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U.S. Department of Justice

Immigration and Naturalization Service

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

PUBLIC COPY

[redacted]

File: EAC 01 256 54434 Office: VERMONT SERVICE CENTER Date: JAN 30 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 [redacted]

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

The petitioner is a construction and maintenance company. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its executive manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the director's denial was erroneous and claims that the beneficiary primarily performs qualifying duties. Counsel has submitted a supporting brief.

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(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 (l)(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.

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 (l)(1)(ii)(G) of this section;
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> (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.

The U.S. petitioner states that it was established in the year 2000 and that it is a wholly-owned subsidiary of Supreme Construction Company, located in Jakarta, Indonesia. The petitioner declares four employees and $200,000 in gross revenues. The initial petition was approved and was valid from September 14, 2000 to September 14, 2001, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of $45,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

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:

> 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 support of the petition, counsel stated that the beneficiary has "hired three employees in the office," as well as "few more contractors on daily wages." Counsel further states that "the duties of the beneficiary are primarily concerned with all of **SCT's** Marketing." (Emphasis in original.) Overall, counsel summed up the beneficiary's duties as "running the day-to-day management, marketing, and administration as well as client negotiation ...." The petitioner's supporting documentation contains the employer's quarterly tax returns for the quarters that ended March 31 and June 30, 2001, both indicating that the petitioner employed three employees and paid quarterly wages totaling over $16,000. The petitioner also submitted a photocopied advertisement soliciting business for the petitioning organization. The advertisement indicates that anyone interested in the services provided by the petitioner should contact the beneficiary directly.

On September 4, 2001, the Service issued a notice which stated, in part, that the record does not establish that the beneficiary will be employed in a managerial or executive capacity. Therefore, the Service instructed the petitioner to submit additional evidence, including a comprehensive description of the beneficiary's proposed duties, and the petitioner's organizational chart, listing all of

its employees by name and position title. The notice specified that the petitioner should include a complete job description for each employee, accompanied by an hourly breakdown of time spent performing each duty on a weekly basis.

In response to the request, counsel submitted a brief asserting, in part, that the petitioner's "reasonable needs" must be taken into account and that the number of employees supervised does not determine eligibility for an L-1A visa classification. Counsel stated that, aside from the beneficiary, the petitioner employs an assistant manager, an administrative manager, and a marketing and sales assistant. Counsel provided the following description of the beneficiary's duties in the United States:

> The beneficiary has authority to hire and fire any staff member. The beneficiary directs the whole organization about the systems and the style and workable conditions for finishing work. The beneficiary makes arrangement for making contracts with the parties arranging meetings, suggesting the way of work and arrangements for the work to be done.

Counsel also discussed the petitioner's contract to build a Sikh Temple which requires "specialized material" that the beneficiary can provide by virtue of his contacts with the petitioner's foreign counterpart. Although the petitioner resubmitted many of the tax documents submitted earlier, it did not provide position descriptions for the beneficiary's three subordinates. Nor did it provide the petitioner's organizational chart or hourly breakdowns of duties for any of the petitioner's employees, including one for the beneficiary. It is noted that failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. 103.2(b)(14).

Furthermore, where a petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, the Service will not consider evidence submitted on appeal for any purpose. Rather, the Service will adjudicate the appeal based on the record of proceedings before the director. See Matter of Soriano, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, the petitioner may file a new petition.

The director denied the petition, noting that the petitioner did not provide pay stubs for any of the beneficiary's claimed subordinates, thereby preventing the Service from being able to determine whether such employees work on a full-time basis. The director concluded that even though the beneficiary may be performing certain discretionary duties, he will primarily be "consumed with non-qualifying duties" and therefore does not qualify for L-1A visa classification.

On appeal, counsel submits a brief in which he reasserts his prior argument that the number of employees supervised does not determine eligibility as an intracompany transferee. While this is true, counsel's argument does not apply to the circumstances of the instant case. 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. Regardless of the size of the petitioning organization, the petitioner maintains the burden of establishing that the beneficiary does not primarily carry out the day-to-day duties needed to provide the petitioner's product or service.

In the appellate brief, counsel states that the beneficiary's duties include communicating with clients, preparing contracts, contacting manufacturers and suppliers, and arranging "for the finalization of contracts with the parties as well as working as a liaison arranging client meetings, suggesting the way of work and making arrangements for the work to be done." Despite the beneficiary's discretionary authority over the petitioner's personnel and overall business goals, the recurring theme of the beneficiary's duties indicates the petitioner's need for the beneficiary to perform nonqualifying tasks. Counsel's assertion that the "beneficiary is the only person who is managing the US entity in all respects" is not supported by any evidence. Simply 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). This is particularly true in light of the description of the beneficiary's duties which suggest that he is actually selling the petitioner's services, overseeing the non-professional employees hired to perform the services, and dealing with customers in regards to the services provided. 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, as it currently stands, indicates that the beneficiary's primary duties are not qualifying. While two of the beneficiary's subordinates have been given managerial titles, thereby giving the impression that they perform managerial duties, the petitioner has not provided their job descriptions so that the Service can conclude whether they perform any of the managerial duties implied by their position titles.

On review, the record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily

supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. The petitioner has not demonstrated that it has reached or will reach 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. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. 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.

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.