

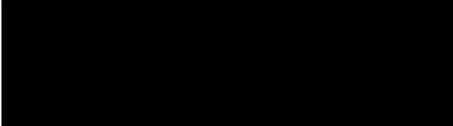


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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC 99 180 52256

Office: CALIFORNIA SERVICE CENTER

Date: 4 - MAR 2002

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:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is engaged in the purchase and sale of automobiles, spare parts and other products and services including automobile registrations. The petitioner seeks to employ the beneficiary temporarily in the United States as its manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's denial was arbitrary and capricious and that the beneficiary is clearly a managerial employee.

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.

8 C.F.R. 214.2(1)(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.

The petitioner is a California corporation, incorporated in January of 1999. The petitioner filed its petition in June of 1999. The director requested additional evidence July 16, 1999 and the petitioner responded in September of 1999. The director made her decision February 8, 2000 and noted that since the petitioner had been doing business for approximately one year at the time of the decision, the business would not be considered under the regulations covering the start-up of a new business. It is also noted that the petitioner indicated that the beneficiary was not coming to the United States to open a new office.

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

The petitioner initially described the beneficiary's job duties in

the petition as follows:

1. Manage the Company's day to day operations,
2. Oversee the staff,
3. Assure that the set standards and guidelines are met.
4. Coordinate the work of outside Contractors and vendors who are engaged to perform service,
5. Ensure that the inventory is up-to date,
6. Maintain good relations with the Clients and cater to their needs,
7. Active involvement in the company's overall business growth.

The director requested copies of the petitioner's Internal Revenue Service (IRS) Form 941 and Form D-6 evidencing wages paid to the petitioner's employees. The director also requested the petitioner's organizational chart, a list of employees including names, job titles, brief job duties and nonimmigrant status.

In response to the director's request, the petitioner provided a copy of the IRS Form 941 for the quarter ending June 30, 1999 showing four employees for that time period. The petitioner also provided a list of five employees, including the beneficiary in the proposed position. The petitioner further provided an organizational chart depicting the proposed beneficiary as general manager, and including an office manager, salesperson and two office clerks.

The director determined, based on the petitioner's type of business and the small number of employees, that the beneficiary would be involved and participating in the day-to-day non-executive aspects of the business. The director further determined that the beneficiary would not be primarily serving in a managerial capacity, since the individuals under her direction were not serving in a supervisory, managerial or professional capacity.

On appeal, counsel for the petitioner asserts that based on the job description stated in the petition, the beneficiary will be serving in a management capacity. In addition, counsel asserts that coordination of employees, vendors and contractors for quality and timeliness as well as coordination of inventory for timeliness is quintessentially a managerial function. Counsel further asserts that keeping good relations with clients and involvement with business growth strategy are also upper management and executive level functions. Counsel concludes by contending that the employee clearly manages essential functions of the employer's organization. Counsel also includes a revised organizational chart as of March 2000 showing the petitioner employs three salespeople and three office clerks.

Counsel's assertions are not persuasive. Counsel's description of the proposed beneficiary's job duties is not sufficient to

warrant a finding of managerial or executive job duties. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, the description of job duties found in the petition is vague and general in nature, essentially serving to paraphrase elements of the regulatory definition of managerial and executive capacity. No concrete description is provided to explain what the beneficiary will actually do in the day-to-day execution of her position. It appears that the beneficiary is performing the necessary operations of the petitioner. The record reveals that at the time of filing the petition, the petitioner did not have a staff sufficient to relieve the beneficiary from performing non-qualifying duties. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing or directing the management of a function, department, subdivision or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy.

Further, 8 C.F.R. 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." As noted above, the information submitted with the petition and in response to the director's request for evidence is insufficient to establish the beneficiary will be acting in a managerial or executive capacity. The addition of two employees sometime after the decision of the director does not enhance the beneficiary's eligibility for this classification at the time the petition was filed.

Beyond the decision of the director, it does not appear a qualifying relationship between the petitioner and the foreign entity has been established. Counsel for the petitioner in response to the director's request for evidence indicates that though the parent company's shares of the petitioner have been issued, the shares are not yet fully paid. This statement draws into question, whether a qualifying relationship has been established. As the appeal will be dismissed for the reason stated above, this issue need not be examined further.

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.