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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



FILE: SRC 01 065 52941 Office: TEXAS SERVICE CENTER Date: **AUG 20 2003**

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)

ON 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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition (L-1A). The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, [REDACTED] states that it is the subsidiary of a Chinese business, [REDACTED], Ltd. The petitioner describes itself as an exporter of petroleum equipment and machinery. The U.S. entity was incorporated on October 1, 1999 in the State of Texas. In December 1999, the U.S. entity petitioned the Bureau to classify the beneficiary¹ as a nonimmigrant intracompany transferee (L-1A). The Bureau approved the petition as valid from December 21, 1999 until December 20, 2000. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for three years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's procurement manager at an annual salary of \$30,000. On July 19, 2001, the director determined, however, that the beneficiary did not qualify as an executive or manager. Consequently, the director denied the petition. On appeal, petitioner's counsel asserts that the beneficiary is an executive or manager and that the director undercounted the number of employees which the petitioner employs in the United States.

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 meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

Under 8 C.F.R. § 214.2(1)(3), an individual petition filed on Form I-129 shall be accompanied by:

¹ The name [REDACTED] appears on various documents throughout the record. [REDACTED] is apparently an adaptation of the beneficiary's name.

(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.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Pursuant to 8 C.F.R. § 214.2(1)(14)(ii), a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied by:

(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.

The issues in this proceeding are: (1) whether the petitioner has employed or will employ the beneficiary in an executive capacity in its United States subsidiary; and (2) the number of employs petitioner has working in its Houston office.

The AAO will first address the issue of whether the beneficiary has been and will be primarily performing managerial or executive duties. 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.

When examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(1)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In this instance, counsel's March 20, 2002 brief asserts that the beneficiary will be serving as a manager and an executive; therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of each capacity.

The petitioner's Form I-129 did not describe the beneficiary's proposed duties; instead, the petitioner described the duties in a December 11, 2000 letter. In relevant part, the letter states:

[The beneficiary] is holding the position of the Procurement Manager of [REDACTED] [and is] fully responsible for the business operations of the company in terms of technical aspects. This includes a series of market surveys and feasibility studies, marketing the parent company's products in the United States, introducing advanced U.S. technology to China and organizing professional

technical training for Chinese workers, etc. In the capacity of the Procurement Manager of the company, [the beneficiary] is also working with the General Manager to plan all the technical activities of the company, design and invent new technologies, promote and market the present high technologies of the parent company. In addition, [the beneficiary] is exercising a wide latitude in discretionary decision-making and has authority to negotiate and procure the technology. He also has the power to hire and fire prospective local employees on behalf of the company. Since his arrival in [the] U.S., he has been . . . researching the U.S. market through telephone, [I]nternet, and traveling around the country. He has already signed several Letters of Intent and draft contracts with several U.S. companies.

The petitioner's description of the beneficiary's proposed duties largely paraphrase the statutory and regulatory executive and managerial requirements. For instance, the petitioner asserted that the beneficiary would exercise "a wide latitude in discretionary decision-making" and the power "to hire and fire" prospective local employees on behalf of the company. Going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, the petitioner submitted virtually no evidence to verify the beneficiary's proposed duties. For example, the petitioner submitted no copies of marketing or feasibility studies and no samples of designs or inventions which the beneficiary has completed. Similarly, the petitioner provided no lesson plans demonstrating that the beneficiary actually trains Chinese workers. The petitioner supplied no records establishing dates on which the beneficiary introduced U.S. technology to China or marketed the parent company's wares in the United States. Additionally, the record fails to specify what U.S. technologies the beneficiary is introducing to China or what Chinese technologies the beneficiary is marketing in the United States. In sum, the petitioner provided no supporting

evidence to explain how these general tasks qualify as managerial or executive.

Moreover, the AAO further observes that the beneficiary's duties primarily appear to comprise marketing tasks. For example, the beneficiary will be promoting and marketing the parent company's present "high technologies" as well as researching the U.S. market by telephone, Internet, and travel. The petitioner asserts that, because of these marketing activities, the beneficiary has already signed several letters of intent and draft contracts with several U.S. companies. Marketing duties, by definition, qualify as performing a task necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or 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 beneficiary's proposed duties, therefore, do not qualify as either managerial or executive.

The AAO now turns to the second issue: whether the petitioner's Houston office employs six people, not three as the director determined. When the petitioner filed its application for an extension of the beneficiary's visa, Year 2000 W-2 forms and quarterly wage reports established that three employees were working in the Houston office: The three employees were [REDACTED] and [REDACTED]. On appeal, counsel asserts that the parent company has sent three additional employees to work for the U.S. entity; however, "[T]hey need some time to change their status and therefore be able to get on the payroll and pay applicable taxes." The three additional claimed employees are: [REDACTED] special assistant to the manager; [REDACTED] the parent company's president; and [REDACTED] the parent company's regional director.

The AAO acknowledges that the three additional employees may increase the U.S. entity's size. However, an entity's size does not necessarily decide the question of managerial or executive capacity. See Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, the duties of the proffered position must be the critical factor. Section 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). As established previously, however, the beneficiary is largely performing tasks required to provide a service or produce a product. Thus, regardless of the U.S. entity's size, the petitioner has not

established that the beneficiary is primarily functioning as an executive or a manager.

Furthermore, the three additional employees were not working for the U.S. entity when the petition was filed. The Bureau may not, approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Therefore, the future presence of three additional employees cannot demonstrate that the beneficiary will serve in a primarily executive or managerial capacity.

Beyond the decision of the director, the AAO notes that it is questionable whether the beneficiary served in a managerial or executive capacity abroad. As explained earlier, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. See section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L); 8 C.F.R. §§ 214.2(1)(3)(iii), (iv).

In response to the director's March 6, 2001 request for evidence, the petitioner stated:

From September 1996 to February 1997, [the beneficiary] was a sales engineer at the parent company . . . and he had been the Procurement Manager for the [parent company] since February 1997 to October 1999. [The beneficiary] has been on US assignment since then to present. In that position of the Procurement Management . . . , he was fully responsible for equipment purchasing and negotiating with his counterparts on behalf of the company; responsible for hiring and firing of the employees within the department subject to the approval of the board of directors and responsible for adopting and executing company policies within the scope of his authority, etc.

The beneficiary's alleged overseas duties display the same evidentiary deficiencies as the claimed U.S. duties. In particular, the description paraphrases the statutory and regulatory executive and managerial requirements. For instance, the petitioner asserted that the beneficiary exercised control

over hiring and firing and was responsible for adopting and executing company policies. Furthermore, the petitioner described the beneficiary's duties abroad only in general terms. As explained earlier, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*; *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*.

Finally, according to the petitioner's representations, the petitioner while working abroad primarily produced a product or rendered a service. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International, supra*. In sum, the record fails to demonstrate that the beneficiary served in a managerial or executive position abroad. However, as the appeal will be dismissed on the grounds discussed, these issues will need not be addressed 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; *Transkei*, 923 F.2d at 178 (holding burden is on the petitioner to provide documentation); *Ikea*, 48 F.Supp at 24-5 (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.