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Department of Homeland Security

Citizenship and immigration Services

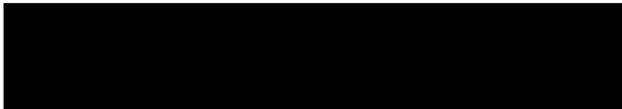
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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536

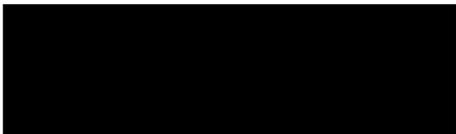
File: EAC-01-253-52379 Office: Vermont Service Center Date: SEP 15 2003

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

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 approval of the nonimmigrant visa petition was revoked by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner engages in the business of placement of skilled farm workers from South Africa with employers in the United States. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its chief executive officer. The director determined that the petitioner had not established that a qualifying relationship exists between the U.S. and foreign entities, or that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel argues that the beneficiary will be employed in a primarily managerial and executive capacity and that a qualifying relationship exists between the U.S. and foreign entities. Counsel submits additional evidence.

Regulations at 8 C.F.R. § 214.2(l)(14)(ii) state that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

"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:

"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 a letter dated August 1, 2001, the beneficiary describes her duties, in pertinent part, as follows:

[The beneficiary] in addition to negotiating contracts for the supply of workers to farm employers also manages the company bank accounts, tax payments, supervises the two employees and directs their activities, sets company policy as to which clients are to be supplied and under what conditions, thereby confirming that she is the executive in charge of management of the company Marketing Works International, Inc.

For tax reasons the two employees under the management of [the beneficiary] are employed by Farmworks International LLC which has a service contract to do administration work for Marketing Works International, Inc. However both companies are owned by [the beneficiary] and the two employees are employed at the office premises of Marketing Works International, Inc.

On appeal, the petitioner's counsel states that, since the beneficiary is an executive, it is impossible for the petitioner to list all of the beneficiary's duties on an hour by hour basis. Counsel describes the beneficiary's duties, in pertinent part, as follows:

1. Plans, directs and coordinates operations in the United States and South Africa according to executive directives, budgets, projected sales volume and other guidelines (like government regulations). Develop plans for expansion of programs, operations and financial activities.
2. Administers placement and trade programs according to government policies, like Code of Federal regulations, IRS and import regulations, and interprets programs to workers or contracted companies and clients. Assists in obtaining objectives in such matters as legislation affecting placement of temporary workers. Do research to facilitate professional growth and efficiency.
3. Plans, coordinates and directs advertising campaigns in the United States and South Africa. Confers with media to be used and to estimate costs. Coordinate activities of workers in order to carry out approved campaigns. Directs research surveys, compilation, and analysis of factors, such as the extent and nature of market need for temporary workers in the United States and the availability of qualified workers in South Africa. Analyze common problems in the trade.
4. Establishes system of record keeping and maintains up-to-date and comprehensive records of office procedures. Estimates and finalize budget. Above requires

negotiations with bookkeepers in the United States and South Africa, the manager of the South African office and the manager of the US administrative contract company (Farmworks LLC).

5. Studies management methods in order to improve work flow, communication, simplification of reporting procedures and implementation of cost reduction. Analysis [of] operation practices. Prepares and update procedural manuals.

6. Hires workers and contract companies to do administrative work. Directs and coordinates activities of both workers and contract companies to further achievements of goals, objectives, and standards of service rendering [sic].

7. Solicit new business. Represents the company in negotiations with representatives of government, business, labor, and other organizations. Presents company's viewpoints, goals, and objectives and utilizations of the company's services. Visits clients to maintain good will.

8. Coordinates work with other agencies, government or private, to develop greater understanding between each other and of procedures that have to be followed and implemented.

On appeal, counsel states that the beneficiary performs qualifying functions which do not require a large number of employees. Counsel cites several unpublished decisions in support of this contention. However, when managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function. The record must demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function.

The record as presently constituted is not sufficient in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The description of duties provided is too general and vague to convey a clear understanding of exactly what the beneficiary does on a daily basis. The petitioner claims that beneficiary has two employees who reports to her, even though they work for a another company whose ownership has not been established. The record does not contain an in-depth description of the duties of these employees. Therefore, it cannot be determined that these employees are a subordinate staff of professional, managerial, or supervisory personnel who relieve the beneficiary from performing nonqualifying duties. Based on the

evidence submitted, it cannot be found that the beneficiary will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

Another issue to be addressed in this proceeding is whether a qualifying relationship exists between the U.S. and foreign entities.

Regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Regulations at 8 C.F.R. § 214.2(l)(1)(ii)(J) state:

Branch means an operating division or office of the same organization housed in a different location.

Regulations at 8 C.F.R. § 214.2(l)(1)(ii)(K) states:

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns directly or indirectly, less than half of the entity, but in fact controls the entity.

Regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, in pertinent part:

Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In his decision, the director noted that the petitioner had failed to submit any stock certificates establishing ownership of the foreign company, Marketing Works CC. The director further noted that the organizational chart submitted by the petitioner named the beneficiary as owner and president of both Marketing Works CC and Marketing Works International, Inc. The director further noted that the record did not contain further evidence that a "concrete relationship" exists between the United States and foreign entities.

On appeal, counsel states in part that:

The record of the petitioner is replete with evidence of the ownership, business activities and control of both companies. In response to the request for additional evidence, the petitioner also included the record of ownership of Marketing Works International, Inc.

A stock certificate, number 001, dated February 11, 1998, contained within the record indicates that the beneficiary owns 1500 shares of stock in Marketing Works International, Inc. The record also contains stock certificates 001 and 002, dated February 11, 1998, indicating that the beneficiary and her husband each own 750 shares of Marketing Works International, Inc. It is stated that the beneficiary owns both the U.S. and foreign companies, but no evidence has been submitted in support of that assertion.

On review, the evidence is insufficient in demonstrating that a qualifying relationship exists between the U.S. petitioning entity and the foreign organization. For this additional reason, 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.