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

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Citizenship and Immigration Services

[redacted]

D7

FILE: SRC 02 208 51356 Office: TEXAS SERVICE CENTER Date: AUG 10 2004

IN RE: Petitioner: [redacted]
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:

[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

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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its executive vice president as an L-1A 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 is a corporation organized in the State of Florida and claims to be a supplier of telecommunications services and accessories. The petitioner states that it is a branch of Marcell Comunications, located in Venezuela. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity. On appeal, the petitioner disputes the director's findings.

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 would be employed 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.

In the supplement to Form I-129, the petitioner indicated that the beneficiary's proposed duties would include marketing and establishing business contacts. No additional evidence was provided to further explain the beneficiary's duties. Therefore, the director issued a request for additional evidence on September 11, 2002. He instructed the petitioner to submit its W-2 tax forms for the prior year, a description of the beneficiary's specific duties, a percentage breakdown of time spent performing such duties, and to discuss the number of employees the beneficiary supervises and their duties. The director also asked the petitioner to identify who is actually selling its products.

In response, the petitioner submitted the following breakdown of the beneficiary's job duties:

To process the annual budget of Income and Debits. Four days by year

To control its fulfillment. One hour daily.

To make sure that the area managers make their budgets and do their responsibilities. Daily, two hours.

To authorize all expenses of the [c]ompany. Weekly 2 hours.

To make contacts with national suppliers for the purchase of national merchandise. Weekly 3 hours.

To search for new suppliers of merchandise in the exterior. 1 hour daily.

To hire new employees. Occasionally, 4 hours (it includes final interview).

To look for events in order to increase the sales. Monthly, variable . . . .

To coordinate the accomplishment of the events. Monthly, variable . . . add 2 more days.

To look for new opportunities of market. Daily, 3 hours.

To look for financing sources for the company, when necessary. Occasionally, variable . . . .

To give authority to the legal adviser. When necessary.

To meet monthly with the accountant to evaluate the development of the management. Monthly, 3 hours . . . .

To train the managers, when it corresponds , on new products. [sic]. Monthly, four hours.

The petitioner stated that the sale of its product is the responsibility of the sales manager and provided an organizational chart, which indicated that the beneficiary's subordinates include an accountant, a sales manager, a legal advisor, and a technical manager. The petitioner provided the names of the technical and sales managers, as well as W-2 tax forms for the beneficiary and the technical manager.

On December 10, 2002 the director denied the petition based on the determination that the beneficiary would not be employed in a managerial or executive capacity.

On appeal, counsel states that the beneficiary oversees the work of two subordinate managers, makes the company's policies, sets up the company budget, and has a high degree of discretion over the growth and general business direction of the company. Counsel also asserts that the director erred in concluding that the petitioner failed to submit proof that the beneficiary has subordinate managerial employees.

As stated above, the record shows that the petitioner submitted a W-2 tax form for [redacted] who the petitioner claims occupies the position of technical manager. However, aside from providing [redacted]

position title and salary information, the petitioner provided no evidence to show that the beneficiary's subordinate is employed as a manager, other than in position title. Thus, while the record shows that the petitioner does, in fact, employ [redacted] the director properly concluded that the petitioner failed to establish that the petitioner employs him in a managerial capacity, and it provided no evidence at all to prove that it has filled the position of sales manager. 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).

Furthermore, 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). In the instant case, the list of duties provided indicates that the beneficiary would actually perform the essential functions of the petitioning entity. Namely, the beneficiary would be expected to search for suppliers, enter into contracts with the suppliers, search for means to increase the company's sales, and coordinate the events that would fulfill that end. While these tasks may be essential to the success 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. Although the organizational hierarchy of the petitioner suggests that the beneficiary has discretionary authority over every aspect of the business, the fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee 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 would be primarily directing the management of the organization. While the petitioner indicated that the sales function will be handled by the sales manager, the record suggests that the sales manager was hired in January 2002, which was nearly five months after the petition was filed. 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). The record indicates that a preponderance of the beneficiary's duties would be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary would be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he would be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

It is noted that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's original petition expired on February 23, 2002. The petition for an extension of the beneficiary's L-1A status was filed on July 10, 2002, almost five months following the expiration of the beneficiary's status. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously

accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed, the beneficiary is ineligible for an extension of stay in the United States.

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.