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U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: SRC 01 225 61819 Office: TEXAS SERVICE CENTER Date **MAR 31 2004**

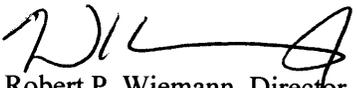
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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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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 an import and export company and a representative of U.S. companies. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its "International Business Manager." The director determined that the petitioner had not established that the U.S. position meets the standards to be considered managerial because there is no evidence that the beneficiary supervises and controls the work of other supervisors, professionals, or managerial employees.

On appeal, counsel argues that the beneficiary qualifies as a manager as evidenced by the duties listed and because the beneficiary supervises a sales manager.

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 (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.

Furthermore, 8 C.F.R. § 214.2(l)(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 (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 United States petitioner was incorporated in 1998 and states that it is a subsidiary of Futuro Trading Importer and Exporter Ltd., located in Brazil. The petitioner indicated one employee on the Form I-129. The initial petition was approved in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for 2 years.

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

Because the petitioner is applying for extension of L-1 status granted under the criteria of a "new office", the Request for Evidence specifically asked for the following:

Evidence that the foreign company is currently engaged in business operations (regular systematic and continuous provision of goods and services). Submit current financial records, such as tax returns, annual reports, profit and loss statements, other accountant reports, banking records etc.

Evidence of the current lease for the United States entity.

Evidence of the staffing level in the United States. Give position titles and duties of all employees. (include copies of the State Quarterly Income Tax returns for the past year, which lists all employees by name). [sic]

Describe duties of the beneficiary for the past year. Indicate the percent of time he/she has spent performing each duty.

Evidence of the business conducted by the United States entity during the past year, such as copies of corporate income tax returns, accountant statements, invoices, bills of sale, bills of lading, shipping receipts, etc.

Though the petitioner responded to some of the director's requests for evidence, the petitioner did not provide evidence of the staffing level for the U.S. company as well as the position titles and duties for all employees. Additionally, the petitioner did not provide the requested description of the beneficiary's duties for the past year as well as the percentage of time the beneficiary spent performing each duty. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Based on the evidence provided by the petitioner, the director determined that the U.S. position did not meet the standards to be considered managerial as there is no evidence to show that the beneficiary supervises and controls the work of other supervisors, managers or professionals. The director determined that the petitioner failed to demonstrate that the beneficiary was employed in a managerial or executive capacity.

On appeal, counsel states that the petitioner is in compliance with its business plan as submitted to the INS (now CIS) with its initial filing. Counsel argues that the U.S. company's business has grown exponentially and that it added a sales manager to its staff which brings its total of U.S. employees to two.

On appeal, counsel argues that:

It should be noted that the addition of a supervision of a function in the company as a basis for executive L-1 status was made by the 1990 Act, and that the new law bars decisions on executive capacity to be made exclusively on the basis of the number of employee supervises [sic], and if staffing levels are considered in making a determination, they must be considered in relation to the reasonable needs of the business and its stage of development.

Counsel's arguments are not persuasive. It is not clear if counsel is arguing that the beneficiary is managing a function. The petitioner did not clarify which function the beneficiary manages. Additionally, counsel alleges that the director based her decision exclusively on the number of employees supervised by the petitioner. The AAO notes that at the time of filing, the petitioner stated that it had one employee. However, as stated by the

director, “when determining whether a position is primarily managerial or executive, [CIS] must look beyond the stated job title and consider the actual day-to-day duties being performed as well as the overall size and scope of the business operation.” The director further explained “ [w]hen a company has a very limited number of employees, it becomes questionable as to whether the business is engaged primarily in managerial or executive duties.” The petitioner did not submit evidence that it employed any subordinate staff members that would perform the actual day-to-day, non-managerial operations of the company. An employee who primarily performs the tasks necessary to produce a product or to provide services 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 on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as the manager and only employee. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to section 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

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 an import/export company and a representative of U.S. companies. The beneficiary has been the sole employee of the U.S. company from the time of its incorporation in 1998 until this instant petition was filed in July 2001. In the appeal, counsel states that a sales manager has been hired and will be supervised by the general manager. However, the sales manager was not hired until after the filing of this petition. Because the sales manager was not listed as an employee at the time the instant petition was filed and counsel stated that the sales manager was not hired until after the request for evidence was answered, the additional employee does not support the claim that the beneficiary has been performing in the capacity of a manager or executive. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Further, the records reveals that at the time of filing the petition, the petitioner did not have a staff sufficient to relieve the beneficiary from performing non-qualifying duties. Petitioner hired a sales manager after the initial petition was filed. 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.” The evidence supplied by the petitioner demonstrates that the beneficiary was performing and continued to perform non-qualifying duties at the time the petition was filed. An employee who primarily performs the tasks necessary to produce a product or to provide services 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).

Additionally, 8 C.F.R. § 214.2(1) (3) (v) (C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. At the time of filing the

instant petition, the petitioner had not reached the point that it could employ the beneficiary in a predominately managerial or executive position.

On appeal counsel states that:

As General Manager and foreign company's U.S. representative, the beneficiary oversees hiring and firing of staff; negotiates contracts for business expansion; receives and reviews purchase orders from customers in Latin America; oversees the purchase and delivery of goods on an international basis; oversees inventory and quality control; and oversees the visits and contacts of the sales manager with vendors in the U.S. The Sales Manager is supervised by the General Manager .

The fact that an individual operates a small business does not necessarily establish eligibility for classification in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly performing the operations of the organization, as mentioned above. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. For these reasons, 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.