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MAY 18 2004



FILE: SRC 02 272 51187 Office: TEXAS SERVICE CENTER Date:

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

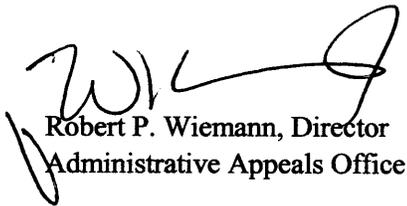
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

**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 was established in the year 2000 and is engaged in the business of freight forwarding. It seeks to extend its authorization to employ the beneficiary temporarily in the United States for an additional two years as its commercial manager. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. On appeal, counsel disputes the director's findings and submits a brief 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.

At issue in this proceeding is whether the petitioner has established that the beneficiary will 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 petitioner provided the following description of the beneficiary's past and proposed duties:

- To manage the Commercial Department of the company at an executive level, establishing goals, policies and administrative rules;
- To hire and dismiss at his discretion;
- To create and install organizational structures;
- To implement systems and methods for work optimization;
- To supervise and control the work of all the professionals that he will employ;

- To select and contract suppliers of goods and services;
- To identify and select new products;
- To establish budgets, market and sales strategies;
- To analyze and resolve work problems, or assist workers in solving work problems;
- To initiate or suggest plans to motivate workers to achieve work goals;
- To determine or initiate personnel actions, such as promotions, transfers, discharges, and disciplinary measures;
- To orient [sic] staff to comply with Brazil and Florida laws and regulations; [sic]

As he has made [sic] so far, [the beneficiary] also, [sic] will create methods and systems to improve the organization and will be involved in planning marketing strategies and in the business budgets [sic].

The petitioner submitted an organizational chart, a tax return, and a number of other supporting documents. However, after reviewing the record, the director denied the petition concluding that the petitioner failed to submit sufficient evidence to establish that the beneficiary would primarily be performing managerial or executive duties. The director noted that based on the petitioner's stage of development at the time of the filing of the petition, the commercial department had not expanded to the point that it required the services of a "bona fide" commercial manager.

On appeal, counsel asserts that the beneficiary is at the top of the petitioner's hierarchy, subordinate only to the company's president and stockholders. Counsel further claims that the petitioner does not have a "specific commercial department" and states that the beneficiary is really a general manager who manages all of the company's departments. However, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities on appeal. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

The petitioner claims that all of the company's executives, supervisors, and independent contractors are under the beneficiary's control. However, the petitioner has provided no information about the duties or educational requirements of the beneficiary's subordinates. Merely providing the employees' position titles does not establish that the beneficiary's subordinates are professional or supervisory personnel, as claimed. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). Furthermore, the petitioner has submitted no documentary evidence to show that it has hired contractors, nor has the petitioner specified what services the claimed contractors allegedly performed. Going on record without supporting documentary evidence is not sufficient for purposes 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 states that its relatively small staff is reasonable in light of the company's early stage of development. However, 8 C.F.R. § 214.2(l)(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. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Further, the petitioner disputes the director's finding that three out of five of the company's employees carry executive or managerial titles, which reflect the functions performed. However, a further review of the organizational chart indicates that the director's calculation was incorrect. While three of the employees listed have managerial or executive titles, only two of those employees are actually employed in the United States. The remaining three employees listed on the organizational chart do not have managerial or executive titles. Accordingly, the director's comment in regard to this matter is hereby withdrawn.

Finally, the petitioner submits a breakdown of the beneficiary's daily activities indicating the number of hours allocated to each activity. However, the breakdown indicates that the beneficiary maintains regular communication with the company's "most important clients/suppliers;" conducts research on new techniques and technology that is relevant to the petitioner's business; allots two hours per day during his lunch time to contact prospective customers and main suppliers; and conducts research to assist with marketing the petitioner's services. Taken together these duties consume a large portion of the beneficiary's day. 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 evidence submitted, the AAO cannot conclude that the beneficiary primarily performs managerial or executive duties. 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.