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U.S. Citizenship
and Immigration
Services



FILE: WAC 02 095 51235 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



AUG 10 2004

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

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DISCUSSION: The Director, California 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 claims to be a subsidiary of Montana Computer Systems, located in Pakistan, and states that it is an importer and exporter of handicrafts, rugs, and carpets. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for an additional two years at a salary of \$27,000 per year. The director determined that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity. On appeal, counsel disputes the director's findings and submits a brief 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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) 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.

At issue in this proceeding 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 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.

On the petition the petitioner indicated that the beneficiary would oversee all of the company's operations. No additional information was submitted regarding the beneficiary's proposed job duties. Therefore, on March 4, 2002, the director issued a request for additional evidence instructing the petitioner to provide its organizational chart naming all of its employees. The petitioner was also instructed to indicate whether the beneficiary supervises managerial or professional employees, and to provide the job titles, educational levels, and job duties of the employees the beneficiary oversees.

The petitioner responded with a statement indicating that the beneficiary is supervising two individuals who perform duties of a non-professional nature. The petitioner stated that it is still in the early stages of development and therefore does not require a professional staff. Among the supporting documents, the petitioner provided letters from business owners in the same industry. The letters generally stated that educated and professional employees are unnecessary for this type of business. The petitioner also provided its organizational chart showing the beneficiary as the company's president. In the two subordinate positions are the corporate buyer and the person in charge of marketing. Although the chart lists positions for

“Employee #1” and “Employee #2,” there is no evidence that either position has been filled. The only two other employees actually named on the chart appear in the positions subordinate to “Employee #1” and “Employee #2.” Their duties consist of clearing overseas shipments through customs through a brokerage agent, transporting the merchandise to the store, checking the merchandise, and delivering each piece to its respective buyer. On May 8, 2002, the director denied the petition concluding that the record fails to establish that the beneficiary would be employed in a managerial capacity.

On appeal, counsel submits a statement indicating that the beneficiary makes all executive decisions on behalf of the petitioner and claims that the beneficiary is responsible for “all contracts with vendors, purchasing, marketing and placing the orders with the Pakistani manufacturers.” While this description lacks sufficient details regarding the beneficiary’s specific duties on a day-to-day basis, it clearly suggests that the beneficiary is directly performing the petitioner’s essential functions. 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). The petitioner has stated that it is in the initial stage of development. CIS regulations at 8 C.F.R. § 214.2(l)(3)(v)(C) allow the intended United States operation one year within the date of approval of the initial petition to support an executive or managerial position. The petitioner is not in its initial year of operation. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Furthermore, while the reasonable needs of the petitioner may require the beneficiary to perform the petitioner’s essential duties, they will not supersede the requirement that the beneficiary be “primarily” employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. Counsel has stressed the beneficiary’s decision-making power and overall discretionary authority with regard to all matters concerning the petitioner. However, the fact remains that the beneficiary has been performing and continues to perform the petitioner’s essential functions while directly overseeing employees that are not professional or managerial. The beneficiary does not primarily perform duties of a managerial or executive nature. For this reason, the petition cannot 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.