

U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

FILE: LIN 00 215 51824 Office: NEBRASKA SERVICE CENTER

Date: APR 26 2004

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:

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

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 nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner claims to be in the sales of computer hardware and software products business. It seeks to employ the beneficiary temporarily in the United States as its network and overseas sales manager. The director determined that the petitioner failed to establish that the beneficiary would be employed by the U.S. entity in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that evidence submitted by the petitioner establishes that the beneficiary's duties have been and will be managerial or executive in nature.

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 regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

The regulation at 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 (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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1996 as a seller of computer hardware and software products. The petitioner declares ten employees and claims \$4,161,148 in gross annual income and \$58,391 in net annual income. The petitioner seeks to employ the beneficiary as its network and overseas sales manager for a period of three years, at a yearly salary of \$30,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed in a primarily managerial or executive capacity.

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.

In the petition the beneficiary's job duties are described as follows:

[The beneficiary] determines the extent of the company's operations, carries out strategic planning, approves major legal and taxation decisions. Manages sales, administrative and financial functions for the company through the Executive Director and Chief Accountant. Holds full authority to make personnel decisions including hiring and firing.

[The beneficiary] will develop marketing plan and pro forma budgets for operations within his division. Will hire technical and sales staff and oversee the design, development, marketing and sales of networking packages. Will determine territories, product lines, and pricing for overseas sales. Will determine staffing requirements with authority to hire and fire.

The petitioner also notes that the beneficiary has a degree in electrical engineering, and nearly ten years of technical and managerial experience in the computer networking industry, including more than three years as a manager abroad.

In a letter of support dated June 23, 2000, the petitioner lists the beneficiary's job duties abroad as follows:

Responsibilities abroad: [The beneficiary] has served as General Manager of Intervest Baltic Company since the company was founded over three years ago. He determines the extent of the company's operations, carries out strategic planning, approves major legal and taxation decisions, and generally supervises and maintains vigilance for the welfare of the business. He manages sales, administrative and financial functions for the company through the Executive Director and Chief Accountant. He reviews market and industry data and assesses the marketing strategy and tactics of competitors. He develops marketing plans and established sales goals, reviewing sales and cost analyses to monitor how closely Intervest Baltic Company is meeting its goals and objectives. He directs the development of the company's product line, monitoring supply costs to set or modify product pricing. He initiates ideas for marketing and liaises [sic] with major clients, planning and directing work on major projects. He holds full authority to make personnel decisions including hiring and firing.

The petitioner continues by describing the beneficiary's proposed job duties as follows:

U.S. responsibilities: [The beneficiary] will serve as Network and Overseas Sales Manager in charge of the new Network and Overseas Sales Division with the following responsibilities:

- ?? Review market and industry data to develop a marketing plan and pro forma budgets for operations within his division
- ?? Select and hire U.S. technical staff or retain qualified contract technicians to develop the networking product line
- ?? Direct and oversee the design and development of the networking packages, ensuring that they will satisfy respective target markets and may be competitively priced with a sufficient profit margin
- ?? Liaise [sic] with the Technical Manager to introduce the networking packages to the Compuvest web site
- ?? Manage and oversee technical staff that assemble the networking packages and provide telephone support
- ?? Determine territories, product lines, and pricing for overseas sales
- ?? Hire and manage U.S. sales staff responsible for international sales
- ?? Initiate promotional and advertising programs for overseas sales

[The beneficiary] will determine staffing requirements within his division with authority to hire and fire. He will liaise [sic] with the Purchasing, Technical and Administrative Managers so as to integrate his division's activities into Intervest Pacific's operations. He will participate in senior management meetings to discuss and establish company policy and procedures and will report directly to the President. Intervest Baltic Company will serve as a subordinate overseas operating division and [the beneficiary] will continue to manage its operations through its Executive Director, making occasional trips to Russia as needed.

An organizational chart for the U.S. entity depicts the beneficiary as network and overseas sales manager, in charge of technicians and sales staff "to be hired" and general manager of the Intervest Baltic Company.

In response to the director's request for additional evidence, the petitioner submitted position descriptions and listed the job duties of the beneficiary that have been made a part of the record.

The director determined that the record did not establish that the beneficiary would be engaged in primarily managerial or executive duties in the United States.

On appeal, counsel contends that the decision of the director is flawed in that it is based on incorrect facts. Counsel also asserts that the current Intervest Pacific staff will provide the marketing, sales, distribution, and technical support functions for the new division. Counsel continues by stating that within the next six months the petitioner plans to hire U.S. staff for five new positions, and provides a brief description of the job responsibilities. Counsel also asserts that three of the five positions require the holder to have a minimum of a Bachelor's degree in a related field, and submits brief job descriptions taken from the Internet to illustrate his claim. The prospective positions are listed as: marketing analyst, domestic and export sales executive, supply chain specialist, network systems analyst, and technical support specialist. Counsel also contends that

as the new U.S. company division develops, additional subordinate staff will be hired and each of the five new positions will become supervisory in nature. As evidence on appeal counsel resubmits a listing of the beneficiary's proposed job duties in the United States. Counsel also submits an affidavit written by the chief executive officer of CompuVest, USA, which states that the beneficiary is being offered a salary of \$60,000 to serve temporarily as its network and overseas sales manager.

Counsel's assertions are not persuasive. The petitioner has not provided sufficient evidence to establish that the beneficiary has been or will be employed primarily in a managerial or executive capacity. The record reveals that the U.S. entity was incorporated in 1996 and has demonstrated that it has been doing business for more than one year prior to the filing of this petition. Therefore, it is not a new office pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(F), and will therefore be examined as an ongoing enterprise.

The information provided by counsel shows that the petitioner wishes to transfer the beneficiary to its office in the United States for the purpose of starting a new division with the existing company. It is also explained that the beneficiary will hire a subordinate staff for the new division within approximately six months of his being transferred to the United States. Counsel further maintains that as the new division develops, further subordinate staff will be hired and each of the five new positions within the new division will become supervisory in nature. However, the petitioner does not qualify as a "new office" pursuant to 8 C.F.R. § 214.2(1)(3)(v)(C) which allows the petitioning business one year to become sufficiently operational. The evidence submitted does not establish that a network and overseas sales division currently exists within the U.S. entity organizational structure. The employment projections made by counsel for the creation and development of that division, are speculative and indefinite. The fact that the petitioner is in a preliminary stage of organizational development is considered, but does not relieve it from meeting statutory requirements. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In evaluating the claimed managerial or executive duties of a beneficiary, the CIS will look to the petitioner's description of the beneficiary's job duties. 8 C.F.R. § 214.2(1)(3)(ii). The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Without clarification, the beneficiaries past and proposed job duties cannot be construed as being managerial or executive in nature.

Furthermore, the petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he has been or will be directing the management of the organization or a major component or function of the organization, that he will be establishing goals and policies, or that he will be exercising a wide latitude in discretionary decision-making. Absent details concerning the beneficiary's and his subordinates' daily activities and percentage of time to be spent performing each duty, the record is insufficient to establish that the beneficiary will be managing rather than performing the petitioner's basic sales functions. Counsel claims that the beneficiary will be the network and overseas sales manager of the U.S. entity. However, rather than managing a major department, subdivision, function, or component of the organization, it appears that he will actually be performing the services for the business. An employee who primarily performs the tasks necessary to produce a product or to provide a service 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). It must be shown that the managerial or executive employee has authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *Id.*

Counsel also contends that the new division will be staffed in the future, and that currently the marketing, sales, distribution, and technical functions for the new division will be provided by U.S. staff. There has been no documentation submitted to substantiate counsel's claim. 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). Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, the petitioner's evidence is not sufficient in establishing that the beneficiary has been or will be managing a subordinate staff who relieve him from performing non-qualifying duties. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than in position title. It appears that the beneficiary would at best be employed as a supervisor. Supervisors who plan, schedule and supervise the day-to-day work of non-professional employees are not employed in a managerial or executive capacity. Both the Act and the CIS regulations state that a first-line supervisor is not considered to be acting in a managerial or executive capacity merely by virtue of the supervisor's supervisory duties, unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

The petitioner initially indicated on its visa application that the beneficiary would be paid a salary of \$30,000 annually. However, on appeal, counsel submits an affidavit written by the chief executive officer of CompuVest, USA, which states that the beneficiary is being offered a salary of \$60,000 to serve temporarily as its network and overseas sales manager. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In conclusion, the evidence submitted by the petitioner fails to establish that the beneficiary will be employed primarily in a managerial or executive capacity. Consequently, the appeal will be dismissed.

Beyond the decision of the director, the minimal documentation of the parent's and the petitioner's business operations raises the issue of whether a qualifying relationship between the petitioner and the foreign entity still exists, and whether the foreign entity will continue doing business during the alien's stay in the United States. As the appeal will be dismissed, these issues 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.