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U.S. Department of Homeland Security
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: SRC 02 094 50603 Office: TEXAS SERVICE CENTER

DEC 12 2003
Date:

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:



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 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 nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as retail business. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been or would be employed primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will be managerial or executive in nature.

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.

The regulation at 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 (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 with 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.

Title 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;

(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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2000 as retail business. The petitioner states that the U.S. entity is an affiliate of Janta Co-op Dairy MIDC. The petitioner declares ten employees and \$258,340 in gross annual income. The petitioner seeks a continuation of the beneficiary's services as its president for three years, at a yearly salary of \$20,000.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been or will

be employed in a primarily managerial or executive or specialized knowledge 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
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the petitioner's letter of support the beneficiary's job duties with the foreign entity and U.S. entity are described as follows:

[The beneficiary] is employed by the Petitioner's affiliate abroad in India. As the General Manager, the Beneficiary is responsible for locating suppliers; negotiating with such suppliers; reviewing market conditions in India to determine the need for additional live-stock; supervising subordinate employees engaged in the production; reviewing and analyzing data relating to the types, quantities, and delivery of dates of products ordered; establishing and implementing policies to manage and achieve marketing goals; overseeing marketing campaigns developed by subordinate managers; reviewing and approving budgets prepared by chartered accountants and directing management of the company.

The Beneficiary is currently employed as the President of the Petitioner, and he is responsible for settling and establishing the company's goals and objectives; reviewing and analyzing the marketing conditions; directing and managing the company; reviewing and approving budgets; reviewing and approving inventory orders prepared by subordinate staff; reviewing and approving inventory control system; supervising and controlling work of subordinate managers and supervisors; hire and fire managers and supervisors; and reviewing financial records prepared by professional staff.

In response to the director's request for additional evidence, the petitioner describes the beneficiary's job duties for the U.S. entity as follows:

The Beneficiary will be employed as the Manager/Executive of the Petitioner and he will be responsible for the following activities. Twenty percent (20%) of his time supervising the sales activities and conferring with store manager; Ten percent (10%) reviewing any new products available in the market; Twenty percent (20%) coordinating activities involved with procurement of inventory, and forecasting sales and promoting the business; Twenty percent (20%) reviewing acquisitions, and conferring with wholesalers and negotiating prices, quantities, delivery schedules, and payment terms; Ten percent (10%) establishing prices according to the market price and trends; Ten percent (10%) reviewing sales budget. In the performance of his duties, the Beneficiary will receive minimum supervision. The Beneficiary will exercise wide discretion and latitude in the performance of his duties. The majority of the Beneficiary's time will be spent in executive or managerial duties . . .

The petitioner further states that the beneficiary will be responsible for supervising ten employees, and proceeds to list them by name and title.

The director determined that the record contained insufficient evidence to demonstrate that the beneficiary will be employed, primarily, in a managerial or executive capacity. The director further maintained that based upon evidence in the record, it was unlikely that the beneficiary supervised ten full time employees for an entire year.

On appeal, counsel asserts its disagreement with the director's decision, and submits a brief and evidence in support of its assertion. Counsel resubmits the beneficiary's position description and a list containing the names and titles of ten employees that he supervises. This list of employees is reiterated in the organizational chart also provided on appeal. Counsel provides a summary of the beneficiary's job duties as follows:

- Supervision of the Sales activities and conferring with Store Manager.

- Coordinating activities involved with procurement of inventory, forecasting sales and promoting the business
- Reviewing Acquisitions, Conferring with wholesalers and negotiating prices, quantities, delivery schedules and payment terms.
- Reviewing New products available in marketing.
- Establishing prices according to the market prices and trends.
- Reviewing the sales budget.

Counsel states that the above listed descriptions are consistent with the statutory and regulatory requirements for managerial or executive capacity. Counsel continues by arguing that CIS did not take into account the reasonable needs of the organization and or the overall purpose and stage of development of the organization. Counsel further asserts that the beneficiary has exhibited his managerial or executive capabilities by purchasing SKN, Inc., by hiring ten new employees, by continuing to be involved in new business development, by overall management of the organization, and by establishing organizational goals and policies. Counsel also contends that the beneficiary manages the sales and marketing functions of the business, and that he is responsible for developing new business ventures and negotiating contracts.

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101 (a) (44) (A) of the Act, or primarily executive duties under section 101 (a) (44) (B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

Counsel's contentions are not persuasive. The petitioner has not provided sufficient evidence to establish that the beneficiary has been or will be employed primarily in a managerial or executive capacity. Contrary to counsel's belief, the U.S. entity is not considered a new office for purposes of statutory and regulatory entitlements. The U.S. entity was, in fact, incorporated in 2000 and has already been granted L-1A status as a new entity. Therefore, the director's basis of

review and analysis of the U.S. entity as an established organization was appropriate in the instant case.

Contrary to counsel's assertions, the record as presently constituted is not persuasive in demonstrating that the beneficiary qualifies as an intracompany transferee in a managerial or executive capacity. The record contains a description of the beneficiary's job duties that essentially paraphrase the essential elements of the statutory definitions of manager or executive. While it is apparent that the beneficiary's experience is an asset to furthering the petitioner's business objectives, it does not appear at this time that the petitioner is prepared to sustain the beneficiary in a strictly managerial or executive capacity. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The numerous assertions made by counsel are not supported by evidentiary facts. The assertions of counsel do not constitute facts. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The assertions of counsel without documentary evidence cannot be used to establish that the beneficiary is acting in a primarily managerial or executive capacity.

On review of the complete record, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. The vague position description is insufficient to establish that the beneficiary's past or proposed job duties are managerial or executive in nature. Furthermore, the petitioner has not provided persuasive evidence to establish that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company, at a senior level of the organization hierarchy. The record does not demonstrate that the U.S. entity contains the organizational complexity to support the proposed managerial or executive staff position. The record does not support a finding that the petitioner will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties.

The petitioner's evidence is not sufficient in establishing that the beneficiary has been or will be directing the management of

the organization or a major component or function of the organization; establishing the goals and policies of the organization; exercising wide latitude in discretionary decision-making; or receiving only general supervision or direction from higher level executives. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title.

Furthermore, the record does not establish that the beneficiary has been or will be primarily managing a function of the organization. The beneficiary's job descriptions depict an individual in charge of the day-to-day services of the organization and supervision of non-professional employees, not a functional manager. When managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function performed. The petitioner must demonstrate that the executive or manager does not directly perform the function. Although counsel argues that the beneficiary will be managing an essential function of the U.S. entity by overseeing all the sales and marketing for the organization, the record does not demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. The petitioner has failed to provide a detailed position description specifying exactly what the management of sales and marketing will entail. The record must further demonstrate that there are qualified employees to perform the function so that the beneficiary is relieved from performing non-qualifying duties. In the instant case, the petitioner submitted documentation that lists employees by name and title only. This evidence is insufficient to establish that they are qualified employees to relieve the beneficiary from performing the function. Absent details concerning the employees' position descriptions, daily activities, and percentage of time spent performing each duty, the record is insufficient to establish that the beneficiary will be managing rather than performing the function. Based upon the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the minimal documentation of the parent's and the petitioner's business operations raises the issue of whether there is a qualifying relationship between the U.S. entity and a foreign entity pursuant to 8 C.F.R. §

214.2(1)(1)(ii)(G). As the appeal will be dismissed, these issues need not be examined 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.