

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

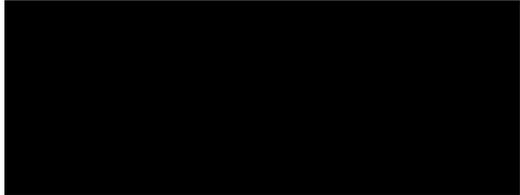


U.S. Citizenship
and Immigration
Services

PUBLIC COPY

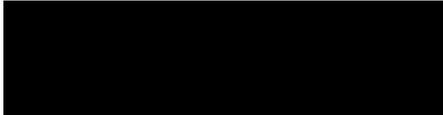
DM

MAY 18 2004



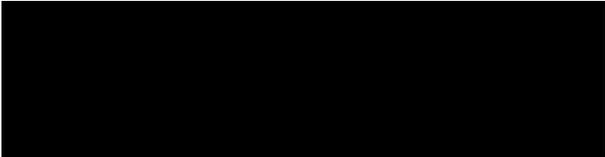
FILE: SRC 02 245 52252 Office: TEXAS SERVICE CENTER Date:

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

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 appeal will be dismissed.

The petitioner in the instant case is a construction and remodeling business seeking to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director denied the petition based on the determination that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity.

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 petitioner was incorporated in the state of Florida in 2001. The initial petition was approved for a one-year period from August 2001 to August 2002. The petitioner now seeks to extend the beneficiary's stay for an additional two years at an annual salary of \$30,000.

The issue in this proceeding is whether the petitioner has established that the beneficiary would be employed 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.

In support of the petition, the following description of the beneficiary's proposed job duties was provided:

[The beneficiary] is on the [petitioner's] executive committee which sets all corporate policies, as well as directs and develops the courses and administration of the institution, exercising wide latitude in discretionary decision-making process. She has directed and coordinated the activities of the U.S. company to obtain optimum efficiency and economy of operations. [The beneficiary] is also responsible for enforcing and structuring the company's policies and objectives in accordance to the guidelines set by the Boards [sic] of Directors.

In 2001, [the beneficiary] performed the aforesaid job duties approximately 70% of her full-time work schedule. She was responsible for reviewing activity reports and financial

statements to determine the progress of the U.S. company and carried out these job duties approximately 30% of the time.

[The beneficiary's] executive duties also include representing our company at meetings and business conferences in an attempt to establish our name and network within the industry in the United States. She has used her business connections as well as private sector acquaintances to develop the market recognition to energize our projects. Her ability to create a market has proved to be essential to the company's overall success. Furthermore, she has been gathering information regarding competitors and customers, and has been preparing reports for the Colombian parent company.

On October 16, 2002, CIS instructed the petitioner to provide additional information regarding its five employees by issuing a request for additional information. The petitioner complied with CIS's request by submitting a list of its current employees, their position titles and brief job descriptions, as well as the position titles and job descriptions for positions to be filled in the future. The petitioner also provided an organizational chart indicating that the beneficiary's immediate subordinates include a commercial department manager, a field operations manager, and an accounting manager. The following job description was attributed to the beneficiary:

The CEO must set goals of [sic] company to accomplish instructions mandated by the Board of Directors and the foreign parent company. Among her functions, the CEO must plan and organize all activities involved to manage [sic] company and personnel. CEO must develop ways to control all, internal and external aspects that can influence in the succes [sic] of the company.

The director denied the petition, noting that the petitioner did not submit evidence to establish that the beneficiary's subordinates will consist of supervisory, professional or managerial employees. Although the petitioner listed a purchasing assistant and financial assistant on the organizational chart, neither of those positions had been filled at the time the petition was filed or at the time the petitioner responded to the request for additional information. Therefore, despite what their position titles may indicate, neither the commercial department manager nor the accounting manager was overseeing subordinate employees. Since the organizational chart and the beneficiary's job descriptions suggest that a significant portion of her job would involve personnel management, the AAO must determine whether the individuals the beneficiary would manage are professional. According to section 101(a)(32) of the Act, the term "profession" includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teacher of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

In the "Strategic Plan," submitted in support of the petition, the petitioner indicated that the position of field operations manager would require at least two years of college and five years of construction supervisory experience. This education requirement suggests that the field operations manager does not fit the above definition of the term *professional*. The petitioner did not provide any education requirements for the accounting manager, and accordingly, has not shown that this individual's position requires a four-year degree. Thus, two out of three of the beneficiary's subordinates do not fit the above definition of

“professional.” Based on the information submitted, the AAO cannot conclude that the beneficiary’s subordinate personnel is largely comprised of managerial, supervisory, and/or professional individuals.

On appeal, counsel submits a brief emphasizing the beneficiary’s significant role in the petitioner’s overall progress. This point, however, is not disputed by the AAO. The issue now is whether the petitioner has reached a stage of development where it can afford to allow the beneficiary to focus on primarily managerial or executive duties rather than daily operational tasks she was initially performing when the petitioning entity had been operating for less than one year. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). In the instant case, the newly provided description of the beneficiary’s job duties indicates that three hours of the beneficiary’s day will be devoted to meeting with the commercial department, and another two hours will be devoted to meeting with the financial department. Since there is no indication that additional employees have been hired to work in either of these departments, the AAO cannot conclude that the managerial titles of the beneficiary’s subordinates are a true indication of their roles within the petitioning organization. As neither employee can be deemed *professional*, as defined above, the AAO can only conclude that at least 50% of the beneficiary’s day is spent managing employees that are not managerial, supervisory, or professional. At least one hour of the beneficiary’s day is spent meeting with clients and prospective clients. However, these tasks are associated with individuals who function as sales people or customer service representatives, not managers or executives as these terms are defined by statute and regulations. *See* 8 U.S.C. § 1101(a)(44)(A) and (B). As more than half of the beneficiary’s day is spent performing job duties that cannot be deemed managerial or executive, the AAO cannot conclude that the beneficiary primarily performs managerial or executive duties. For this reason, the petition cannot 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.