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Citizenship and Immigration Services

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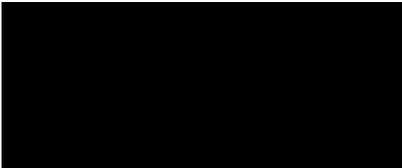
DEC 13 2003

FILE: SRC 00 267 54143 Office: TEXAS SERVICE CENTER 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 Director, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, [REDACTED] avers that it is an affiliate of a German business, [REDACTED]. The petitioner states that it imports and sells laminated flooring and engineered wood products. The U.S. entity was incorporated in the State of Delaware on May 13, 1999. The petitioner endeavors to hire the beneficiary as a new employee. Consequently, in September 2000, the U.S. entity filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee (L-1) for three years. The petitioner seeks to employ the beneficiary as the U.S. entity's administrative manager at an annual salary of \$48,000.

On April 30, 2001, the director determined, however, that the beneficiary will be carrying out the day to day operations of the U.S. entity and will not be supervising any subordinates or professional employees. Consequently, the director concluded that the beneficiary will not perform managerial duties in the United States. Additionally, the director noted that the beneficiary's prior L-2 status precluded her reclassification as an L-1 intracompany transferee.

On appeal, counsel asserts that the petitioner is in its start-up phase; therefore, the beneficiary may perform non-managerial duties during that period. Additionally, counsel states that the beneficiary will manage an essential function and that denying her petition will harm South Carolina's economy. Finally, counsel claims that the beneficiary's prior L-2 status does not preclude her reclassification as an L-1 intracompany transferee.

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:

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

The AAO notes that on Form I-129 the petitioner did not claim that the beneficiary was coming to the United States to open a new office; however, on appeal and in response to the director's December 15, 2000 request for evidence, counsel's assertions appear to treat this matter as a new office petition. Additionally, the petition was filed on September 5, 2000. In response to the director's December 15, 2000 request for evidence, counsel submitted a February 23, 2001 letter that stated, "[The petitioner] had NO employees on the U.S. payroll until February 2000" (emphasis in original.) Therefore, within the meaning of the regulations, the petitioner did not start doing business until February 2000. See 8 C.F.R. § 214(1)(1)(ii)(H). Consequently, at the time the petition was filed, the U.S. entity had existed for less than one year. In light of the filing date and counsel's assertions, the AAO will treat this matter as a new office petition.

Pursuant to 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority of the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraph (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

On December 15, 2000, the director requested: "Evidence that the [beneficiary] has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing." In response, the petitioner submitted certified translations of pay stubs verifying that the foreign entity paid the beneficiary for the period June 1999 through December 2000. The evidence establishes, therefore, that the beneficiary was employed by the foreign entity for one continuous year in the three-year period preceding the filing of the petition.

The AAO will now address the question of whether the beneficiary primarily worked as a manager abroad.¹ In regard to the issue of whether a beneficiary has been and will be primarily performing managerial 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.

When examining the managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(1)(3)(ii). On Form I-129, the petitioner listed the beneficiary's overseas duties as:

¹ The petitioner makes no claim that the beneficiary served in an executive capacity abroad or will serve in an executive capacity in the United States.

[The beneficiary has been] Sales Manager at [REDACTED] with overall responsibility for directing and coordinating all marketing and sales activities related to [REDACTED] products in the following countries/regions: Great Britain, Scandinavia, Belgium, The Netherlands, France, and Cyprus.

The petitioner added that her duties abroad have included:

- responsibility for day-to-day decisions related to developing the market strategy for [REDACTED] products within these regions in order to optimize profits and meet sales quotas;
- preparing strategic marketing plans and sales targets and coordinating implementation of same;
- evaluating the feasibility of new markets and recommending new market approaches;
- developing strategies to develop the markets within the assigned regions and attract new accounts;
- coordinating logistics for export sales;
- managing and directing a sales staff and dealers/agents;
- motivating and training sales representatives; and
- setting up [an] agent network.

(Bullets added.) Finally, the petitioner stated that the job abroad "is a management-level position and involves a high level of discretionary authority and managerial decision-making."

In response to the director's December 15, 2000 request for evidence, counsel submitted a February 23, 2001 letter further detailing the beneficiary's duties abroad:

[T]hrough Summer 2000, the beneficiary had been employed by Kronotex Fussboden as sales manager responsible for the company's products in the following regions: Great Britain, Scandinavia, Belgium, The Netherlands, France, and Cyprus, with two

assistants and four sales representatives reporting to her.

The petitioner has stated that the beneficiary "has had overall responsibility for directing and coordinating marketing and sales activities for [REDACTED] products in those countries/regions." The petitioner also stated that the beneficiary was responsible for making day-to-day decisions related to:

- developing the marketing strategy for Kronotex Fussboden products within those regions in order to optimize profits and meet sales quotas;
- preparing strategic marketing plans and sales targets and coordinating implementation of same;
- evaluating the feasibility of new markets and recommending new market approaches;
- developing strategies to develop the markets within the assigned regions and attract new accounts;
- coordinating logistics for export sales;
- managing and directing a staff and dealers/agents;
- motivating and training sales representatives;
- setting up an agent network; and
- coordinating the after-sales logistics for Kronotex products imported and sold in North America.

(Bullets added.)

The beneficiary's responsibilities abroad appear to comprise mainly marketing duties. For instance, the beneficiary's duties overseas include: "marketing strategy" for specific regions and countries; "preparing strategic marketing plans and sales targets"; "evaluating" new markets; "recommending new market approaches"; and "attract[ing] new accounts." Additionally, her duties encompass "coordinating logistics for export sales" and "after-sales logistics for . . . products imported and sold in

North America." 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). In sum, the duties listed above fail to demonstrate that the beneficiary will primarily function as a manager.

Furthermore, the petitioner has not demonstrated that the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing nonqualifying duties. See section 101(a)(44)(A)(ii) of the Act. In particular, section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[T]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

In this instance, the petitioner provided no evidence demonstrating that the claimed subordinate staff, dealers, agents, and sales representatives qualify as professionals. Additionally, the subordinates' titles suggest that the employees carry out marketing duties similar to the ones the beneficiary performs. Thus, the subordinates apparently do not relieve the beneficiary of her nonqualifying duties.

Additionally, the beneficiary's overseas job descriptions are vague and fail to convey an understanding of the beneficiary's daily duties. For example, the petitioner gives no concrete or quantitative examples to define "developing the marketing strategy," "preparing strategic marketing plans and sales targets," "evaluating the feasibility of new markets," "coordinating logistics for export sales," "managing and directing a staff and dealers/agents," or "setting up an agent network." Going on record without supporting documentary evidence is insufficient to meet 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).

Finally, the petitioner generally paraphrased the statutory definition of "managerial" capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as exercising a high level of discretionary authority and managerial decision-making. The petitioner did not, however, define her discretionary authority and managerial decision-making duties. In sum, the petitioner has failed to demonstrate that the beneficiary's position abroad was primarily managerial.

The AAO will now examine whether the beneficiary qualifies as a manager under the new office requirements. On appeal, counsel asserts that the beneficiary's proposed duties demonstrate that she will be managing an essential function; therefore, her proposed duties will be primarily managerial. The assertions of counsel do not, however, 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). The petitioner initially listed the beneficiary's duties on Form I-129 as:

[The beneficiary] will be employed as Administrative Manager to oversee and coordinate the day-to-day administrative decisions of the company, including personnel, customer service, purchasing, procurement, product import/customs requirements, and transportation logistics to ensure that product orders are coordinated with [the petitioner's] affiliated manufacturing plants in Europe, customer specifications are met, and delivery schedules are met in a timely manner.

Furthermore, the petitioner stated that the beneficiary's duties would include:

- direct and coordinate all activities related to the administrative decisions and logistics concerning the import and sale of [the overseas entity's] products;
- recommend and implement company procedures in the areas of purchasing, shipping, receiving, and customer service;

- review sales orders and coordinate procurement activities with production schedules at [the petitioner's] manufacturing facilities in Europe to ensure that orders are filled within scheduled delivery deadlines;
- organize, implement, and coordinate purchasing procedures to achieve just-in-time delivery, to monitor inventory, and to maintain inventory at minimal levels;
- evaluate suppliers and negotiate agreements with same;
- manage and coordinate all shipping and receiving logistics;
- ensure compliance with all U.S. customs requirements regarding imported products; coordinate and develop communication and product information flow between [the petitioner] and [its] European affiliates;
- organize and develop operational and customer service systems and procedures and coordinate implementation of same;
- maintain customer relations; and
- establish and manage a customer service system to respond to customer concerns, problems, and complaints.

(Bullets added.) Finally, the petitioner stated:

The Administrative Manager reports directly to [the petitioner's] President/CEO. This responsibility manages and oversees a critical function of our business and involves discretionary decision-making authority.

An August 18, 2000, letter appended to the Form I-129 restated the above proposed duties. On December 15, 2000, the director requested additional evidence including the exact duties of the petitioner's employees. In response, the petitioner submitted a February 23, 2001 letter that restated the duties listed on the Form I-129.

The petitioner also attached a projected 2001 organizational chart to the Form I-129. The chart presents 22 positions of which only four were filled: N. Voss, Chief Executive Officer;

A. Limberg, Vice President Import Sales; L. Van Poucke, Manager; and T. Bass, Vice President Sales and Marketing. The AAO recognizes that, during the first year of operation, a beneficiary may perform some duties which are not normally managerial. See 8 C.F.R. §§ 214.2(1)(3)(v)(C)(1), (2), and (3). However, the petitioner must demonstrate that the U.S. office will support the beneficiary's managerial position within one year of the approval of the petition. The petitioner submitted evidence asserting that the U.S. entity planned to build a manufacturing plant in the United States. The petitioner suggested that the manufacturing plant could eventually employ as many as 160 persons, thus, requiring the beneficiary to function as a manager. The petitioner, however, submitted no evidence establishing exactly when it would build the new plant. Therefore, given this lack of evidence, CIS cannot determine whether will the U.S. petitioner be able to support a manager after one year of operation.

Furthermore, the AAO will examine the petitioner's description of the beneficiary's proposed duties. Here, the responsibilities primarily comprise marketing duties. The beneficiary's projected duties for the U.S. entity are essentially the same service and production oriented tasks as those she performs for the overseas entity. Therefore, the evidence fails to demonstrate that the beneficiary will serve primarily as a manager.

Counsel states on appeal that it will take several years for the U.S. entity to emerge from its start up phase. Thus, counsel is implicitly requesting an extension of the period in which the beneficiary may avail herself of the new office regulations. As discussed earlier, the regulation at 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations allowing for an extension of this one-year period. Therefore, CIS cannot accord the beneficiary more than one year to demonstrate duties which are primarily managerial.

On appeal, counsel further claims that the director improperly considered the size of the proposed U.S. operation. The AAO acknowledges that 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 will largely be 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 will primarily function as a manager.

Additionally, counsel maintains that the beneficiary will serve as a manager because she will manage an essential function. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that the duties are "primarily" managerial. Here, the petition fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's projected duties as managerial, but it fails to quantify the time she will spend on them. This failure of documentation is important because the majority of the beneficiary's daily tasks comprise marketing tasks that do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *Ikea US, Inc. v. INS, supra*.

Counsel states that, if the AAO denies the petition for an L1-A classification, the AAO should in the alternative grant the petition pursuant to the L1-B specialized knowledge classification. See section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B); 8 C.F.R. § 214.2(l)(1)(ii)(D). The petitioner has, however, submitted no evidence to establish that the beneficiary possesses specialized knowledge. Going on record without supporting documentary evidence is insufficient to meet 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*. Therefore, the lack of evidence precludes the AAO from granting the petition pursuant to the L1-B classification.

When the petitioner submitted its Form I-290B on May 22, 2001, it requested oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant oral argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. See 8 C.F.R. § 103.3(b). In this instance, counsel's brief on appeal identified no unique factors or issues of law to be resolved.

In fact, counsel set forth no specific reasons why oral argument should be held. The written record of proceedings fully represents the facts and issues in this case. Consequently, the request for oral argument is denied.

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.