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

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

FILE: [REDACTED] LIN 02 213 53026 Office: NEBRASKA SERVICE CENTER Date: DEC 24 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]

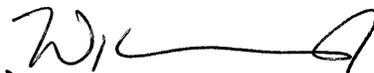
INSTRUCTIONS:

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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be an executive search and recruitment service, and distributors of Ionic Water Protection units. It seeks to employ the beneficiary temporarily in the United States as the president of its new office for three years. The director determined that the petitioner failed to establish that: (1) the beneficiary has been employed by the foreign entity for one continuous year within the three years preceding the filing of the petition in a managerial or executive capacity; (2) the record lacked sufficient evidence to establish that the new office would support a managerial or executive position within one year of operation; and (3) the petitioner had not established that it had secured sufficient physical premises to house the new office.

On appeal, the petitioner disagrees with the director's determination and asserts that the beneficiary's duties abroad have been managerial or executive in nature; that the U.S. entity, as a new office, will be in a position to support the beneficiary as manager or executive within one year of operation; and that the petitioner has established that it has secured sufficient physical premises to house the new office.

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)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch,

affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(1)(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.

The regulation at 8 C.F.R. § 214.2(1)(3)(v) states that 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 over 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 paragraphs (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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2002 and claims to be an executive search and recruitment service, and distributor of Ionic Water Protection units. The petitioner claims that the U.S. entity is a subsidiary of JT Executive Search Limited, located in the United Kingdom. The petitioner declares three proposed employees and \$525,000 in projected gross annual income. The petitioner seeks the beneficiary's services in order to open a new office and render services as its president for a period of three years, at a yearly salary of \$84,000.

The first issue in this proceeding is whether the petitioner has established that the beneficiary has been employed abroad in a primarily managerial or executive capacity for one continuous year within the three years preceding the filing of the petition, and whether the U.S. entity will be able to support a managerial or executive position within one year of operation as a new office.

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.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In the petition, the petitioner described the beneficiary's job responsibilities abroad as follows:

As CEO of the UK parent company beneficiary has overall financial and managerial control, sets budgets & cash flow, directs development of company, hires & fires staff, & undertakes search for executives placements. Prior 2 years similar duties with RML Inter'. [Sic]

In support of the petition, the foreign entity's managing director describes the beneficiary's job duties abroad as follows:

[The beneficiary] is the company's chief executive officer and has been responsible for the overall executive control and management of the company, and executive search company . . . [The beneficiary] is responsible for setting policy and budgets for the company, for directing its management, seeking new business, representing the company to financial and legal bodies, and directing the activities of the managing director and staff.

The petitioner also provided a description of the beneficiary's job duties abroad as part of the supplementary evidence in support of the petition as follows:

Mr. Roca-Mas is the company's Chief Executive Officer and as such his duties and responsibilities include:

- Overall executive and financial control of the company
- Establishing and implementing the company's policies and procedures
- Directing and monitoring the company's progress, and setting strategy for its on-going long-term development
- Setting and monitoring annual budgets and cash flows
- Directing and researching all business opportunities
- Determining and implementing all marketing and advertising strategies for the company, its products and services
- Determining, implementing and coordinating customer service functions
- Selection, recruitment, training and guidance of all mid-level management
- Hiring and firing all management and staff
- Selection and negotiation of all purchases for the company
- Representation of the company at promotional shows and exhibitions
- Representing the company to bankers, attorneys, accountants, and other professionals
- Directly managing the activities of the managing director and staff

The petitioner submitted an organizational chart depicting the organizational structure of the foreign entity to include: the beneficiary as CEO, a managing director, an associate consultant, an advisor, and an accountant.

The petitioner also submitted a proposed organizational chart of the U.S. entity, which depicts the beneficiary as president and CEO, along with a technical director, a recruitment assistant, and a technical senior engineer.

In response to the director's request for additional evidence, the petitioner submitted a copy of the United Kingdom Inland Revenue Form P60 End of Year Certificate 2001-2002, which depicts the beneficiary's salary received. The information contained in Form P60 was handwritten and the petitioner submitted no evidence to show that it was actually filed. The petitioner also submitted a proposed business plan, which indicated that the petitioner plans on hiring an executive search consultant, a chemical engineer and an installer in the first year of operations in the United States.

The director determined that the record lacked sufficient evidence to establish that the beneficiary has been employed by the foreign entity in a managerial or executive capacity, and that the new office would be able to support a managerial or executive position within one year. The director further states that in the instant case, it does not appear that the foreign entity has reached a stage of organizational development and is of sufficient complexity to conclude that the beneficiary has been employed in an executive or managerial capacity. The director also states that from the evidence it appears that the beneficiary will primarily be involved in the performance of day-to-day tasks that are necessary to provide the services of the U.S. entity for the foreseeable future. The director states that the record does not establish that the foreign entity has enough start up capital nor a sound business plan that will allow start up and operation of a business entity that will be able to support a managerial or executive position within one year of operation. Accordingly, the director denied the petition.

On appeal, the petitioner disagrees with the director's decision and states that the evidence submitted has established that the beneficiary has been employed by the foreign entity in a managerial or executive capacity, and that the U.S. entity will be in a position to support a managerial or executive position within one year of operation. The petitioner submits a brief and additional evidence in support of its contentions. On appeal the petitioner submits a revised business plan; descriptive materials obtained from the Calcat web site; a list of Spanish installations used as reference sites to open the U.S. market; a letter confirming the beneficiary's exclusive selling rights to the Calcat product outside of Spain; and a series of emails regarding the beneficiary's communications concerning the Calcat ionic water treatment product. The petitioner states that the beneficiary is the foreign entity's chief executive officer, that he is directly responsible for the

activities of the managing director, who in turn is responsible for the activities of the three staff members. The petitioner further states that the beneficiary has overall executive and financial control over the foreign entity, that he establishes the entity's policy and direction, and that his experience has been pivotal in the development of new business.

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.

The petitioner's contentions are not persuasive. Upon review, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily executive capacity by the foreign entity. 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. See Section 101(a)(44)(B) of the Act. Furthermore, the following duties are without any context in which to reach a determination as to whether they are qualifying: responsible for overall executive control and management of the company, sets policy and budgets for the company, directs the company management, represents the company to financial and legal bodies, and directs the activities of the managing director and staff. The use of the position title "chief executive officer" is not sufficient to establish that the beneficiary is employed by the foreign entity in an executive capacity. Further, the general descriptions of the beneficiary's job duties paraphrase the elements of the regulatory definitions. Paraphrasing the regulation as a substitute for a day-to-day description of the beneficiary's job duties is insufficient to demonstrate the beneficiary is acting in an executive capacity. The petitioner has not shown that the beneficiary has been functioning at a senior level within an organizational hierarchy other than in position title.

Likewise, the petitioner has failed to submit sufficient evidence to establish that the beneficiary has been employed by the foreign entity in a managerial capacity. There has been no evidence submitted to establish that the beneficiary has been employed by a qualifying organization for one continuous year within the three years preceding the filing of the petition. On appeal, the petitioner asserts that the beneficiary was employed by RML International Company in a managerial or executive capacity prior to being employed by the foreign entity. The beneficiary's resume reflects that he was employed by RML International Company from 1997 to 1999 as manager (financial division), and from 1999 to 2001 as chairman of the company. However, there has been no independent documentary evidence submitted to substantiate this claim, or to establish that there existed a qualifying relationship between the RML International Company and the U.S. entity during the period in which the beneficiary was employed. There is no description given of the beneficiary's duties while employed by RML International Company. In addition, the petitioner submitted Revenue Form P60 as evidence to substantiate its claim that the beneficiary has been employed by the foreign entity, JT Executive Search Limited, for one continuous year. Contrary to the petitioner's contentions, there is nothing in the record that establishes the authenticity of the hand written revenue form or that it was ever officially filed with the revenue service. Furthermore, the petitioner has failed to provide detailed payroll or tax records to establish the exact dates of the beneficiary's employment with the foreign entity. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In the instant case, the evidence demonstrates that the foreign entity was established in 2001, and appears to still be in its developing stages. It also shows that the foreign entity employs four individuals in addition to the beneficiary. The petitioner contends that the beneficiary is responsible for the overall executive control and management of the company. However, there has been no evidence submitted by the petitioner to show how the beneficiary manages and controls the entity's operation and personnel. There is no indication from the record how much time the beneficiary spends performing managerial versus non-managerial duties. *Ikea US, Inc. v. U.S. Department of Justice*, 48 F. Supp. 2d, 22, 24 (D.D.C. 1999) (requiring the petitioner to provide adequate documentation).

Evidence submitted by the petitioner fails to demonstrate that the four employees at the foreign entity are professional, managerial, or supervisory personnel whose functions are

directly or indirectly managed by the beneficiary. The petitioner has not submitted sufficient evidence to establish that the beneficiary manages a function of the organization. Evidence submitted by the petitioner describes the beneficiary's job duties abroad only in broad and general terms. The petitioner has not provided a description of the beneficiary's day-to-day duties and responsibilities.

The petitioner contends that the beneficiary has overall executive and financial control over the foreign entity. However, rather than primarily performing executive duties or managing a major department, subdivision, function, or component of the organization, it appears that he has actually been performing the day-to-day services of the business. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service is not considered to be employed in a managerial or executive capacity. *Matter of Church of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Regarding the petitioning company, the evidence submitted fails to establish that the U.S. entity will be able to support a managerial or executive position within one year of operation. See 8 C.F.R. § 214.2(l)(3)(v)(C). The business plan submitted by the petitioner fails to detail accurate, realistic projections to establish that the U.S. entity will realize growth within one year sufficient to support a managerial or executive position. Although the evidence demonstrates that the petitioner intends to hire new employees within one year of operation, the petitioner has not provided detailed position descriptions to show that they will be employed in other than non-professional positions. The evidence submitted is also insufficient to establish that the U.S. entity will be able to remunerate the beneficiary for his services within one year of operation. Rather than the beneficiary functioning at a senior level within the organizational hierarchy within one year of operation, it appears from the record that he will continue to perform the functions of the organization and carry out the day-to-day services of the business.

The evidence submitted by the petitioner, including a revised business plan for the U.S. entity, is insufficient to substantiate the petitioner's contention that it will be able to support a managerial or executive position within one year. It is not evident from the evidence submitted that the petitioner has any experience in the sale of Ionic Water Protection Units to substantiate its projections and business plan for the U.S.

entity. There has been no independent documentary evidence submitted to substantiate the petitioner's contention that the beneficiary has been employed as director of International Business for Europea de Servicios since 1991 and has vast experience selling ionic water treatment systems. 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 (Reg. Comm. 1972). In addition, the director's decision concerning the plausibility of the petitioner's proposed business plan for the U.S. entity, the size of the U.S. investment (\$5,000), and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States have not been counterbalanced by any evidence submitted by the petitioner.

On review of the complete record, the petitioner has failed to establish that the beneficiary has been employed in a primarily managerial or executive position for one continuous year within three years preceding the filing of the petition or that the petitioner will be able to support a managerial or executive position within one year of operation in the United States.

A second issue in this proceeding is whether the petitioner has secured sufficient physical premises to house a new office.

The petitioner initially submitted a copy of a lease agreement dated, May 15, 2002, entered into by the U.S. entity and a boat and marine sales business. The lease agreement is for one year, subject to amendment to other property or cancellation with one months notice. The lease agreement calls for the petitioner to use and occupy the premises to conduct business of water treatment and head hunting and for no other object or purpose without the written consent of the lessor. The petitioner also provided a color photograph of the interior of the office space leased. The photograph depicts a medium sized desk and one medium sized office chair. In response to the director's request for additional evidence, the petitioner submitted a letter from the boat and marine sales business, Metro East Fiberglass and Marine, Inc. dated July 9, 2002, where the lessor stated that the petitioner rents an office within its complex at a premium of \$200.00 per month. The lessor also stated that the petitioner had paid three months rental.

The director, in denying the petition, stated that the record clearly establishes that the U.S. entity does not have any physical premises to house any employees other than the

beneficiary. The director also states that the petitioner's contention that the U.S. entity does not need any substantive physical premises because the future employees will perform all their duties at client sites is not persuasive.

On appeal, the petitioner states as follows:

The petitioner leased the office space in order to have premises from which to incorporate Calcat World, Inc. and in order to be able to open a business bank account and to obtain an employer identification number.

Once the beneficiary is in the United States he may look to house the business elsewhere or even take the larger premises he has been offered by the same landlord and which are capable of house up to 15 employees.

As the business develops it may be necessary to move to new offices in a different location altogether.

The petitioner declined to rent the larger premises offered by the current landlord because, at that early stage, the petitioner believed it sound business practice not to rent larger premises from which they may relocate.

The petitioner's assertions are not persuasive. The regulations require the petitioner to submit evidence that establishes that sufficient physical premises to house the new office have been secured at the time the new office petition is filed. See 8 C.F.R. § 214.2(1)(3)(v)(A). In the instant case, the evidence fails to show how much space was leased to house the new office or whether the leased space is located in a commercial zoning district. The petitioner has not provided a floor plan to establish that the leased space is sufficient for the U.S. entity to begin operations. The petitioner states on appeal that the initial intent in leasing the office space was to incorporate the U.S. entity, open a business bank account, and obtain an employer identification number. There is no evidence in the record to demonstrate that the intent in leasing the office space was for the purpose of housing the new office. To the contrary, it appears that the petitioner's intentions were short-term and did not take into consideration the organization's space requirements. Although the evidence establishes that the duration of the lease agreement is for one year, the evidence also shows that it can be cancelled with one months notice.

There is no evidence in the record to establish that the petitioner has taken affirmative steps to secure more permanent quarters within the foreseeable future. The petitioner states that the U.S. entity was established in order to operate an executive search and recruitment service and to provide distributor and maintenance services to customers of the Ionic Water Protection Unit. There is no evidence in the record that demonstrates that the petitioner has leased sufficient office or warehouse facilities to accommodate the anticipated employees or equipment needed to function both as an executive search and recruitment service and as a distributor and maintainer of water protection units.

The petitioner also contends that the U.S. entity does not need any substantive physical premises because the future employees will perform all their duties at client sites. This contention is not persuasive and has not been substantiated by any independent documentary evidence. There is no evidence in the record that establishes how the day-to-day services of both companies within the organization can be met by confining the U.S. entity to such limited space. The decision not to rent larger premises to accommodate the start up of the U.S. entity has not been justifiably substantiated by the petitioner. Furthermore, the petitioner's assertion, that it may rent larger premises in the future, is speculative. The regulations clearly require the petitioner to have acquired "sufficient physical premises" at the time the petition is filed. The petitioner must establish eligibility when the nonimmigrant visa petition is filed. CIS 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 Corp.*, 17 I&N Dec. 248, 249 (reg. Comm. 1978). The evidence of record fails to establish that the petitioner has secured sufficient physical premises to house the new office.

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.