

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

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



U.S. Citizenship
and Immigration
Services



[Handwritten signature]

File: WAC 02 161 52477 Office: CALIFORNIA SERVICE CENTER

Date: **OCT 01 2004**

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)

IN 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.

[Handwritten signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in 1995. It designs, manufactures, and distributes costume jewelry. It seeks to temporarily employ the beneficiary as its sales and manufacturing vice-president. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims to be affiliated with Swedish, British, and Hong Kong companies.

The director denied the petition concluding that the record did not establish that the beneficiary had been employed at least one continuous year abroad with a qualifying organization within the three years preceding the filing of the petition. The director observed that the beneficiary had been admitted into the United States on December 5, 1999 and had remained in the United States for a period of three years as an F-1 student.

On appeal, counsel for the petitioner complains that the director's request for additional evidence was unlawful and improper and the petition should not be denied based on the petitioner's response to the request for evidence. Counsel also asserts that the entire record and the applicable law support the proposition that the beneficiary meets the requirements of 8 C.F.R. § 214.2(l)(3)(iii).

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in this proceeding is whether the beneficiary was employed in a managerial or executive capacity for one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

The petitioner initially stated that the beneficiary had been employed by the petitioner's affiliates in Sweden and England in a managerial capacity from June 1998 to June 2000.

The director requested additional evidence including the foreign entity's payroll records for the year preceding the filing of the petition for L-1 status. The director specifically requested the date when the foreign entity hired the beneficiary.

In response, the petitioner clarified that the initial data regarding the beneficiary's foreign employment was incorrect. The petitioner listed the beneficiary's dates and places of employment as:

June 1998 to December 1998 – Sesam England
January 1999 to September 1999 – Sesam, Sweden
October 1, 1999 to November 30, 1999 – Sesam, England
April 30, 2000 to June 14, 2000 – Sesam England
May 1, 2001 to August 17, 2001 – Sesam Sweden

Counsel for the petitioner asserted that, as a matter of law, an employer-employee relationship for purposes of L-1A classification does not require the employer to pay wages to the employee citing *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Counsel also submitted two documents showing that the beneficiary had been paid £3,420 in the tax year "to April 2000" and had been paid £7,200 for work during January 1999 to June 1999.

The director determined that the beneficiary had not worked full time for one continuous year within the three years preceding the filing of the petition on April 15, 2002. As noted above, the director observed that the beneficiary had been in the United States in an F-1 student capacity since December 5, 1999.

On appeal, counsel for the petitioner asserts that the petitioner had met its evidentiary burden with the documentation initially submitted. Counsel argues that the director must articulate specific areas of deficiency before it can shift the burden of evidence production back to the petitioner. Counsel contends that even if the director properly requested additional evidence, the initial evidence and evidence in response to the director's request support the contention that the beneficiary had at least one continuous year of full-time employment abroad within the three years preceding the filing of the petition.

Counsel also cites the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) that states in pertinent part:

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 but such periods shall not be counted toward fulfillment of that requirement.

Counsel interprets the word “brief” to include any stay in the United States for the majority of nonimmigrants because the majority of nonimmigrants must have a residence in a foreign country which they have no intention of abandoning. Counsel interprets the words “trips to the United States for pleasure” to include trips to the United States for education. Counsel supports this interpretation by noting that 8 C.F.R. § 214.2(l)(1)(ii)(A) does not specifically define “pleasure trips.”

Counsel’s assertions are not persuasive. First, the regulation states that a petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Moreover, the 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). The director requested information concerning an inherent inconsistency in the initial record. On the one hand, the petitioner claimed that the beneficiary had been working for its affiliates prior to filing the petition and yet the beneficiary’s most recent immigration status indicated the beneficiary had been a student in the United States. The inconsistency relates to an essential element of eligibility. Ignoring such a glaring inconsistency would have resulted in gross error on the part of the director. The director properly requested further evidence to establish that the beneficiary had been employed abroad for one continuous year in a full-time managerial or executive capacity.

Second, in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner’s partial response to the director’s request for evidence substantiates that the beneficiary did not work full time for one continuous year for the foreign entity within the three years preceding the filing of the petition. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Third, counsel’s interpretation of the word “brief” and the words “trips for pleasure” in an attempt to finesse the eligibility requirements of this visa classification lacks basic common sense. We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). The AAO will not attempt to set out an exact definition of the word “brief.” Suffice it to say that an individual whose work history included breaks of five months in the third year preceding the filing of the petition (April 15, 1999 – April 14, 2000); ten months in the second year preceding

the filing of the petition (April 15, 2000 – April 14, 2001) and nine months in the year immediately preceding the filing of the petition (April 15, 2001 - April 14, 2002) has not had a “brief” interpretation of his employment abroad; rather the majority of each year was not spent working for the foreign employer. Likewise counsel’s stretch to extend the F-1 visa requirements for students to include the B-1 visa requirements for nonimmigrants for business or pleasure is without merit. The AAO will not circumvent the plain meaning of the regulations to allow study pursuant to an F-1 classification to convert into a B-1 classification for a trip for pleasure.

The petitioner has not established that the beneficiary worked full time for one continuous year within the three years preceding the filing of the petition on April 15, 2002

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.