



IDENTIFICATION

U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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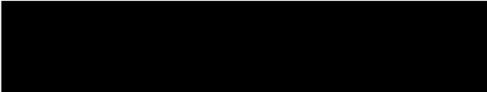


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Office: TEXAS SERVICE CENTER

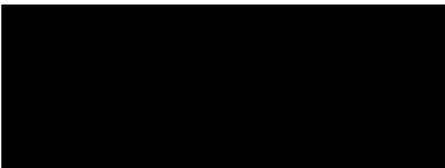
Date: JAN 13 2011

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 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. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a freight forwarding corporation that seeks to continue to employ the beneficiary in the United States as its president. The director determined that the petitioner had not established that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel states that the director's denial of the petition was arbitrary, capricious and an abuse of discretion. Counsel further states the decision denying the petition to extend L-1A status for a non-immigrant managerial/executive intracompany transferee was in error. Counsel submits evidence that the petitioner uses several independent contractors to pack and transport shipments, prepare customs clearance documentation, and to perform accounting work for the corporation. Counsel argues that this relieves the beneficiary from performing these duties.

Counsel indicates that the director did not acknowledge the position of [REDACTED] as General Manager who relieves the beneficiary of non-qualifying duties. Counsel also indicates that the director failed to consider the fact that the beneficiary will manage two supervisory employees who will be carrying out the essential company functions. Counsel states that one of the two employees is a subordinate General Manager who reports directly to the beneficiary and the other is a Shipping Assistant who supervises the work of independent contractors.

Counsel's citing of various unpublished decisions do not support his assertions. Unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

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 issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity.

The petitioner was incorporated on November 8, 1999 in the State of Florida. The petitioner now seeks to extend the petition's validity and the beneficiary's stay for an additional two years.

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

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 describes the beneficiary's proposed job duties as follows:

1.) To direct all functions of the Miami office, including sales, administrative, financial and personnel functions;

2.) To exercise complete decision making authority regarding these functions, including goal setting and performance review monitoring;

3.) To plan develop and establish policies and objectives in accordance with corporate charter;

- 4.) Supervise and direct activities of subordinate managers and personnel;
- 5.) Direct and establish financial and fiscal policies;
- 6.) Supervise compilation of financial data and reporting of same;
- 7.) Establish hiring and firing standards and administer same;
- 8.) Plan and develop public relations policy designed to improve company's image and relationship with clients.

The record indicates that the beneficiary will be responsible for directing and coordinating the activities of the company including sales, purchasing, administrative, financial, and personnel. The petitioner indicates that the percentages of time that the beneficiary will spend in directing and coordinating the company's activities and delegating responsibilities to further attain goals are apportioned as follows:

- (1) Sales, 30%
- (2) Human Resources, 10%;
- (3) Accounting/Financial, 20%;
- (4) Shipping 20%; and
- (5) Administrative, 20%.

On May 2, 2001, the date the visa petition was filed, the firm employed only two persons. Additionally, during 2000, the corporation only paid salary and wages of \$3,640 and officer compensation of \$17,500. At the time the visa petition was filed, the firm employed two persons including the beneficiary. The director determined that the petitioner had failed to establish that the beneficiary was managing a subordinate staff of professional, managerial or supervisory personnel who relieved him from performing non-qualifying duties.

The description of the beneficiary's job duties is insufficient to warrant a finding that the beneficiary will be employed in a managerial capacity. Given the nature of the business, the fact that the petitioner used several independent contractors to pack and transport shipments, prepare customs clearance documentation, and to perform accounting work is unremarkable. It appears, at most, the beneficiary will be performing operational rather than managerial duties. The petitioner has provided insufficient evidence to establish that the beneficiary has been or will be managing or directing the management of a function, department, subdivision or component of the company.

Based upon the record, the petitioner has not provided evidence that the beneficiary will be managing a subordinate staff of professional, managerial or supervisory personnel who relieve him

from performing non-qualifying duties. The beneficiary is the individual performing the necessary tasks for the ongoing operation of the company, rather than primarily directing or managing those functions through the work of others.

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.