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Citizenship and Immigration Services

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OFFICE OF ADMINISTRATIVE APPEALS
CIS, AAO, 20 Mass, 3/F
425 I Street NW
Washington, DC 20536



FILE: WAC 01 196 51106 Office: CALIFORNIA SERVICE CENTER Date: DEC 23 2003

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)

ON BEHALF OF PETITIONER:
[Redacted]

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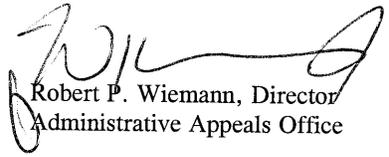
INSTRUCTIONS:

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, California 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, Lakhani Enterprise, Inc., states that it is a branch office of Brilliant Watches Company, LLC, which is organized in Dubai, United Arab Emirates.¹ The petitioner describes itself as an importer of fine watches. The U.S. entity was incorporated as a close corporation in the State of California on July 20, 2000. The petitioner now seeks to hire the beneficiary as a new employee. Consequently, on May 4, 2001, the U.S. entity petitioned to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) for one year. The petitioner seeks to employ the beneficiary as the U.S. entity's product development manager at an annual salary of \$30,000.

The director determined that there was insufficient evidence to demonstrate that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees able to relieve him of performing non-qualifying duties. Consequently, the director concluded that the beneficiary will not serve in a managerial or executive capacity. On appeal, the petitioner's counsel asserts that the beneficiary's proposed duties qualify as managerial or executive.

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 record indicates that the overseas entity owns all the shares of the U.S. entity; therefore, the U.S. entity is actually a subsidiary. See 8 C.F.R. §§ 214.2(1)(1)(ii)(J), (K).

(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.

The AAO notes that on Form I-129 the petitioner did not explicitly claim that the beneficiary was coming to the United States to open a new office; however, the U.S. entity was incorporated in May 2000 and petitioned to employ the beneficiary for one year. Consequently, the U.S. entity appears to be petitioning to open a new office. The AAO will, therefore, treat this matter as a new office petition. Pursuant to 8 C.F.R. § 214.2(1)(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 (1)(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.

When the petitioner initially filed its Form I-129, Petition for a Nonimmigrant Worker, the U.S. entity described the beneficiary's proposed duties as:

- Analyze [U.S.] market.
- Coordinate and direct activities for new design.
- Prepare criteria for stand[ard] design[.]
- Prepare guidelines for manufacturer[.]
- [Serve as] liaison between parent co[mpany] and the manufacturer[.]

The petitioner appended an April 20, 2001 letter to its Form I-129. The April 20 letter elaborated further on the beneficiary's proposed job duties:

- a. Establish procedures to direct and coordinate activities on studies, analyzation [sic] and evaluation of the product demand based on the U.S.A. market.
- b. Coordinate and direct activities on design and development of the current lines of product and new lines of product, between the U.S.A. Office, Parent office and the manufacture[r].
- c. Establish guidelines to develop and initiate criteria for new design for the parent company and manufacturer.

- d. Established procedures to prepare and direct criteria for standardizing the design and manufacture [of] parts.
- e. Prepare guidelines for the manufacture[r] to meet the demands in a timely fashion.
- f. Direct and coordinate internal procedures for processing design and development criteria for new designs and modifications for efficient production and delivery.
- g. Establish and maintain liaison between the parent company and the manufacture[r].
- h. Review preliminary design and make recommendation[s] as per new fashion and effective production.

Subsequently, on November 19, 2001, the director issued a request for evidence in order to make a final decision in this case. The director sought documents to establish that the beneficiary will primarily perform the duties of a manager or an executive for the U.S. entity. In relevant part, the director requested:

- U.S. Business Organizational Chart: Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current names of all executives, managers, supervisors, and numbers of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, salary/wages. . . for all employees under the beneficiary's supervision. (Emphasis in original.)
- Duties in the U.S.: Submit a more detailed description of the beneficiary's duties in the U.S. Be specific. List the education and employment qualifications for the position in the U.S. Company. Include evidence that the beneficiary meets the petitioner's qualifications and, if required, that the beneficiary has the ability to speak, read, and

write English. Also, indicate the percentage of time the beneficiary spends in each of the listed duties.

On October 9, 2001, the petitioner responded to the request for evidence. In reference to the proposed U.S. duties, the U.S. the petitioner's business plan states:

In order to grow and fulfill our vision, we are planning to hire more 4 to 5 people [sic] in our marketing and sales department.

In conjunction with [the] above operational and marketing establishment, [the beneficiary] is playing [a] key role in setting up, developing and implementing through his administrative and marketing abilities [sic]. As a Product Development Manager of a parent company his responsibilities includes [sic] but [are] not limited to overseeing various aspects of operations, management of staff and work force, creation and implementing new marketing strategies, procurement and management of new accounts, study[ing] local market[s] and develop[ing] innovative and different sales strategies according to the market potentialities of product line[s]. [The beneficiary] has already fulfilled [the] company's first year target of sales and [the] parent company's goal.

In addition, on October 9, 2001, the petitioner described the beneficiary's proposed U.S. duties as:

Direct and coordinate activities on development and management. *Time Spent 60%*

- a. Manage and supervise the staff.
- b. Coordinate and direct information regarding specifications and orders between [sic] [the petitioner], [the foreign entity], and the Manufacturer's Engineering, Planning, Production and Shipment Departments. Resolve problems regarding design, quality, orders, lead time, quantity, supply prices and shipment with the Manufacturers and suppliers in Hongkong [sic], Dubia [sic] and India.
- c. Establish and implement necessary procedures to ensure crucial specifications are communicated

accurately and efficiently to the appropriate departments of the Manufacturer.

- d. Prepare and provide processed information on orders, supply and cost on the products to the [overseas entity].
- e. Prepare and implement necessary procedures to achieve [the] company's goals.
- f. [Prepare] [f]inancial statements and report to management.
- g. Attend exhibitions and trade shows locally and internationally.

Direct and coordinate, local sales and Marketing.

Time spent 30%

- h. Study and analyze current trends of fashions in watches, with respect to various factors such as design, quality, appearances[,] etc.
- i. [Conduct] [s]ales planning, forecasting and budgeting.
- j. Supervise Sales Department.
- k. Provide necessary service and support to the clients regarding, [sic] timely delivery, quality control and address any other clients['] concern[s].
- l. Set the whole sale [sic] prices.
- m. [Perform] Inventory Planning[;] prepare and provide processed information on Sales and inventory to the Management.

Training Support[.] *Time Spent 10%*

- n. Train[] the staff for their respective duties and provid[e] necessary technical support for [the] professional operation of the business.

The petitioner's IRS Form 941s, Quarterly Federal Tax Returns, for the periods ending September 30, 2000, December 31, 2000, March 31, 2001, June 30, 2001, and September 30, 2001, reflected

one employee. Similarly, the petitioner's year 2000 IRS 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Return, reported one employee. Payroll journals from January 1, 2001 to June 30, 2001 and from July 1, 2001 to August 31, 2001 listed two employees: (1) Eddy Chan; and (2) Deepak Malikan. The record included a year 2000 W-2 statement for Eddy Chan.

The petitioner's line and block organizational chart identified the beneficiary as the product development manager. The chart depicted the beneficiary as supervising three persons:

Deepak Malikan, Accounts Manager

Day to day supervision and general administration, [g]eneral accounting and book keeping [sic], preparation of financial statements and report[ing] to management, [l]iaison with bank and CPA/Tax accountant of the company.

Eddie Chan, Sales Manager

Responsible for day to day sales in local market, assisting in sales planning and inventory management, assisting market development and actively involved in launching of new products and assisting in marketing.

Jose Martin, Sales Associate

Responsible for day to day sales in local market, collection of payment and distribution in local market.

On appeal, the petitioner reiterates its position that the beneficiary will function in a primarily executive or managerial capacity: "[T]he beneficiary will direct the management of the new subsidiary, establish goals and policies of the subsidiary, exercise wide latitude in discretionary decision-making, and will receive only general supervision and direction from the owners of the company."

The beneficiary's job descriptions are vague and fail to convey an understanding of the beneficiary's proposed daily duties. For example, the job descriptions repeatedly characterize the beneficiary as "directing and coordinating activities"; however, the petitioner fails to define what specific tasks those two activities entail. Likewise, in several instances, the descriptions indicate that the beneficiary would "establish and implement necessary procedures" without enumerating the actual procedures to be established or implemented. Moreover, the descriptions depict the beneficiary as "communicating

information" to the overseas entity as well as to manufacturers. The petitioner did not, however, elaborate on the content or frequency of these communications. The failure to submit adequate supporting documentary evidence does not 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).

Also, the petitioner's brief merely paraphrases the statutory and regulatory definitions of a manager or executive. 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 job descriptions are, therefore, too vague to establish that the beneficiary will serve in a primarily managerial or executive capacity.

Furthermore, the petitioner admits that a significant amount of the beneficiary's time - 30 percent - will be spent performing marketing and client support duties. Marketing and client support duties, by definition, qualify as performing tasks 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). Additionally, even though the beneficiary will spend 60 percent of his time on developmental and managerial duties, he will, in fact, be largely performing production-oriented activities. For example, he will communicate design specifications to manufacturers, resolve any production problems with manufacturers, and attend trade shows. In short, the evidence reveals that the beneficiary will spend too much time in production-oriented activities to qualify as a manager or an executive.

Finally, the evidence regarding the petitioner's organization presents inconsistencies which, in turn, undermine the credibility of the beneficiary's proposed job duties:

- The petitioner's business plan implies that the petitioner had been working in the United States for at least one year prior to October 9, 2001 - the

date on which the petitioner responded to the request for evidence. However, the payroll journals in evidence do not list the beneficiary as having worked for the U.S. entity.

- The IRS Form 941s and Form 940-EZ indicate that the U.S. entity employed only person during 2000 and 2001. In contrast, the petitioner claims that the beneficiary as well as Deepak Malikan, Eddy Chan, and Jose Martin worked for the U.S. entity during those two years. Furthermore, the payroll journals only list Eddy Chan and Deepak Malikan as employees during 2001.
- The beneficiary's responsibilities are quite similar to Deppak Malikan, Eddy Chan, and Jose Martin's duties; therefore, this inconsistency leads the AAO to questions the validity of the beneficiary and his claimed subordinates' titles.

The evidence offers no explanation for these inconsistencies. The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA 1988). These inconsistencies, therefore, further support the director's finding that the beneficiary will not be serving in a managerial or executive 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. Moreover, the director's request for evidence asked the petitioner to submit a detailed description of the beneficiary's duties abroad, including the percentage of time spent in each of the listed duties.

The beneficiary's alleged overseas duties display the same evidentiary deficiencies as the claimed U.S. duties. In particular, the beneficiary's overseas job description is vague in that it fails to convey an understanding of the beneficiary's daily duties. For example, the job description repeatedly characterizes the beneficiary as "directing and coordinating

activities"; however, the petitioner does not define what specific tasks those two activities entail. The failure to submit adequate supporting documentary evidence does not meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*; see generally *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*.

Additionally, the overseas duties largely comprise marketing, client support, and producing a product. These duties include directing and coordinating exports, supervising a sales department, managing inventory, setting wholesale prices, and establishing specifications for a manufacturer. 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 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.