



U.S. Citizenship  
and Immigration  
Services

57

[Redacted]

FILE: EAC 02 127 53343 Office: VERMONT SERVICE CENTER Date:

OCT 14 2004

IN RE: Petitioner:  
Beneficiary:

[Redacted]

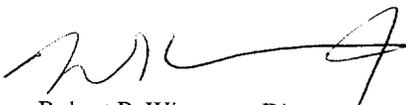
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

**PUBLIC COPY**

identifying data deleted to  
prevent disclosure of unclassified  
information and protect privacy

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Vermont 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 importer and exporter of agribusiness products, services, and solutions. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its chief executive officer (CEO) and president. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been or would continue to be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will continue to be managerial or executive in nature.

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)(1)(ii) states, in part:

*Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary 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 (1)(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 with 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 serves

in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 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 (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- 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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2000 as an importer and exporter of agribusiness products, services, and solutions. The petitioner claims that the U.S. entity is a subsidiary of Shree Chem Pest (India), Ltd. The petitioner declares four employees with a gross annual income of \$65,056.00. The petitioner seeks to extend the beneficiary's services as CEO and president for a period of two years, at a yearly salary of \$50,000.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity has been and will continue to be primarily managerial or executive in nature and whether the U.S. entity can support such a position.

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.

The petitioner stated that the beneficiary has been and will continue to be CEO and president in charge of management and business development for the U.S. and foreign entities. The petitioner submitted as evidence a payroll list for the U.S. entity, dated January 23, 2002, Corporate Income Tax Return Form 1120 and Form 941, sample brochures of the company's product, and copies of invoices, purchase orders, and other business correspondence relative to the U.S. entity doing business.

The director determined that the petitioner had not submitted sufficient evidence to decide the beneficiary's eligibility, and thereafter requested that the petitioner submit additional evidence pertaining to the beneficiary's position descriptions and duties performed.

In response to the director's request for additional evidence, the petitioner provided a summary of the beneficiary's responsibilities to include:

Providing Strategic Leadership:

- Develop, evaluate and execute business expansion/growth ideas
- Identify capital management and financing alternatives
- Optimize manufacturing and production processes
- Evaluate and enhance competitive position
- Build/grow sales and marketing infrastructure
- Maintain close relationship with the Government/Licensing authorities

Implementation of Strategies, as approved by the Board of Directors, and Business/Operation Management:

- Develop, implement and manage operating policies and procedures
- Recruit, train, and manage professional staff
- Select vendors, oversee raw material procurement process, and manage inventory levels
- Identify distributors, customers and manage relationship
- Plan production and define quality control standards
- Determine product pricing levels
- Set advertising and promotional policies
- Establish/maintain Banking relationships
- Authorize procurement of fixed assets

The Board of Directors has delegated significant responsibilities as well as authority to [the beneficiary] as a President and CEO, including the following:

- Developing/implementing corporate strategy, operating policies, and procedures
- Hiring/firing, training, managing the employees
- Managing banking relationship and authority to commit cash/capital/borrow/invest funds, authorizing/purchasing fixed assets
- Overseeing and optimizing procurements, selecting suppliers, and evaluating quality control
- Deciding product pricing, sales and promotion policy
- Overseeing marketing, sales and customer/distributor relationship

The petitioner stated that the beneficiary had hired three new employees including, an analyst, office manager, and market research specialist who each work 40 hours per week. Their duties are described as:

**OFFICE MANAGER:** Reports directly to [the beneficiary] and manage day-to-day operations of all of the office activities including, effectively communicating with the customers, and suppliers; execution of the orders; billing and collection; accounts payable, bills payment and banking activities; effectively resolving office issues; and managing one research analyst.

**MARKET RESEARCH:** Reports directly to [the beneficiary] and [is] responsible for market researcher [sic] and analysis. She is responsible for evaluating competitive environment for new and innovative products/services as well as suppliers/vendors, viability of the new business prospects, and customer need. Her market survey on used off road vehicles export initiative has resulted into one of the success story [sic] in the first six months of our operations.

**ANALYST:** Reports to the office manager and is responsible to [sic] conduct detailed research and analysis related to existing clients as well as new initiatives and clients. She also helps the office manager in other office activities.

The petitioner further stated that the U.S. entity has employed and will continue to employ external consultants for certain project assignments, and professional service providers such as accountants and lawyers, as necessary. The petitioner provided an organizational chart of the U.S. entity that depicts the beneficiary as president and CEO, with an office manager, research analyst, and market research specialist under his direction. The petitioner also submitted as evidence copies of W-2 tax forms for the year 2001 that demonstrates wage and tax statements

for four employees of the U.S. entity. The petitioner submitted copies of business correspondence, invoices, purchase orders, and other business and tax documents pertaining to the U.S. entity.

The director determined that the record contained insufficient evidence to demonstrate that the beneficiary had been or would continue to be employed primarily in a managerial or executive capacity. The director stated that the evidence failed to show that the U.S. employees were employed on a full-time basis. The director further stated that the description given of the employees' duties were insufficient to establish that the beneficiary's position had been or would be executive or managerial in nature. The director surmised that the U.S. entity did not employ any sales representatives, and that therefore, it was likely that the beneficiary was primarily engaged in providing sales services to the U.S. entity's clients, rather than directing the organization as asserted by the petitioner. The director stated that the beneficiary could not be said to be engaged in primarily executive duties a preponderance of the time and that the business had not expanded to the point where the services of a full-time, bona fide executive would be required. The director further stated that the petitioner had not established that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who would relieve him from performing the services of the organization.

On appeal, counsel disagrees with the director's decision. The petitioner states that the beneficiary is president and CEO of the U.S. entity and that he has 17 years of experience in Indian agribusiness. The petitioner also states that the beneficiary has complete discretionary authority in the following areas:

- Developing/implementing corporate strategy, operating policies, and procedures
- Hiring/firing, training, reviewing the work of the employees
- Managing banking relationships/and making investment decisions
- Establishing procurement procedures, selecting suppliers, and evaluating quality control
- Deciding product pricing, sales and promotion policies
- Overseeing the development of marketing, sales and customer/distributor relationships

The petitioner further states that the beneficiary retains the following responsibilities at the foreign entity:

- Developing, evaluating and executing business expansion/growth ideas
- Identifying capital management and financing alternatives
- Optimizing manufacturing and production processes
- Evaluating and enhancing our competitive position
- Building and maintaining our sales and marketing infrastructure

The petitioner asserts that 28 people work under the beneficiary in India. The petitioner also asserts that the beneficiary has in the past year been devoting himself to international enterprise development, strategic planning for the U.S. entity, and recruiting and directing the research necessary for long range planning. The petitioner further contends that the beneficiary has not been performing the sales function for the U.S. entity in that such function is still being performed and supported by the foreign entity. The petitioner did not submit any additional evidence on appeal.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive position. The record reveals that the petitioner is filing for a new office extension and therefore has been doing business for one year prior to the filing of the petition.

Therefore, it is not to be considered a new office pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(F) for purposes of evaluating the beneficiary's proposed position. The petitioner infers that the U.S. entity is still in its developmental stages. However, 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Service 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 case, the petitioner has failed to present sufficient evidence to establish that it has reached the point where it can employ the beneficiary in a predominantly managerial or executive position.

The petitioner has not provided a comprehensive description of the beneficiary's purported job duties. The beneficiary's position description is too general and broad to establish that the preponderance of his duties will be executive in nature. The following duties are without any context in which to reach a determination as to whether they would be qualifying as executive: develop and implement corporate strategy; hire, fire and train new employees; manage banking relationships; establish procurement procedures; and decide product pricing. Further, there is insufficient detail regarding the actual duties of the assignment to overcome the objectives of the director. There is no indication from the record how much of the beneficiary's time will be devoted to performing each task. The petitioner stated that the beneficiary is not only responsible for performing duties for the U.S. operations, but that he still performs duties for the foreign entity. 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. *Fedin Bros. Co., Ltd. V. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id. at 1108*. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervising personnel who can relieve him from performing non-qualifying duties. The evidence shows that there is an office manager, market research specialist, and analyst who are employed by the U.S. entity. However, the record does not reflect that the employees are professional, maintain supervisory positions, work on a full-time basis, or that they take direction from the beneficiary in performing their duties. The petitioner admits that it utilizes the services of outside contractors on an as needed basis. In addition, the duty descriptions given for the other employees are vague and general and are insufficient to establish that the beneficiary is relieved to perform executive duties.

Furthermore, there has been no evidence submitted to demonstrate that the U.S. entity will be in a position to remunerate the beneficiary for his services pursuant to 8 C.F.R. § 214.2(1)(14)(ii)(E). Tax records submitted by the petitioner reflect that in 2001 the U.S. entity realized gross receipts and sales in the amount of \$27,756 and paid out a total of \$20,750 in compensation for officers and salaries and wages. Evidence in the record demonstrates that the beneficiary's salary is to be \$50,000 per year. Based upon the evidence submitted it does not appear that the petitioner is in a position to remunerate the beneficiary for his services or that the reasonable needs of the petitioning company would plausibly be met by the services of the beneficiary as executive.

The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he would be establishing goals and policies, that he will be exercising a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Paraphrasing the regulations as a substitute for a day-to-day description of the beneficiary's job duties is insufficient to demonstrate the beneficiary is acting in an executive or managerial capacity. *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); *Avyr Associates, Inc. v. Meissner*, 1977 WL 188942 at \*5 (S.D.N.Y.). There has been no evidence presented to demonstrate what goals and policies have been and will be established by the beneficiary in his capacity or the percentage of time he has to devote to such tasks.

The record does not demonstrate that the beneficiary primarily manages an essential function of the organization. Although the petitioner stated that the beneficiary will be primarily responsible for managing the long-range planning and development of the business, and will also establish and implement corporate strategy, the record reflects that the beneficiary continues to perform the duties necessary to establish the business. Evidence submitted by the petitioner demonstrates that the beneficiary's signature appears on the majority of the U.S. entities financial and business records. The petitioner has failed to provide sufficient documentary evidence to show how the beneficiary manages the finances or how and why the sales function of the U.S. business continues to be performed and supported by the foreign entity.

Based upon evidence submitted on the record, it appears that the beneficiary will be performing the services of the U.S. entity rather than serving as its president and CEO. 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). The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the organization. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Accordingly, the petitioner has failed to demonstrate that the beneficiary will be employed primarily in a qualifying executive capacity. For this reason, the appeal will be dismissed.

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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.