

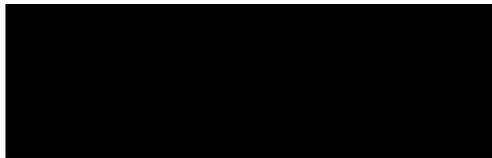
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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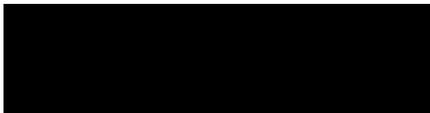
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536



FEB 03 2004

FILE: WAC 01 196 54867 Office: CALIFORNIA 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:



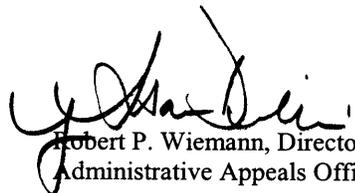
INSTRUCTIONS:

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

The petitioner is described as an exporter of meat and other food products to Japan. It seeks to employ the beneficiary temporarily in the United States as its director and manager of the import and export department. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary would be employed primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties 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)(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 1999 as an exporter of meat and other food products to Japan. The petitioner states that the U.S. entity is an affiliate of New World Co., Ltd., located in Japan. The petitioner declares three employees and \$8,526,392 in gross annual income. The petitioner seeks to employ the beneficiary's services as director and manager of its import and export department at a yearly salary of \$36,000.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary 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.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as

previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The record includes a letter of support dated April 13, 2001, that details the beneficiary's past and proposed position descriptions, which will not be repeated in detail as it is a matter of record. The description, in part, states the following:

Perform senior management duties and responsibilities involving the company's import/export activities.

Analyze present operations, estimated/realized revenues and operational commitments to ensure balanced operations.

Serve as senior management liaison with business and product marketing sections at the parent company to develop comprehensive import/export strategies.

Review consumer preference, marketing and sales reports to assess product quality and volume potential of specific grade meat product with marketability requirements.

Serve as a senior management liaison with major growers, associations and packaging facilities regarding purchasing, packaging and shipment procedures.

Organize conference between designated suppliers and 3-M inspectors to facilitate material inspection, substitution, and standardization of meat products.

Act as senior management liaison with American livestock producers to analyze custom feeding methods developed in the U.S. to produce marbled meat.

Make decisions based upon administrative audits, to review effectiveness of management controls and record keeping procedures for administration and operations activities.

The petitioner also submitted an organizational chart of the U.S. entity that depicts the beneficiary as the director, with the administrative staff, plant inspector, and sales staff as his subordinates. Although requested by the director, there has been no evidence submitted to establish the subordinates' job duties nor has there been documentation submitted to demonstrate the subordinates' titles or their correlation with the import and export department.

The director denied the petition stating that upon review, the evidence as provided did not demonstrate that the beneficiary's duties involved responsibilities that were primarily managerial or executive in nature. The director went on to state that the petitioner had provided no comprehensive description of the beneficiary's proposed job duties that would demonstrate that the beneficiary would be managing the organization, or managing a department, subdivision, function, or component of the company. The director concluded by stating that the submitted evidence was not persuasive in establishing that the beneficiary would be managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve the beneficiary from performing non-qualifying duties.

On appeal, counsel disagrees with the director's decision and submits a brief in support of his contention. Counsel argues that the petitioner provided clear and comprehensive descriptions of the beneficiary's proposed duties to demonstrate that he will manage an essential function for the organization. Counsel goes on to note that the beneficiary also has specialized knowledge of the foreign entity's operations and procedures. Counsel also restates the proposed job duties of the beneficiary while employed by the U.S. entity. Counsel asserts that the beneficiary, as director and manager of the import and export department, will direct and coordinate all import and export operations for the company involving export of beef products to the parent company and import of food products to the United States. Counsel further states that the beneficiary will manage and direct three specialist and staff personnel who will perform the actual functions of the import and export department. Counsel concludes by stating that the director erred in finding that the evidence of record failed to establish that the beneficiary would manage a subordinate staff of professional, managerial, or supervisory personnel where the evidence clearly demonstrated that the beneficiary would be managing an essential function of the organization.

Counsel's assertions are not persuasive. The record reveals that the U.S. entity was incorporated in 1999 and 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 viewed as an ongoing enterprise.

The record does not establish that the beneficiary will be primarily managing a function of the organization. The

beneficiary's job description depicts an individual in charge of the day-to-day services of the organization, not a functional manager. When managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function performed. The petitioner must demonstrate that the executive or manager does not directly perform the function. Although counsel argues that the beneficiary will be managing an essential function of the U.S. entity by overseeing the import and export department for the organization, the record does not demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. The petitioner has failed to provide a detailed position description specifying exactly what the management of the import and export department will entail and what percentage of the beneficiary's time will be spent performing managerial duties. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The record must further demonstrate that there are qualified employees to perform the function so that the beneficiary is relieved from performing non-qualifying duties. In the instant matter, the petitioner submitted an organizational chart of the U.S. entity that lists the administrative staff, plant inspector and sales staff as subordinate to the beneficiary. This evidence is non-descriptive and is insufficient to establish that there are qualified employees to relieve the beneficiary from performing the function of director and manager of the import and export department. Absent details concerning the beneficiary's and employees' position descriptions, daily activities, and percentage of time spent performing each duty, the record is insufficient to establish that the beneficiary will be managing rather than performing the function. *Matter of Church of Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

Furthermore, contrary to counsel's contentions, the record does not support a finding that the beneficiary qualifies under the supervisory managerial category pursuant to 8 C.F.R. § 214.2(I)(ii)(B)(2), in that he will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. There is no detailed description of the job duties to be performed by the subordinates listed as being under the beneficiary's direction within the U.S. entity. The record does not reflect the managerial, supervisory or professional status of any subordinates who will be supervised by the beneficiary. To the contrary, the record reflects that the beneficiary will continue to perform the services necessary to

maintain the petitioner's business. Position title alone is insufficient to establish that the beneficiary will be functioning primarily in a managerial or executive capacity.

On review of the record, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity. The vague and general outline of the beneficiary's position description is insufficient to establish that the beneficiary's proposed job duties are managerial or executive in nature. The petitioner has not provided persuasive evidence to establish that the beneficiary will be managing the organization, or managing a department, subdivision, function, or component of the company, at a senior level of the organization hierarchy. The record does not demonstrate that the U.S. entity contains the organizational complexity to support a managerial or executive position. While it is apparent that the beneficiary's experience is an asset to furthering the petitioner's business objectives, it does not appear at this time that the petitioner is prepared to sustain the beneficiary in a strictly managerial or executive capacity. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California, supra*.

The numerous assertions made by counsel are not supported by evidentiary facts. The assertions of counsel do not constitute facts. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The assertions of counsel without documentary evidence cannot be used to establish that the beneficiary is acting in a primarily managerial or executive capacity.

Finally, counsel contends that the beneficiary possesses specialized knowledge of the foreign entity's operations and procedures, in that he continues to assume management and specialized knowledge assignments involving trade and quality control inspection activities for meat products planned for import to Japan. Counsel further maintains that the beneficiary has acquired specialized knowledge from his experience working for the foreign entity.

The AAO notes that the petitioner filed the petition to seek classification of the beneficiary as a manager or executive (L-1A), not as an employee with specialized knowledge (L-1B). The petitioner cannot now on appeal seek a different classification

for the beneficiary in an attempt to conform to Citizenship and Immigration Services requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Accordingly, the AAO will not discuss further whether the beneficiary's employment would be in a specialized knowledge capacity.

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.