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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: SRC 03 182 52046 Office: TEXAS SERVICE CENTER

MAR 31 2004
Date:

IN RE: Petitioner:
Beneficiary



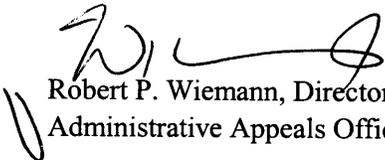
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision 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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prevent clearly unwarranted
invasion of personal privacy**

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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 claims to be engaged in retail, investment, and import and export of merchandise. 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 established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits a statement in support of his assertions.

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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) 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 (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (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 U.S. petitioner was established in October 2001 and states that it is a subsidiary of Christian Keul, GMBH, located in Germany. The initial petition was approved and was valid from June 21, 2002 to June 20, 2003, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$30,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed primarily in a managerial or executive capacity.

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.

The petitioner failed to provide a description of the beneficiary's duties, past or present, in support of the initial petition. Consequently, on June 25, 2003, CIS issued a request for additional evidence. The petitioner was asked to describe its staffing level, including names, titles, and job duties of its employees, as well as the hours worked per week, and the dates they were hired. The petitioner was also asked to provide a copy of its organizational chart, its W-2 forms for the last year and a percentage breakdown of the beneficiary's specific duties.

The petitioner's response included a list of the beneficiary's job duties. As the director included that list of duties, verbatim, in her decision, the AAO will not restate the list in this discussion. The petitioner also provided an organizational chart, and a list of names and dates of hire for all employees current at the time of the response. However, as noted by the director, the petitioner failed to submit the percentage breakdown of the beneficiary's duties and it failed to provide job duties for any of the petitioner's other employees. Furthermore, even though the petitioner listed a vice president on the organizational chart, it failed to provide a W-2 tax statement for that individual. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The director denied the petition noting the deficiencies in the petitioner's response to CIS's request for additional evidence. The director concluded that the petitioner failed to submit sufficient evidence that the beneficiary has been and would be employed in a managerial or executive capacity. The director affirmed that determination in response to the petitioner's motion to reopen.

On appeal, the petitioner resubmits the statement submitted on motion and additionally states that the beneficiary directly supervises the import and export department as well as the company's vice president. However, the petitioner has failed to submit any evidence establishing the employment of a vice president. Simply 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 petitioner also failed to provide a percentage breakdown of the beneficiary's duties as requested in the request for additional evidence. It is noted that failure to submit requested evidence, which precludes a material line of inquiry, shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Although the petitioner has now chosen to comply with CIS's request for job descriptions for all of the petitioner's employees, failure to comply with this request when it was initially made allows the AAO to disregard that evidence when submitted on appeal. Therefore, the AAO may adjudicate the appeal based on the record of proceedings before the director. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, it may file a new petition. As the petitioner in the instant case failed to submit evidence requested by CIS, the newly submitted job descriptions of the petitioner's employees will not be considered.

On review, 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. The petitioner is a retail operation that is also involved in the import and export of goods. Although the petitioner maintains that the beneficiary is not directly involved in the day-to-day tasks associated with importing and exporting and claims that it employs a staff to handle the non-qualifying tasks, it failed to provide job descriptions of the beneficiary's subordinates. Without this crucial information the director was unable to determine who was performing the necessary day-to-day operational tasks. While the beneficiary's job description does not affirmatively name any non-qualifying tasks, the description was entirely too broad to convey any understanding at all of what the beneficiary has been and will be doing on a daily basis. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act.

As the beneficiary's job description does not name any specific job duties, the record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the

organization. Nor has the petitioner demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. Furthermore, the petitioner's quarterly federal tax return for the third quarter, the quarter during which the instant petition was filed, indicates that the petitioner had only one employee. Therefore, the record does not clearly establish that the petitioner had a staff that would relieve the beneficiary from performing non-qualifying duties. Although the petitioner's subsequent quarterly tax returns indicate that the petitioner's work force increased to a total of five employees by the fourth quarter, eligibility must be established at the time of filing. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248 (Reg. Comm. 1978). Thus, the AAO cannot consider employees whose employment commenced after the petition was filed. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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.