

U.S. Department of Homeland Security

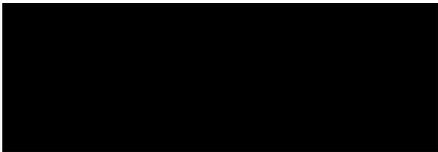
Citizenship and Immigration Services

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

PUBLIC COPY

FEB 11 2004



FILE: SRC 02 224 50813 Office: TEXAS SERVICE CENTER Date:

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]

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

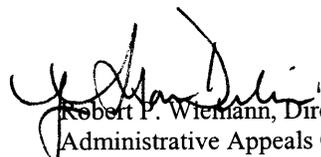
INSTRUCTIONS:

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

The petitioner is described as a tourist transportation business. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been or 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 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)(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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2001 as a tourist transportation company. The petitioner states that the U.S. entity is a wholly-owned subsidiary of Transacciones Ferreteras, S.R.L. The petitioner declares three employees. The petitioner seeks the continuation of the beneficiary's services as its president for three years, at an annual salary of \$30,000.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been or 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 petitioner provided a position description for the beneficiary as president of the tourist transportation company as follows:

Procedures, consistent with established policies and Board approval. Oversees the adequacy and soundness of the organization's financial structure. Reviews operating results of the organization, compares them to established objectives and takes steps to ensure that appropriate measures are taken to correct unsatisfactory results. Plans and directs all investigations and negotiations pertaining to mergers, joint ventures, acquisition of businesses or sale of major assets with approval of the Board of Directors. Establishes and maintains an effective system of communications throughout the organization. Represents the organization with major customers, shareholders, the financial community and the public.

In response to the director's request for additional evidence, the petitioner listed the beneficiary's job duties as follows:

1. Establishes current and long-range objectives, plans and policies, subject to approval by the Board of Directors.
2. Dispenses advice, guidance, direction and authorization to carry out major plans and procedures, consistent with established policies and Board approval.
3. Oversees the adequacy and soundness of organization's financial structure.
4. Reviews operating results of the organization, compares them to established objectives, and takes steps to ensure that appropriate measures are taken to correct unsatisfactory results.
5. Plans and directs all investigations and negotiations pertaining to mergers, joint ventures, the acquisition of businesses, or the sale of major assets with approval of the Board of Directors.
6. Establishes and maintains an effective system of communications throughout the organization.

7. Represents the organization with major customers, shareholders, the financial community and the public.

The petitioner also lists the job duties of the sales manager, who is subordinate to the beneficiary, and the driver, who is subordinate to the sales manager. The record shows that the sales manager was hired April 1, 2002 with an annual salary of \$15,600 plus commissions, and that the driver was hired June 1, 2002 with an annual salary of \$13,200.

An organizational chart for the U.S. entity depicts the beneficiary as president, with a sales manager, secretary and drivers listed as his subordinates.

The director denied the petition stating that upon review, the evidence as provided was deficient in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The director went on to state that the job description for the beneficiary indicates the beneficiary will be performing the day-to-day operations of the business itself, rather than managing or directing the organization.

On appeal, counsel disagrees with the director's decision and asserts that the evidence submitted supports a determination that the beneficiary's position has been and will be managerial or executive in nature. Counsel further contends that the beneficiary is a leader, and in being such, he manages and supervises other employees, money, property and operations of the business. Counsel also submits a copy of the Employer's Quarterly Federal Tax Return for 2002, which depicts wages and tips paid to three employees for the quarter ending June 30, 2002. The petitioner also submits an employee work schedule with a footnote which states "work schedule changes, depending on tourist season."

On review, counsel's contentions are not persuasive. 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). Going on record without 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). The assertions of counsel without documentary evidence cannot be used to establish that the beneficiary is acting and will be acting in a primarily managerial or executive capacity.

Further, while company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other pertinent factors such as the nature of the petitioner's business. Together, these factors can be used as indicators which help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant matter, the latter more accurately describes the beneficiary's role. The record demonstrates that the beneficiary's job duties overlap with that of his subordinate staff.

Although counsel contends that the beneficiary manages an employee, there has been no documentary evidence submitted detailing his supervisory responsibilities. The petitioner has provided no comprehensive description of the beneficiary's or the subordinate's duties that would demonstrate that he will be directing the management of the organization. There is no evidence submitted to show the number of hours attributed to each of the beneficiary's managerial and non-managerial duties. Although the petitioner has submitted an organizational chart depicting a sales manager as the beneficiary's subordinate, there has been no evidence submitted to show that the person supervised functions as a manager or performs duties sufficient to relieve the beneficiary from performing non-qualifying duties. There has been no evidence produced to show that the employees under the beneficiary's direction are full-time, year round workers. The evidence of record demonstrates that the beneficiary continues to perform the services of the organization as a transportation services provider, rather than as someone who directs the activities of the organization. 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). The record does not demonstrate that the petitioner is financially able to support a managerial or executive position. Based upon the evidence submitted it does not appear that the reasonable needs of the petitioning company would plausibly be met by the services of the beneficiary as manager or executive.

On review, it cannot be found that the beneficiary has been or will be employed primarily in an executive capacity. The petitioner's description of the beneficiary's duties are not supported by documentary evidence, and does not sufficiently

demonstrate that he directs the management of the petitioner. The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. The evidence does not establish an adequate distinction between the beneficiary's managerial and non-managerial duties. There is insufficient detail regarding the actual duties of the assignment to overcome the issues raised by the director. Duties described as establishes current and long-range objectives, dispenses advice and guidance, and reviews operating results are without any context in which to reach a determination as to whether they would be qualifying as executive in nature. There has been no evidence submitted to establish how the beneficiary is to carryout its duties.

Furthermore, the petitioner has provided no comprehensive description of the subordinate's duties that would demonstrate that the beneficiary will be directing the organization or a major component or function of the organization, that he will be establishing goals and policies, that he will be exercising a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals. Paraphrasing the regulation as a substitute for a day-to-day description of the beneficiary's job duties is insufficient to demonstrate the beneficiary is acting in a managerial capacity.

In summary, the petitioner's evidence is not sufficient in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The record does not demonstrate that the U.S. entity contains the organizational complexity or finances to support a managerial or executive staff position. The petitioner has not shown that the beneficiary 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. For this reason, 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.