

D7

Department of Homeland Security

Citizenship and immigration Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

File: SRC-02-022-57718 Office: Texas 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 nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an import export company. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager. The director determined that the petitioning entity had not demonstrated that the U.S. entity and the foreign entity are actively doing business or that the beneficiary has been or will be employed in a managerial capacity.

On appeal, counsel argues that the beneficiary is "acting" as an executive/manager and cites *Mars Jewelers, Inc. v. I.N.S.*, 702 F.Supp. 1570 (N.D. Ga. 1988) and several unpublished decisions to corroborate his claim. Counsel argues that even though the petitioner has few employees, the beneficiary is performing as a manager/executive. Counsel states that the petitioner has submitted sufficient documentation to confirm that the U.S. entity and the foreign entity are continuing to conduct business.

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.

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.

The U.S. petitioner states that it was established in 2000 and that it is a branch of [REDACTED] and [REDACTED] L.L.C., located in Oman. The petitioner declares two employees and a gross annual income of approximately \$100,000. It seeks to extend the petition's validity and the beneficiary's stay for one year at an annual salary of \$55,000.

The first issue to be addressed in this proceeding is whether the United States entity and the foreign entity have been doing business.

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

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The director in his decision dated May 10, 2002, found that the record does not establish that the petitioner is actively doing business. The director found that the petitioner had not submitted sufficient evidence to establish that the foreign entity had been doing business during the previous year or that the United States company was doing business. The petition was submitted October 27, 2001. Therefore, the petitioner must have been doing business from October 2000 to October 2001. A review of the record reveals that the petitioner has submitted evidence that it has been conducting business since February 2001. However, the petitioner has submitted no evidence that the United States entity has been conducting business from October 2000 to February 2001. The record does not contain sufficient evidence establishing that the United States entity has been doing business for the previous year. The record further reveals that the petitioner did not submit any evidence that the foreign entity was still doing business when the petition was filed. Therefore, the petitioner has not overcome these issues addressed by the director in rendering her decision. For this reason, the petition may not be approved.

The second issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been or 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:

"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.

On appeal, counsel states, in pertinent part, that the petitioner performs the following duties:

1. To manage the U.S. corporation and operations of the company;

2. Research the establishment of the corporation under appropriate state laws;
3. Establish banking relationships;
4. Recruitment, hiring and training of staff;
5. Research U.S. markets and establish contacts with manufacturers and suppliers;
6. Enter into marketing agreements;
7. Negotiate for and establish leases;
8. To serve as the General Manager of the U.S. subsidiary;
9. To make all company policy;
10. To be in charge of marketing, expansion, and growth of the company;
11. Preside over Board meetings and report to the Board of the parent company;
12. To have full authority to negotiate for and enter into binding agreements on behalf of the company;
13. To be responsible for all corporate finance, banking, management and accounting for the company;
14. To seek out and acquire additional investments for the company;
15. Budgeting;
16. To exercise wide latitude in decision making on behalf of the company; and
17. To have full management control of the company and all of its operations.

On appeal, counsel cites *Mars Jewelers, Inc. v. I.N.S.*, supra, as evidence that the beneficiary's duties are qualifying. Although the petitioning company is relatively small as was Mars Jewelers, this decision, unlike Mars Jewelers, is based on the duties of the beneficiary, not upon the size of the petitioning company.

The petitioner has not shown that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel states that staffing levels should not be the sole determining factor when

determining whether the beneficiary's position is managerial or executive. The record reflects that the U.S. company has two employees. Counsel, however, asserts that the beneficiary recruits, hires and trains staff as well as oversees the marketing, expansion, and growth of the company. While this may be the case, the record contains no evidence that any employees have been recently hired, nor does it contain any evidence of any planned future hires. It is not apparent that the beneficiary's time on duty is occupied by personnel matters to any significant extent. The record does not reflect that the beneficiary will function at a senior level within an organizational hierarchy other than in position title. There is no comprehensive description of the beneficiary's duties that persuasively demonstrates that the beneficiary has been and will be performing in a primarily managerial or executive capacity. Further, some of the beneficiary's duties such as budgeting, entering into marketing agreements, and negotiating leases, have not been persuasively shown to be managerial or executive duties.

There is no evidence to establish that the petitioner employs a subordinate staff of professional, managerial, or supervisory personnel who relieve the beneficiary from performing nonqualifying duties. Rather, counsel acknowledges that such is not the case. The evidence provided is not persuasive in establishing that the beneficiary will not be primarily involved in performing the day-to-day functions of the petitioning organization. The petitioner has not overcome the objection of the director. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that it can support a manager or executive position. As the appeal will be dismissed on the grounds discussed, this issue 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.