

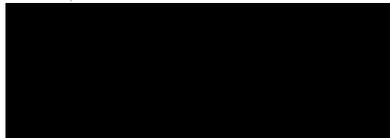
U.S. Department of Homeland Security
Citizenship and Immigration Services

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



FILE: LIN 02 229 50098 Office: NEBRASKA SERVICE CENTER Date: FEB 03 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 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 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be an importer and distributor of general merchandise. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and CEO. 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 continue to 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)(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.

* * *

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)(14)(ii) states that a visa petition under section 101(a)(15)(L) of the Act, 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 (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- 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 regulation at 8 C.F.R. § 103.2(b)(14) states, in part:

Where an applicant or petitioner does not submit all requested additional evidence and requests a decision based on the evidence already submitted, a decision shall be issued based on the record. Failure to submit requested evidence which precludes a material line of

inquiry shall be grounds for denying the applications or petition.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1999 and is an importer and distributor of general merchandise. The petitioner states that the U.S. entity is a subsidiary of Trade-in Africa International, located in South Africa. The petitioner declares three employees and claims \$900,000 in projected gross annual income. The petitioner seeks to extend its opportunity to employ the beneficiary as president and CEO for a period of two years, at a yearly salary of \$40,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been and will continue to 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.

The director determined that the evidence submitted by the petitioner was insufficient to establish that the beneficiary had been or would be employed primarily in a managerial or executive capacity. Based upon this determination, in a notice, dated August 22, 2002, the director requested that the petitioner submit additional evidence demonstrating that the United States firm and the foreign firm continue to be qualifying corporate organizations, a statement describing the staffing of the new operation, evidence of the financial status of the United States operation, and photos of the physical premises of the plant/office building in the United States. The petitioner was also notified that there would be no extension of time allowed in which to submit evidence in response to the director's request. The record establishes that the petitioner was given until November 17, 2002 in which to respond to the director's request for additional evidence. The record also

shows that the petitioner submitted a letter, dated November 12, 2002, in which a request was made for an extension of time to respond to the director's request. There is no evidence in the record to show that the petitioner submitted documentary evidence in response to the director's request for additional evidence. Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Evidence presented on appeal will not be considered and the record as presently constituted does not demonstrate that the beneficiary has or will continue to be employed primarily in a managerial or executive capacity.

The petitioner's evidence, as presented, is not persuasive. In evaluating the claimed managerial or executive duties of a beneficiary, Citizenship and Immigration Service (CIS) will look first to the petitioner's description of the beneficiary's job duties. 8 C.F.R. § 214.2(l)(3)(ii). The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. The following duties are without any context in which to reach a determination as to whether they are qualifying: responsible for establishing organizational goals and policies, chartered financial planning, established budget and expenditure control, negotiated major purchase and sales contracts, and set inventory at an optimum level. Furthermore, there is insufficient detail regarding the actual duties of the assignment to overcome the issues raised by the director. Without clarification or documentation to substantiate the petitioner's claims, the beneficiary's job duties listed cannot be construed as being managerial or executive in nature.

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a primarily managerial or executive capacity. 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. There is no evidence submitted to show the number of hours actually attributable to the beneficiary's alleged managerial duties. The petitioner claims that the beneficiary will continue to be the president and CEO 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 all the services for the business. As case law confirms, 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). In addition, there has been no evidence submitted by the petitioner that establishes the existence of other employees employed by the U.S. entity, other than the beneficiary. Tax records submitted by the petitioner demonstrate that no employee wages or salaries were paid during the 2000 and 2001 tax years.

Further, the petitioner's evidence is not sufficient in establishing that the beneficiary has been or will be managing a subordinate staff that will relieve him from performing non-qualifying duties. The director requested that the petitioner submit 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 that should include documented evidence showing names of employees. 8 C.F.R. § 103.2(b)(14). The record establishes that the petitioner did not submit additional documentary evidence in response to the director's request. Moreover, 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. Based upon the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Consequently, the appeal will be dismissed.

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.