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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536



FILE: EAC-02-231-52349 Office: VERMONT SERVICE CENTER

Date: DEC 9 - 2003

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for 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:



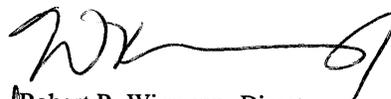
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a New York based company engaged as an importer and exporter of gemstones. The petitioner currently employs the beneficiary as an executive and seeks to extend the beneficiary's status as an intracompany transferee for an additional two years. The director denied the petition stating that the petitioner had failed to prove that the beneficiary has been or will be employed in a primarily executive or managerial position.

On appeal, petitioner's counsel asserted that the director erred as a matter of law in concluding that the beneficiary is not a manager. Counsel submitted a brief in support of such.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. In addition, 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.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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.

(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 services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in the present case is whether the beneficiary will be employed in a primarily managerial or executive capacity as defined in the regulations.

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.

In the petition, the petitioner asserted that the beneficiary held an executive position in the U.S. company, which included overseeing, planning, and directing the continued establishment of the office, developing new contacts and directing the staff in achieving quarterly goals set by the parent company.

In a request for evidence, the director asked for a substantial amount of additional evidence. As the director's request is part of the record, the entire list will not be restated herein. However, the director requested, in part: (1) a detailed description of the beneficiary's duties in the United States, including the percentage of time spent on each listed duty; (2) a specific organizational chart, including the current names of all employees, executives, managers, and supervisors; (3) all employees under the direction of the supervisor, including their job title, job description, educational level, annual salary or wages, current immigration status, and the amount of time allocated to each of their duties; and, (4) payroll records and employer and employee tax forms. The director also asked for an explanation as to why the petitioning entity required the beneficiary as an executive and how the duties will differ from current managers or executives.

In response to the director's request for evidence, the petitioner submitted a U.S. organizational chart naming three current employees: the beneficiary, as the executive, and two subordinates, an office manager/administrator and a secretary/sales person. In reference to the beneficiary's role as an executive the petitioner provided the following description:

Executes supervisory control of staff and office management. Sets sales goals for company. Communicates with parent office in Brazil for status of inventory and special client requests, future trade shows and company sales goals. Reviews bank figures, accounts [receivable], accounts [payable] and payroll records. Meets with company accountant. Initiates client contacts, researches new trade shows and coordinates between parent company and in-house sales person for coverage at trade shows. Initiates attorney contact for delinquent accounts if and when necessary upon office manager's recommendations. Reviews employee performance, hires and terminates all employees. Implements new strategies to increase clientele base. Does necessary research in fashion industry and contemporary society to anticipate future trends for anticipated rise in demand of particular gems or stone type.

* * *

The percentage of time that the beneficiary spends in each of his many duties is impossible to put down on paper as he is an executive and not a lower level employee with only one or two specific job duties. The beneficiary may spend a whole day doing one thing while the next day he spends doing a little of everything.

In regards to the beneficiary's two subordinates, the petitioner noted that the secretary has an associate degree in photo journalism and is certified in grading stones; the administrator is enrolled in an unnamed university and is certified in gemology. The administrator's job is described as managing the office, overseeing sales staff, controlling inventory, and implementing the strategies developed by upper management. The secretary acts also as the salesperson at the petitioning office and at trade shows.

In his decision, the director concluded that, contrary to the beneficiary being called an executive, the beneficiary was not working in a primarily executive or managerial position. Because of the size and nature of the organization, the director determined that the beneficiary will be engaged primarily in the non-managerial, day-to-day operations involved in providing a service. The descriptions provided by the petitioner in regards to the beneficiary's position were found to be vague and restated portions of the regulations. The director also noted

that the petitioner had failed to provide a breakdown of the time allotted by each subordinate to her job, and that from the information provided, the employees supervised by the beneficiary were not professionals. Consequently, the director denied the petition.

On appeal, counsel asserted that "[a]n error of law has been made as [the] beneficiary is a manager with specialized knowledge running an organization which has succeeded to establish a good solid company." Counsel also submitted a brief in which she addressed several of the points raised by the director in his decision. Specifically, in regards to the beneficiary and his job duties, counsel asserted that "[a]n executive does not have all his time accounted for by the hour in this business as he travels extensively and must be able to change his schedule. . . ." Counsel further noted that the description of the beneficiary's duties is vague because there is "an element of confidentiality" that exists between the beneficiary and clientele or other companies, and it would not be "diplomatic" to reveal the clients' purchases. Counsel stated that no daily ledgers of the beneficiary's duties were submitted as his duties change daily.

In reference to the subordinates of the beneficiary, counsel asserted that both are professionals. Because of the office administrator's "artistic background" she has the experience and professionalism to effectively manage the office and respond to customer needs. Likewise, the salesperson has "all around professionalism with the clients" and must be considered a professional, otherwise "[she] would not be able to effectuate the high volume of sales."

On review, the record is not persuasive in establishing that the beneficiary is an executive or manager.

In examining the managerial or executive capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(1)(3)(ii). The petitioner has not provided a sufficient in-depth description of the beneficiary's job duties to conclude that the beneficiary has been or will be working in a managerial or executive position. Rather, the evidence submitted contains vague and broad descriptions that the beneficiary will "execute[] supervisory control," "set sales goals," "review[] company bank figures," "review employee performance," and "implement[] new strategies." As noted by the director, the petitioner has simply restated the regulations and has not

provided a comprehensive description of the beneficiary's role as an executive. Petitioner's counsel, in her brief, also agreed that the descriptions provided were vague, yet asserted that the beneficiary should be considered an executive because he has many duties, unlike "a lower level employee with only one or two specific job duties." Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190, 193-94 (Reg. Comm. 1972). Also, counsel's assertions 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).

In addition, the petitioner had an opportunity to submit a more detailed description of the beneficiary's position, yet failed to do so. The director specifically requested that the petitioner provide a detailed description of the beneficiary's job duties, as well as employment qualifications for the position of executive. The petitioner responded with a broad paragraph of the beneficiary's job functions, and explained that it was impossible to identify a percentage of time spent on each executive duty. 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).

The evidence provided does not support a finding that the beneficiary is acting as an executive. First, the job description submitted in response to the director's request specifically stated that the beneficiary communicates with the parent office for the "status of inventory and special client requests, future trade shows and *company sales goals*." (emphasis added). The phrase executive capacity, as defined in the regulations, specifically states that an executive must establish the goals and policies of the organization or function. In the present case, it appears that the beneficiary is simply performing the steps necessary to achieve the goals created by the managers in the parent company, rather than actually establishing the goals himself. Further, there is insufficient evidence to conclude that the beneficiary exercises wide latitude in discretionary decision-making or that he receives only general supervision from higher level executives. As already noted, because the beneficiary must contact the parent company to discuss inventory, special requests, future trade shows and company goals, it seems that individuals in the parent company are supervising the beneficiary, rather than the beneficiary having discretion over the U.S. company's operations. A managerial or executive employee must have

authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Therefore, the beneficiary's functions in the U.S. company cannot be found to be primarily executive.

Further, counsel's argument asserting that the subordinates of the beneficiary are professional is misplaced. The term "profession" is defined in section 101(a)(32) of the Act and includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teachers of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. §204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. The petitioner noted in its response to the director's request for evidence that neither the administrator nor the salesperson had received a baccalaureate degree. Therefore, neither subordinate can be considered a professional under the definition provided in the Act. While the employees likely interact in a professional manner with clients, their demeanor does not establish them as professionals for purposes of examining managerial or executive status.

For the foregoing reasons, the AAO cannot conclude that the beneficiary is employed in a primarily managerial or executive capacity.

Beyond the decision of the director is another issue of whether the beneficiary was employed abroad in a managerial or executive capacity for the requisite amount of time prior to his transfer to the United States. The petitioner asserted that some of the beneficiary's duties in the foreign company included traveling internationally to represent the company and maintaining international relationships. These activities, when considered in connection with other job functions, are often viewed as performing a function or service of the company which is deemed to be non-managerial or executive. As the appeal will be dismissed for the foregoing reasons, this issue 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.