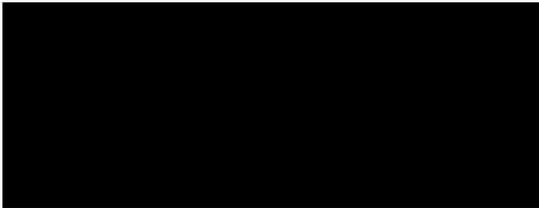


D7

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

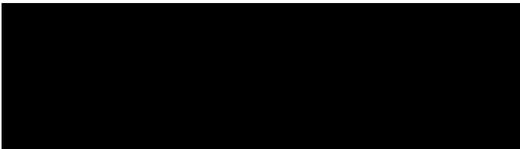


FILE: SRC 02 227 50151 Office: TEXAS SERVICE CENTER Date: MAR 31 2004

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:



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

DISCUSSION: The Director, Texas 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 is engaged in the business of building, operating, and marketing hotel and real estate property. It seeks authorization to employ the beneficiary temporarily in the United States as its vice president of purchasing. The director determined that the petitioner had not established that the beneficiary was employed abroad in a managerial or executive capacity for at least one year prior to filing the instant petition.

On appeal, counsel refutes the director's findings and submits evidence in support of his statements.

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.

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 (l)(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 within 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 services in the United States.

The U.S. petitioner states that it was established in 1987 and that it is an affiliate of Mayan Resorts, S.A. de C.V., located in Mexico. The petitioner seeks to employ the beneficiary in the United States for three years at an annual salary of \$70,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary was employed abroad in a managerial or executive capacity for at least one of the three years prior to filing the instant petition.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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.

In support of the petition, the petitioner stated that prior to his admission to the United States in 1997, the beneficiary was employed in a managerial capacity by the petitioner's foreign affiliate from September 1994 to May 1996. The petitioner also stated that the beneficiary entered the United States as a full-time student to attend Rice University and subsequently obtained a job with a U.S. company that was not affiliated with the current petitioner prior to being hired by the petitioner.

On July 30, 2002, CIS issued a request for additional evidence informing the petitioner that the evidence of record indicates that the beneficiary did not work for the petitioner's foreign branch or affiliate for any of the three years prior to filing the instant petition. The petitioner was instructed to explain and provide evidence

of what the beneficiary was doing from May 1996, when he stopped working for the petitioner's foreign affiliate, to July 2002 when the petition was filed.

The petitioner responded with a statement explaining that the beneficiary left his employment with the foreign affiliate in 1996 in order to attend a university in the United States as a full-time student. The petitioner further explained that upon completion of his four-year course of study, the beneficiary obtained "Optional Practical Training" status and went on to work with a U.S. company that is not affiliated with the petitioning organization. The petitioner stated that the beneficiary did not commence employment with the U.S. petitioner until September 2001.

On August 14, 2002, the director denied the petition concluding that the beneficiary has not worked one continuous year abroad with a qualifying organization within the three years prior to filing the instant petition. The director further noted that the record shows that the beneficiary entered the United States in 1996 for the purpose of pursuing an education, not to work for the petitioning organization or its affiliate.

On appeal counsel refers to the regulatory definition of *intracompany* transferee and claims that the beneficiary worked for the petitioner's foreign affiliate within the three years prior to his application for admission into the United States. However, counsel's interpretation of the regulatory definition is incorrect. Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(A) an *intracompany* transferee, in pertinent part, is defined as follows:

[Someone 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. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad by such periods shall not be counted toward fulfillment of that requirement. (Emphasis added).

The above definition clearly states that the beneficiary's admission to the United States must be for the purpose of working for a parent, branch, affiliate, or subsidiary of the entity abroad. In the instant case the beneficiary's initial admission to the United States was in order to pursue educational endeavors, not to work for the petitioner. Only after having completed his course requirements for a baccalaureate degree and subsequently obtaining other employment did the beneficiary seek employment with the petitioning organization. Although the one-year period would not have been considered as interruptive if the beneficiary's time in the United States prior to filing the petition was spent working for a branch, affiliate, subsidiary, or parent of the foreign employer, the beneficiary in the instant case clearly came to the United States to pursue an education. Therefore, the AAO must view the beneficiary's prior admission as an F-1 student as interruptive of the required one-year period.

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.