the tasks of furthering each pillar of [the petitioner's] business endeavors: establishing a local information technology publication; providing in-house, web-based information technology services, small business support services including technology support, and acquiring a printing business to offset costs for its business services. Each of the foregoing requires [the beneficiary] to direct the consolidation planning, strategic planning, feasibility studies, and project development toward full implementation.

. . .

In addition, [the beneficiary] is currently assessing potential printing business acquisitions that would allow [the petitioner] to deliver in-house printing services.

. . .

[The beneficiary] directly and indirectly manages the entire U.S. staff of [sic] (currently 6 full time professionals, to be expanded to 13 before the end of 2003), while also managing the relationships with [the petitioner's] 3 independent contractors. [The beneficiary] will continue to exercise near-complete discretionary decision-making authority over the day-to-day execution of his executive duties, including the authority to hire, promote, and terminate any employee or independent contractor.

The duties and percentages of time listed above are too broad to convey an understanding of the beneficiary's daily activities. For example, in several instances, the duties referred to formulating policies and setting goals; however, the petitioner failed to identify the policies or goals. Furthermore, the petitioner described the beneficiary as managing and directing subordinate staff. The petitioner did not, however, define managing and directing. Additionally, the petitioner generally paraphrased the statutory definitions of "managerial" and "executive" capacity. See sections 101(a)(44)(A)(i), (iv) and 101(a)(44)(B)(iii) of the Act. For example, the petitioner depicted the beneficiary as having the authority to recommend the hiring, promotion, and termination of the U.S. entity's staff. Similarly, the petitioner stated that the beneficiary will exercise near-complete discretionary decision-making authority over the day-to-day execution of his managerial duties.

Going on record without supporting documentary evidence is insufficient 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).

Moreover, the beneficiary's duties appear to comprise mainly marketing duties. For instance, the beneficiary's proposed tasks include "developing and implementing . . . sales and marketing strategies, developing business opportunities and strategic alliances with other companies and individuals, [and] negotiating contracts with customers and vendors" Marketing duties, by definition, qualify as performing a task necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or 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). Furthermore, the beneficiary's proposed duties encompass customer satisfaction responsibilities. Specifically, the beneficiary will "ensure [that the U.S. entity's] products and services are consistent with the [the U.S. entity's] high standards and methodologies." Thus, the record lacks adequate

supporting documentary evidence to demonstrate that the beneficiary's duties are primarily executive or managerial.

On appeal, counsel asserts that the director erroneously concluded that the beneficiary supervised too few employees to qualify as an executive or manager. The AAO recognizes that an entity's size does not necessarily decide the question of managerial or executive capacity. As established previously, however, the beneficiary is performing tasks required to provide a service or produce a product; thus, regardless of the U.S. entity's size, the petitioner has not established that the beneficiary is primarily functioning as an executive or a manager.

Additionally, on appeal, counsel cites several unpublished cases to support its position that the beneficiary is a manager or an executive. Counsel, however, did not attach copies of the cases; therefore, it is impossible to gauge the unpublished cases' relevance. Although CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. 8 C.F.R. § 103.3(c). Consequently, because the cited cases are unpublished, they have no precedential effect in this matter.

Counsel further claims on appeal that the director incorrectly characterized the petitioner as a Mailboxes, Etc. rather than as a computer publishing company. Counsel cites the petitioner's November 15, 2002 letter to support this claim. The November 15 letter states:

[The U.S. entity] . . . provides electronic data processing, electronic instrumentation, and other computer services to clients, including printing, publishing, and distributing newsletters, updates, and periodicals pertaining to electronic data processing and computers as well as their accessories and related instrumentation.

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). In addition, the petitioner's Form 2002 U.S. Corporation Income Tax Return, Schedule K, describes the U.S. entity's business activity as "mail services," and the U.S. entity's product or service as "mailing supplies." Finally, the photos, which the petitioner

submitted in response to the director's request for evidence, demonstrate that the U.S. entity is, in fact, a Mailboxes, Etc. store. Therefore, the director reasonably concluded that the U.S. entity functions primarily as a Mailboxes, Etc. franchise rather than as a computer publishing company.

Finally, on appeal, counsel asserts that, if CIS does not extend the validity of the petition, a local economy will suffer. When determining eligibility as a nonimmigrant manager or executive, CIS is limited to the criteria outlined in the statute and regulations. See section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L); see sections 101(a)(44)(A), (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A), (B). Neither of these two authorities allows CIS to consider the impact of the petitioner's operations on a local economy or job market when determining whether the proffered position is primarily managerial or executive. Therefore, counsel's assertions regarding the effect on a local economy are irrelevant to this matter.

Beyond the decision of the director, the AAO notes that the petitioner's assertions rely, in part, on future events rather than on conditions in existence when the petition was filed. For example, the U.S. entity does not currently provide in-house, web-based information technology services; instead, the petitioner plans to establish those services in the future. Similarly, the petitioner stated that the beneficiary is currently assessing potential printing business acquisitions that would allow [the petitioner] to deliver in-house printing services. Also, the petitioner claims that it will expand its current staff of six employees to 13 employees before the end of 2003. CIS may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Therefore, the future provision of expanded services, business acquisitions, and hiring of additional employees have no bearing on whether the beneficiary's proposed duties qualify as primarily managerial or executive. However, as the appeal will be dismissed, the AAO will not examine this issue any further.

Also, beyond the decision of the director, the AAO notes that the director initially approved the petition as valid from November 15, 1996 through November 15, 1997. CIS approved two further extensions of the petition. The last approval extended the petition's validity until November 30, 2002. The

regulations limit nonimmigrant L-1 stays to a period of seven years. 8 C.F.R. § 214.2(1)(12). The U.S. entity is asking CIS to extend the petition's validity for two years beyond November 30, 2002. Pursuant to the regulations, CIS may only extend the petition until November 30, 2003. However, as established above, the beneficiary's proposed duties are neither primarily managerial nor primarily executive. As the appeal will be dismissed, the AAO will not examine this issue 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; *Transkei*, 923 F.2d at 178 (holding burden is on the petitioner to provide documentation); *Ikea*, 48 F.Supp at 24-5 (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.