

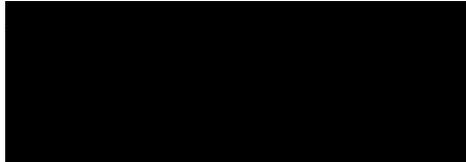
U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
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Washington, D.C. 20536

DM



FILE: EAC 02 220 50528

Office: VERMONT SERVICE CENTER

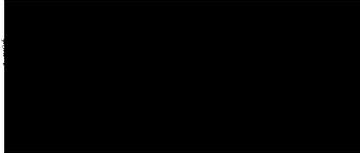
Date: FEB 11 2004

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:



PUBLIC COPY

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont 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 buyer and exporter of trucks and related automotive parts. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the evidence was not sufficient to establish that the beneficiary would be employed primarily in a qualifying managerial or executive capacity.

On appeal, the petitioner 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)(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.

* * *

The regulation at 8 C.F.R. § 214.2(1)(14)(ii) states that 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 (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 as a buyer and exporter of trucks and related automotive parts. The petitioner states that the U.S. entity is a subsidiary of El Sol Norteno S.R.I., located in Argentina. The petitioner declares four employees. The petitioner seeks the beneficiary's services as president of the organization at a yearly salary of \$35,000.

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.

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 submitted an organizational chart for the U.S. entity that depicts the beneficiary as president. The petitioner lists the beneficiary's job duties as: "makes major company decisions. Oversees and supervises all business operations." The

chart shows that the beneficiary has received a high school diploma, and a salary of \$2,150 per month. The chart also illustrates a sales manager, administrative assistant and chief mechanic as employees under the direction of the beneficiary. Job duties of the sales manager include: "supervises sales and transactions, public relations." Job duties of the administrative assistant include: "assists with administrative tasks, conducts daily office operations, make purchases." Job duties of the chief mechanic include: "maintains company fleet and mobilized units to different locations."

The petitioner also submitted copies of W-2 income tax forms which demonstrated that at the time the petition was filed, the U.S. entity employed three individuals.

The director determined that the record did not establish that the beneficiary had been and would continue to be employed in either a managerial or executive capacity.

On appeal, counsel asserts his disagreement with the director's decision and contends that the evidence establishes that the beneficiary has been and will continue to be employed primarily in a managerial or executive capacity. Counsel further contends that the beneficiary has been employed in an executive capacity as president of the U.S. entity.

Counsel also submits a position description that describes the beneficiary's job duties as following:

The President and CEO makes major decisions for the company, such as company's policies, financing, staff management, marketing, and defines the company's goals and objectives. He supervises sales and oversees customers' accounts. He is the top company officer. Mr. De Luca is also responsible for the company's relations with the headquarters in South America, foreign customers [sic] and resolves [or] intervenes in disputes or difficulties whenever present in a transaction with a customer.

Counsel's assertions are not persuasive. After the director requested additional documentation on this issue the petitioner failed to submit sufficient evidence. On appeal, counsel relies on evidence that was requested but not produced until after the initial decision to deny the petition was made by the director. The petitioner submitted position descriptions for the employees of the U.S. entity and a revised version of the entity's

organizational chart. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Citizenship and Immigration Services (CIS) cannot consider facts that come into being only subsequent to the filing of a petition. See *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998).

Pursuant to 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." 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). The petitioner's new evidence will not be considered and the record as presently constituted does not demonstrate that the beneficiary has been or will be functioning primarily in a 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 majority of the beneficiary's job duties entail sales and service on behalf of the U.S. entity.

Although counsel contends that the beneficiary supervises three employees, there has been no documentary evidence submitted detailing his supervisory responsibilities. The petitioner has provided no comprehensive description of the beneficiary's or the subordinates' duties that would demonstrate that he will be directing the management of the organization. There is no evidence submitted to show the percentage of time attributed to

each of the beneficiary's executive versus non-executive duties. Evidence of record does not establish that the three employees have received any type of professional training or education, nor does it show that they are managers or supervise a subordinate staff. There is no evidence to show that the three employees are full-time workers. Moreover, the evidence of record demonstrates that the beneficiary continues to perform the services of the organization as sales and marketing agent, rather than directing 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). 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 of the record, it cannot be found that the beneficiary has been or will be employed primarily in an executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he 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, 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. Duties described as makes major company decisions, defines company goals and policies, and supervises sales and oversees customers' accounts 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 presented to demonstrate what goals and policies have been and will be established by the beneficiary in his capacity. Counsel contends that the evidence demonstrates that the beneficiary's subordinates carry out the sales activities of the U.S. organization. However, the record does not support a finding that the subordinates are employed on a full-time basis by the U.S. entity. Nor is the record clear as to how much of the beneficiary's job activities involve non-executive duties in the absence of the subordinate workers. Counsel also asserts that the beneficiary, as president, exercises complete latitude in discretionary decision making such as staffing levels required to meet the goals of the organization. However, there has been no documentary evidence produced to substantiate counsel's claim.

In summary, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. 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 has been or will be serving in an executive capacity. The CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. Accordingly, 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.