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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

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

[redacted]

File: SRC 01 153 50277 Office: TEXAS SERVICE CENTER Date: JAN 08 2003

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)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision 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.

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 that 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 that 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, Texas Service Center and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a plastering contractor that seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director concluded that the petitioner had failed to demonstrate that the United States company or the foreign entities were doing business. The director also found that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner submits an updated accountant's letter, financial statement for the year ended June 30, 2000, various 2001 invoices and business advertisements for Partridge Plastering UK, the foreign entity abroad. The petitioner also submits updated accountants statements through September 30, 2001, general ledger reports, numerous work orders rendered by the company, proposals prepared by the company, numerous customer reference letters and copies of checks issued by the firm. The petitioner states that the director incorrectly applied the definition of executive capacity to the facts in this case and requests that the visa petition be approved.

The petitioner has submitted sufficient evidence to establish that the United States company and the foreign entity were doing business at the time the visa petition was filed.

The remaining 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

iii. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner described the beneficiary's duties in the United States as follows:

With regard to Mr. [redacted] position in the US, [redacted] is the President/CEO [redacted] Inc. As such, he is solely responsible for managing, developing and directing all aspects of the company. As is typical of the President/CEO position, [redacted] is the most senior manager/officer in the enterprise. However, given our early stage of development, [redacted] is also directly involved in daily construction operations and management; including all aspects of estimating, bidding, purchasing, scheduling, hiring, firing, training, and personnel supervision.

While we expect [redacted] daily duties to gravitate more towards administration and firm development as [redacted] grows and additional levels of management are added, he currently spends approximately 75% of his time at job sites managing the construction

> operations of the enterprise (i.e. scheduling work, scheduling labor, purchasing materials, meeting with and reporting to clients and project owners, troubleshooting, and supervising the progress of construction). The remaining 25% of his time is spent administering the company (i.e. directing the firm's outside accountants, banking, budgeting, purchasing and securing equipment and tools, identifying additional revenue streams such as the Aquatic Technologies agreement referred to in our original submission, marketing, meeting with prospects, bidding jobs, etc.).

On appeal, the petitioner submits an average breakdown of the beneficiary's daily agenda as follows:

> In a usual day I start at approximately 5:30 am, getting a general layout for my staff, including who will be on what project performing certain tasks, and who will be supervising work if I am tied up in meetings with owners, engineers, architects as such. I start my staff and give them their appropriate work orders between 6:30 and 7 am. Generally I have meetings or communicates, coordinating work with other trades or owners change orders between 7 am and on some occasions up to noon time. If on other occasions I have time available I am estimating and biding new contracts, banking deposits or making necessary telephone calls.
>
> In the afternoon most of my time is going round the certain ongoing projects making sure everything is running smooth and answering any questions or quires customers or my staff may need, also planning what materials are needed for the following days work. Later on in the day I make other necessary phone calls or afternoon estimates I may have, and try to make a final round on the ongoing projects to make sure everything has been finished and clean up has taken place, that all tools are cleaned and are securely stored away with any materials or scaffolding.
>
> In the evening I am taking care of billing to customers and bids that have to be mailed out along with receivables and any overdue invoicing that I may have, also still answering phone calls and messages left on my answering machine. Time permitting I am also trying to have deliveries for jobs set up or actually having one of my staff go and collect from a supplier, I also go thru the staffs paperwork to make sure everything is in order and prepare payroll as needed on Thursday, I (sic) time permits I have also to train some of my staff to better improve our overall service to the public.

> All this does not include any permits I have to obtain, incoming calls, and interviewing prospective staff, all in all makes my day on average from 5:30 to late evenings some time past midnight for 6 days a week on average.

The petitioning entity was incorporated on October 25, 1999. The U.S. Corporation Income Tax Return for 2000 shows that during 2000, the gross receipts or sales for the business only totaled $46,773. No salary or wages were paid during that period. At the time the visa petition was filed on April 16, 2001, the petitioner indicated the corporation had two employees. The record shows that the petitioner paid $10,184.50 to subcontractors From January through June 2001. The petitioner provides W-4's and I-9's for three employees that it hired on a permanent basis in July 2001.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity nor that he will supervise professional employees.

The record does not establish that a majority of the beneficiary's duties will be managing or directing the management of the organization. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. Based on the evidence submitted, it cannot be found that the beneficiary will be employed in a primarily executive or managerial capacity. 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.