U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

**PUBLIC COPY**

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

[redacted]

FILE: EAC 02 071 52887 Office: VERMONT SERVICE CENTER Date: APR 12 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is engaged in the export and distribution of published material. It seeks authorization to employ the beneficiary temporarily in the United States as its treasurer. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel refutes the director's findings and submits a brief and additional evidence in support of his arguments.

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.

8 C.F.R. § 214.2(l)(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 (l)(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.

At issue in the instant matter is whether the petitioner has established that the beneficiary would be employed in a managerial or executive capacity.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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 support of the petition, the petitioner provided the following in-depth description of the beneficiary's proposed duties in the United States:

[S]he will have full power and authority over the entire company's finances, investments, accounting and budget operations. She will also be in charge of planning, developing and implementing financial policies, investment strategies, financial guidelines, accounting procedures, financial goals and investment return objectives. In addition, [the beneficiary] will be responsible for reviewing and overseeing the preparation of financial analyses, financial statements, accounts payable and receivable, and other financial data for the guidance of the board of directors and management. She will also be accountable for preparing reports outlining the Petitioner's financial position in areas of incomes, expenses, investments and earning based on past, present and future operations. Her other responsibilities are to oversee the reconciliation of all bank accounts, daily cash receipts,

> monthly account payable statements for suppliers, as well as arranging and authorizing all wire transfers. She will be required to direct, oversee and audit bill payment statements for trucking, supplies, import expenses and services. In addition, she is accountable for making payments to the U.S. Custom Services for our company's import operations. [The beneficiary] will be required to act as the coordinator with the Parent Company concerning various financial business opportunities, investment projects, joint venture operations, financial market information exchanges in North America, domestic and international business relations, budgets, utilization of finds and developing new financial markets.

On January 11, 2002, the director issued a request for additional evidence instructing the petitioner to submit a comprehensive list of the beneficiary's proposed duties, accompanied by a description of duties and hourly breakdown of time spent performing those duties for each of the petitioner's employees, including the beneficiary herself.

The petitioner complied with that request. The following was the description and hourly breakdown of the beneficiary's duties in the United States:

> The treasurer is to be vested with full power and authority over and to spend most of the working hours on managing the entire company's finances, investments, accounting and budget operations reporting only to the President. Approximately 10 hours will be spent on planning, developing and implementing financial policies, investment strategies, financial guidelines, accounting procedures, financial goals and investment return objectives. Approximately 5 hours will be spent on reviewing and overseeing the preparation of financial analyses, financial statements, accounts payable and receivable, and other financial data for the guidance of the board of directors and management. Approximately 2 hours will be spent on handling payroll and benefits payment to employees; Approximately 8 hours will be spent on overseeing the reconciliation of all bank accounts, daily cash receipts, monthly account payable statements for suppliers, as well as arranging and authorizing all wire transfers; Approximately 5 hours will be spent on directing, overseeing and auditing bill payment statements for trucking, supplies, import expenses and services; making payments to the U.S. Custom Services for the company's import operations; Approximately 2 hours will be spent on collecting on overdue bills and/or transmitting delinquent accounts to outside contractors conferring with same; Approximately 5 hours will be spent on communicating and conferring with the President, and Business Manager verifying and coordinating financial records; Approximately 3 hours will be spent on coordinating with the Parent Company concerning various financial business opportunities, investment projects, joint venture operations, financial market information exchanges in North America, domestic and international business relations, budgets, utilization of funds and developing new financial markets.

The director also instructed the petitioner to submit copies of all the W-2 and 1099 tax statements it issued in the year 2000, as well as its Form 941 quarterly tax statements for the first two quarters of 2001. The petitioner produced all of the requested documentation.

Nevertheless, the director denied the petition, pointing to inconsistencies in the record based mainly on the tax documents submitted in the petitioner's response to the request for evidence. However, it must be noted that any information found within these documents is irrelevant to the case at hand since the petition was not actually filed until the end of December of 2001. Although the petitioner must establish eligibility at the time

of filing, there is no statutory or regulatory mandate, nor is there any legal precedent that requires the petitioner to establish eligibility prior to the time it is ready to file its petition. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248 (Reg. Comm. 1978). Thus, the director erred in using out-dated documents in order to reach the adverse conclusion in the instant case. Moreover, counsel is correct in pointing out that mere attrition or addition of personnel is not an indication of an inconsistency in the record and should not be adversely perceived when considering the petition's overall credibility.

The director also relied on the amount of the beneficiary's salary as well as the petitioner's ability to pay that salary in deciding to deny the petition. However, neither statutes nor regulations permit consideration of either of these factors in determining the petitioner's eligibility for the benefit sought. Among the most important factors in determining whether a beneficiary will be employed in a primarily managerial or executive capacity is to carefully consider what the beneficiary's duties will be. In the instant case, the director instructed the petitioner to submit a comprehensive list of the beneficiary's duties along with an hourly breakdown of how much time will actually be spent performing those duties. Although the petitioner complied with that request, it is apparent that the director did not properly review the evidence submitted. Contrary to the director's conclusion, the description of duties is not "in an abstract form." Rather, the list is sufficiently detailed to allow the AAO, and the director, to gauge the level of the beneficiary's authority and to get a fair insight as to what her days would normally entail. There are no other known grounds for denying the instant case.

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 been met.

**ORDER:** The appeal is sustained.