

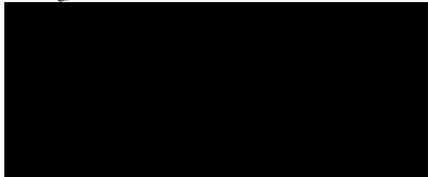
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U.S. Department of Homeland Security  
Citizenship and Immigration Services

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



NOV 20 2003

FILE: LIN 02 076 50368 Office: NEBRASKA SERVICE CENTER Date:

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]

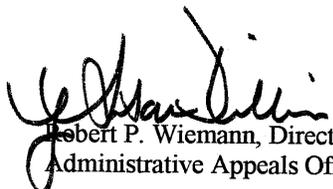
**INSTRUCTIONS:**

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 is described as an importer of textiles from Uzbekistan. It seeks to employ the beneficiary temporarily in the United States as its purchasing and sales manager. 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(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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1996 as an importer of textiles from Uzbekistan. The petitioner states that the U.S. entity is a joint venture of [REDACTED] located in Tashford, Uzbekistan. The petitioner declares three employees and \$255,000 in gross annual income. The petitioner seeks to secure the beneficiary's services as a purchasing and sales manager for a period of one year, at a yearly salary of \$25,000.

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 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 petition, the petitioner describes the beneficiary's duties with the foreign entity as "Sales and Marketing Manager, Seeks [sic] new buyers for products; Reviews the financial operations of all import/export matters; Marketing and distribution [sic] of ready to wear goods (clothing); Travels overseas to negotiate contracts and develop new markets for products." The beneficiary's proposed job duties are described as "Develop [sic] joint-venture import/export of sale of clothing manufactured at facilities of Tashford Corporation."

In a letter of support dated April 30, 2001, the vice-president of Sorel Company, Inc. describes the beneficiary's proposed job duties for the U.S. entity as follows:

[The beneficiary] will seek new buyers and markets in the U.S. for products manufactured by Tashford. She will review the financial operations of all import/export matters. She will also be responsible to negotiate contracts and develop new markets.

In response to the director's request for additional evidence, the beneficiary's proposed job duties included: developing new markets for importing textile products, negotiating contracts and sales prices, and traveling to and from Tashkent, Uzbekistan to oversee packaging for importing clothing and checking quality control at the factory. A breakdown in percentages of time to be spent on each task reveals that 75 percent of the beneficiary's time is to be spent developing new markets, and 25 percent of her time is to be spent negotiating contracts and sales prices.

The beneficiary's job duties for the foreign entity included: seeking new buyers for products, managing sales staff for the local sales staff, negotiating contracts and sales prices, reviewing financial operations of all import/export matters, and attending meetings with other members of management staff and preparing reports and updates for the owners of the company. A breakdown in percentages of time spent on each task reveals that 10 percent of her time is spent in direct sales and marketing, 35 percent of her time is spent overseeing other sales staff, 15 percent of her time is spent negotiating contracts and sales prices, 30 percent of her time is spent reviewing financial operations of all import/export matters, and 10 percent of her time is spent meeting with management staff and preparing reports and updates for the foreign entity.

A list of employees for the foreign entity shows that the beneficiary's title was production and commerce director, with the production and supply departments listed under her department. The petitioner also contends that the beneficiary will manage a major function within the U.S. entity and that she is entitled to executive capacity "as she has ability to make independent decisions." The petitioner goes on to say that the U.S. entity has only two employees, a president and a vice-president, and that the beneficiary's transfer to the United States will raise the number of employees to three persons.

The director determined that the record contained insufficient evidence to demonstrate that the beneficiary has been or will be employed primarily in a managerial or executive capacity. The director further maintained that the evidence submitted did not establish that the beneficiary would be directing or managing a function of the U.S. entity, but rather would be performing the function as a sales person. The director continued by stating that based upon the descriptions given by the petitioner of the beneficiary's duties for the foreign entity, which included direct sales and marketing, and the purchasing of raw materials, it was not evident that such duties were managerial or executive in nature. The director also noted that, while the beneficiary oversees a sales staff, the record did not establish that the positions were professional. The director concluded by stating that it did not appear from the evidence that the beneficiary was directing a function of the foreign entity.

On appeal, counsel asserts its disagreement with the director's decision, and submits a brief in support of its assertion. Counsel contends that the beneficiary will be managing an essential function of the U.S. entity by overseeing all the import/export and marketing for the entity, and by creating sales for the organization. Counsel also asserts that the beneficiary will be managing a primary function of the U.S. entity, namely, marketing and selling the entity's product. Counsel continues by averring that the beneficiary will function at a senior level within the U.S. entity, in that she will be entirely in charge of her own job duties. Counsel further contends that the beneficiary will serve at a senior level in that she will be solely responsible from the factory to the import and export process on through the marketing and distribution within the United States. Counsel states that once the functions are in place, the beneficiary will have authority to hire and fire personnel to assist her in these functions. Counsel continues by stating that the beneficiary will be exercising discretion over the day-to-day operations of the function, in that she would be the main "point person" for the U.S. entity, and will also be responsible for developing the market in the United States for the organization's textile products. In addition, counsel asserts that the beneficiary qualifies as an executive for the U.S. entity, in that she will direct the management of a major component or function of the organization as marketing manager, by establishing goals and policies, developing markets and determining pricing structure, and by receiving limited direction or supervision from the owners. Counsel concludes by contending that the director based her decision to deny the L-1A petition upon an analysis of an

established company, rather than a new office petition where the organization is trying to develop business relationships with U.S. markets. Counsel does not address the beneficiary's employment with the foreign entity.

Counsel's statements 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. Counsel contends that the director's basis of analysis was inappropriate, in that the petitioner should be analyzed as a new office. Contrary to counsel's belief, the U.S. entity will not be considered a new office for purposes of statutory and regulatory entitlements. The U.S. entity was, in fact, incorporated in 1996 and has already had one purchase and sales manager working for it. The petition in the instant matter was filed January 15, 2002. In addition, the petitioner submitted copies of a 1999 U.S. Corporation Tax Return, filed on behalf of the U.S. entity, which showed gross receipts/sales in the amount of \$255,034 for the year. On review, the record reveals that the petitioner has been doing business for more than one year. Therefore, it is not a new office pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(F), and will not be treated as one for purposes of this analysis. Furthermore, the director's basis of analysis was appropriate in the instant case. The fact that the petitioner is in a preliminary stage of organizational development is considered, but does not relieve it from meeting statutory and regulatory requirements.

Likewise, on appeal, counsel fails to address issues raised by the director dealing with whether the beneficiary's job duties at the foreign entity qualify as managerial or executive. In rendering her decision, the director specifically states:

In addition, the petitioner's response describes the beneficiary's duties for the foreign employer . . . . This description fails to clearly establish that the beneficiary performed in a managerial or executive capacity at the qualifying entity. Performing direct sales and marketing is not managerial in nature, nor is purchasing raw material. Furthermore, while the beneficiary oversees sales staff, the record does not establish that the positions are professional in nature. Furthermore, it does not appear that the beneficiary is directing a function of the organization. Therefore, the evidence fails to establish that the beneficiary's employment abroad was

in a managerial or executive capacity and for this additional reason the petition may not be approved.

Counsel fails to address the objections made by the director, and there has been no documentary evidence submitted on appeal to refute the director's decision. 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." Hence, the grounds for denial of the petition by the director, with respect to the beneficiary's job duties for the foreign entity, have not been overcome.

Furthermore, the petitioner has failed to provide sufficient evidence to establish that the beneficiary's proposed job duties for the U.S. entity are managerial or executive in nature. The beneficiary's proposed title for the U.S. entity reads "purchasing and sales manager," indicating an individual in charge of the day-to-day sales and marketing services of the organization, 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 import/export and marketing and creation of sales for the organization, the record does not demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. In fact the evidence submitted demonstrates that, only after the beneficiary begins working for the U.S. entity, will the beneficiary have the authority to hire additional staff to perform the function. Further, the petitioner has failed to provide a detailed position description specifying exactly what the management of the U.S. entity 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 documentary evidence of the U.S. entity's organizational structure depicting the beneficiary as purchasing and sales manager, and a president and vice-president. 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.

Counsel contends that the beneficiary qualifies as an executive capacity in that she directs the management of a major component or function of the U.S. entity. Counsel continues by asserting that, as marketing manager, the beneficiary would establish goals and policies develop markets and determine pricing structure for the joint venture. Counsel further avers the beneficiary would receive only limited direction or supervision from the owners of the organization.

Contrary to counsel's assertions, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in an executive capacity at the U.S. entity. The record contains a description of the beneficiary's job duties that essentially paraphrase the essential elements of the statutory definitions of 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.

The record does not establish that the beneficiary has been or will be primarily managing the organization, or a department, subdivision, function, or component of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the organization. The petitioner has not demonstrated that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy. The petitioner has not demonstrated that the beneficiary will be primarily supervising

a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties.

Counsel further maintains that a person could be considered a manager or executive under the regulations, even where it is shown that the person was the sole employee of the company and uses outside independent contractors, or where it can be shown that the business is complex. The evidence presented in the instant case does not demonstrate that the beneficiary will be the sole employee, that the U.S. entity has hired independent contractors, or that the entity is in anyway considered a complex business. See *Matter of Treasure Craft, supra*.

Finally, counsel contends that the beneficiary possesses a specialized skill that would qualify her for an L-1 visa. Counsel further maintains that the beneficiary has acquired specialized knowledge from her work with the Tashkent factory concerning the product, costs of goods and labor, and pricing of the product for markets based upon her knowledge of the factory.

Counsel cannot request classification of the beneficiary as an L-1B intracompany transferee (an employee with specialized knowledge) after the filing of the petition. Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). If the petitioner believed that the beneficiary was eligible for this nonimmigrant visa classification as an employee who possessed specialized knowledge, the petitioner was required to request such classification when filing the petition. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The petitioner cannot request such a change now on appeal. The AAO notes that, if the petitioner wishes to seek classification of the beneficiary as an L-1B intracompany transferee, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

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). In addition, the petitioner has not submitted sufficient evidence to establish that the U.S. entity is a qualifying organization doing business pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(G)(2) in that it is engaged in the regular, systematic, and continuous provision of goods and/or

services and does not represent a mere presence of an agent or office in the United States. As the appeal will be dismissed, however, 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; *Republic of Transkei v. INS*, 923 F.2d 175,178 (D.C. Cir. 1991) (holding burden is on the petitioner to provide documentation); *Ikea US, Inc. v. U.S. Dept. of Justice*, 48 F.Supp.2d 22, 24 (D.D.C. 1999) (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.