



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 00 090 53045 Office: CALIFORNIA SERVICE CENTER Date: **DEC 17 2001**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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]

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. Weimann, 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 described as a manufacturer, supplier and retailer of hand crafted dental prosthetics. The petitioner seeks to employ the beneficiary in the United States as its sales manager. The director determined that the petitioner had failed to demonstrate that the beneficiary would function in a primarily managerial or executive capacity.

On appeal, the petitioner disagrees with the director's determination and asserts that the duties and responsibilities of the position of sales manager within the company qualifies the position at an executive or managerial level.

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 United States petitioner was incorporated in October of 1997 in Guam. The petitioner declared four employees and a gross income of approximately \$66,740 for its fiscal year ending in August of 1999. The petitioner seeks to employ the beneficiary as its sales manager.

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

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

In the February 7, 2000 petition, the petitioner described the beneficiary's job duties as follows:

[S]he will . . . negotiate contracts with the clinics for longer-term commitments to buy the company's products. She will develop a sales brochure and arrange for its printing and distribution, then make follow-up telephone surveys of the customers to arrange meetings and demonstrations at their offices. [The beneficiary] will also perform a critical liaison function with our Japan affiliate, and prepare reports to them.

The petitioner also indicated the beneficiary would perform other job duties as described above. It is unclear what job duties are being referred to in this reference. The petitioner also attached an organizational chart showing that the proposed sales manager would supervise one sales clerk.

The director determined that the information provided by the petitioner was insufficient to show that the beneficiary would function in a managerial or executive capacity or that the beneficiary's duties would be primarily managerial or executive in nature.

On appeal, counsel asserts that the beneficiary's duties and responsibilities as sales manager are such that she will be performing at an executive level. Counsel elaborates on the description of the beneficiary's duties as follows:

[The beneficiary], as Sales Manager, will direct the management of an essential function of the organization. The employer . . . is engaged in the unique business of fabricating dental prosthetic devices for dentists' use on their patients. While other managers and employees are engaged in the actual production of these very specialized devices and in maintaining quality control, [the beneficiary] will be solely responsible for the other essential function of the company, which is sales.

[The beneficiary] will establish the goals and policies of the sales department, to ensure that the company creates and maintains a close relationship with its customers. Her duties will include developing and implementing sales plans and programs, which are designed to achieve the goals and growth potential of the company. She will be solely responsible for directing the sales department in such a manner as to increase the company's current market share.

[The beneficiary] will exercise complete discretion in decision making at an executive level. She alone will set the goals of the sales department, and she will decide on procedures to be followed to make the company successful. Included in her areas of discretion are complete authority over all personnel matters in her

department, such as work assignments and hiring/firing [sic]. She will also be solely responsible for negotiating the terms of sales contracts and executing those agreements, with the goal of having clinics enter into long-term commitments with the company to secure a reliable future supply of dental prosthetic devices and products.

[The beneficiary] will receive only general supervision from higher level executives. . . . [I]n a small company like this the managerial and executive duties of several people often overlap. Actually there are only two primary managers in the Guam company, the Sales Manager and the Operations Manager. . . . At those times when the Operations Manager is not on Guam, [the beneficiary] will be tasked with all the duties of being an all-around general manager of the company. At those times, she will be responsible for independently making decisions which [sic] direct and manage all aspects of the daily function of the company. She will also report to and coordinate decisions with the higher-level management in Japan.

Counsel further maintains that the beneficiary has met the definition of managerial capacity in that she will be managing and supervising an essential function of the organization as sales manager. Counsel indicates that the beneficiary's authority to hire and fire and to recommend personnel actions for those in her department, and her discretionary authority over daily operations of both her department and at times of the entire company, satisfies the remaining elements of the definition.

Counsel's assertions are not persuasive. The record does not support the assertion that the principal duties of the beneficiary are executive and managerial in nature and 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). Counsel's description of the job duties is not sufficient to warrant a finding that the beneficiary will be functioning at a managerial or executive level. The description of job duties is vague and general in nature, essentially serving to paraphrase the elements of the regulatory definition of managerial and executive capacity. No concrete description is provided to explain what the beneficiary will do in the day-to-day execution of her position.

The record reflects that at most the beneficiary will be primarily performing the necessary tasks to sell dental prosthetics. The record does not demonstrate that the beneficiary is primarily directing, or managing, the sales function through the work of others as opposed to performing the function herself. Counsel's assertion that at times the sales manager will be required to act as general manager is not supported with documentary evidence. 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). On review, the record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization or managing an essential function of the petitioner.

The district court decision, Mars Jewelers, Inc. v. INS, 702 F. Supp. 1570, 1574 (D.C.N.Ga., 1988), referred to by counsel does not support a finding in the instant case that the beneficiary will be primarily managing or directing an essential function of the petitioner. As noted above, counsel has not provided a comprehensive description of the beneficiary's actual daily duties and has not provided evidence that the beneficiary will not be performing the essential sales function for the petitioner.

Counsel also refers to an unpublished decision to support the claim that the beneficiary is managing an essential function of the petitioner. However, the record does not provide detailed information that demonstrates that the facts of the instant petition are analogous to those in the unpublished decision. Counsel instead has recited the language used in the unpublished decision to conclude that the beneficiary is managing an essential function. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

On review, the record demonstrates that the beneficiary is primarily performing the sales function of the petitioning organization as opposed to primarily directing, or managing the function through the work of others. The record, further reveals that the beneficiary's duties have not been established as the duties of one who functions or will function at a senior level within an organizational hierarchy other than in position title.

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.