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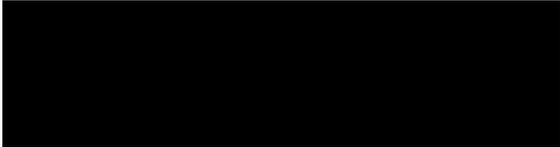


U.S. Citizenship  
and Immigration  
Services

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APR 19 2004



FILE: SRC 02 061 52901 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



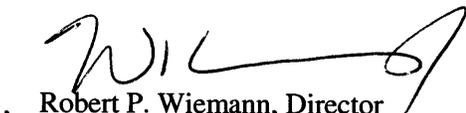
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is engaged in the business of exporting airline parts and services. It seeks authorization to employ the beneficiary temporarily in the United States as its general manager. 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 disputes the director's findings and submits a statement in support of his assertions.

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.

The regulations at 8 C.F.R. § 214.2(l)(3) state 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.

The U.S. petitioner states that it was established in 1990 and claims to be a subsidiary of Aviheco, Ltd., located in Columbia. The petitioner seeks to employ the beneficiary in the United States for an initial period of two years at an annual salary of \$24,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily 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 description of the beneficiary's position:

[The beneficiary] will continue to be responsible for managing the entire U.S. entity and will have the discretion over operations decisions for the company. He will manage the organization and/or essential function of the organization. He will negotiate contracts on behalf of the corporation and deal with the U.S. supplier of goods. He will manage the essential function within the organization of overseeing the organization. When other employees are to be hired by the U.S. entity, he will directly supervise and will have the

authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization).

[The beneficiary] will also exercise discretion over day-to-day operations of the activity or function for which he has authority. . . .

The petitioner also provided the following breakdown of the beneficiary's duties:

- (15%) Networking with business industries in community to identify and cultivate new information sources, attend trade shows and conferences to keep abreast of the industry.
- (10%) Travel to Colombia, as well as within the United States to communicate with the various suppliers, distributors, clients, and potential clients.
- (5%) Preparation of budget for the company operations and monitor finances.
- (5%) Determination of operational needs of the US company, including purchasing the equipment and inventory that will be used.
- (10%) Evaluate and review the services ultimately provided by the company to ensure it meets proper specifications as per customer, and the products to ensure conformity with standards.
- (10%) Identify new markets for penetration and develop marketing strategy accordingly.
- (15%) Maintain regular communication with the foreign subsidiary company.
- (20%) Monitor the activities of all employees, including the Sales Manager and the Assistants when they are to be hired.
- (10%) Establish supplier and distributor chains for import/export operations.

On February 4, 2002, CIS instructed the petitioner to submit additional evidence regarding the beneficiary's proposed duties with the U.S. entity. The petitioner was also asked to describe the staffing of its operation, indicating the number of employees and the duties they perform on a daily basis.

The petitioner responded with the following additional description of the beneficiary's duties:

[The beneficiary] will transfer as the company's General Manager. He will be in charge of the general direction of the company's operation, and will monitor the employment of the 3 other employees. He will also directly supervise the employment activities of the Sales Manager, and will oversee general activities of the sales force. He will be responsible for networking with businesses in the industry within the US. He will also be responsible for the overall management of the finances of the company's operations, and reporting to the company's owners and Board of Directors.

The petitioner explained that it currently has one employee who is acting as the general manager. It further claimed that upon the beneficiary's arrival, the current general manager would move to the position of sales manager and the petitioner would then hire two additional employees: a sales clerk to process sales orders and export documents; and an administrative assistant to handle the secretarial office duties.

The director denied the petition noting that the petitioner does not have a large enough support staff to enable the beneficiary to focus primarily on managerial or executive duties. The director concluded that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying capacity.

On appeal, counsel submits a statement indicating that the petitioner has been functioning for several years and "already has a base of established operations of freight forwarding services . . . ." Counsel also maintains that the petitioner will hire additional personnel once the beneficiary is transferred from abroad. However, eligibility must be established at the time of filing. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248 (Reg. Comm. 1978). At the time of the filing of the petition, the petitioner had only one employee. Although the AAO cannot base its entire decision solely on the size of the petitioning organization, consideration of this factor comports with current law. The AAO can and should consider the size of the petitioner's personnel for the purpose of establishing whether the petitioner has a sufficient staff to relieve the beneficiary from performing non-qualifying duties. In the instant case, the petitioner states that it currently has one employee. If the beneficiary is transferred from abroad, the petitioner will have two employees, including the beneficiary. Based on the petitioner's own statements, it does not yet have an administrative assistant or a sales clerk to take over the operational tasks necessary to run the business on a daily basis. Absent such employees at the time of filing, the AAO must assume that upon arrival to the United States the beneficiary would be directly involved in performing non-qualifying, operational tasks of the petitioning entity regardless of the petitioner's description of the beneficiary's proposed duties. It is noted that 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).

Further, in paragraph no. 38 of the appellate brief, counsel focuses on the differences between the regulatory requirements for manager and executive. She points out that only when claiming managerial capacity does the petitioner potentially need to establish that the beneficiary supervises a staff of professional, managerial, or supervisory employment. Counsel states that if the petitioner claims executive capacity, it only needs to establish that the beneficiary directs the management of the organization. However, counsel's discussion of "executive capacity" is irrelevant in the instant proceeding in light of her statements in paragraph no. 34, where she states that the beneficiary would come to the United States as the petitioner's "top manager" and claims that his job will be "to manage the activities of the company, and [to] oversee the activities of three other employees."

Although the petitioner states that it was established in 1990 and has been doing business for several years, a review of the record indicates that it has not achieved a stage of development that would require an individual who would primarily perform managerial or executive tasks. Nevertheless, the reasonable needs of the petitioning organization do not relieve the petitioner of the burden of establishing that the beneficiary will be employed in a managerial capacity. In the instant case, the evidence of record suggests that the current staffing levels would prevent the beneficiary from focusing primarily on managerial or executive tasks. Simply going on record without providing supporting documentary evidence is not sufficient for the purpose of meeting the

burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

On review, the record as presently constituted indicates that a preponderance of the beneficiary's duties would be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he will be relieved from performing non-qualifying duties. As previously stated, the petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and managing the overall organization constitute significant components of the duties performed on a day-to-day basis. Rather, a comparison of the petitioner's 1999 and 2000 tax returns, suggests that the petitioner earned more income and paid more money for compensation of officers in 1999 than it did the following year. This leads the AAO to question whether the petitioner has made any progress at all in its stage of development. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this 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.