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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

[REDACTED]

File: WAC 02 035 56111 Office: CALIFORNIA SERVICE CENTER

Date: NOV 26 2002

IN RE: Petitioner:
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)

IN 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

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

The petitioner is described as involved in the business of communications equipment sales and exports. It seeks to amend and change the status of the beneficiary from a L-1B specialized knowledge position to an L-1A manager position. The proposed L-1A position is Sales Manager. The director determined that the petitioner had not established that the beneficiary has been and will be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary manages an essential function of the company and qualifies as a manager. Counsel also requests that if the appeal for change of status to L-1A is dismissed, that the AAO extend the status of the beneficiary in L-1B status. However, the AAO will only review the record of proceeding in which the petitioner filed a petition requesting the change of status from an L-1B to an L-1A. If the petitioner wishes to request L-1B status for the beneficiary, the petitioner should file a new petition with the appropriate Service Center.

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.

The United States petitioner was incorporated in 1994 and states that it owns 50% of Viko Limited, located in Moscow, Russia.

Counsel for the petitioner states the petitioner employs seven persons and had gross sales of \$3.4 million for the year 2001. The initial L-1B petition was approved and was valid from November 30, 1998 to November 7, 2001. The petitioner seeks to amend and extend the petition's validity and the beneficiary's stay for two years at an annual salary of \$30,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed primarily in a 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.

The director issued a request for additional evidence to demonstrate that the beneficiary will be engaged in primarily managerial or executive job duties. The director requested:

The U.S. entity's organization chart with the beneficiary's position and other named employees in the chart.

Provide a detailed description of the beneficiary's specific job duties, including the percentage of time to be spent on each duty.

Clearly indicate whether the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees. The evidence should include name, job title, entry date of employment, education level, salaries/wages, and evidence they are actually employees of the U.S. entity.

Other employees currently under the beneficiary's supervision, including name, job title and duties, entry date of employment, education level, annual salaries/wages and evidence that are actually employees of the U.S. entity.

Submit DE-6 for the last four quarters to demonstrate that the U.S. entity has employees.

(Emphasis in original.) Counsel for the petitioner responded to the request for evidence. The response included the petitioner's organizational chart which listed the name of each employee and their title. Counsel states that the beneficiary, as sales manager, is responsible for:

The direct supervision of at least two professionals in the sales department, direction of the accounting division one professional bookkeeper as well as the management and direction of the shipping division.

Counsel describes the duties of the beneficiary as including the

design and implementation of a system of management for the Sales division of the operation. The specific duties include:

- development of a company strategic plan to benefit the organization;
- responsibility for business growth plans, both long and short range;
- development of revenue and profit augmentation procedures;
- development of quality assurance procedures
- establishment of customer service programs;
- staffing and training management and support personnel in the sales management office and shipping facilities;
- supervision and control of sales, shipping as well as supervision of accounting services inventory and control, billing and collections;
- planning and implementation of advertising and corporate imaging.

The AAO notes that the petitioner did not respond to the specific request by the director to include the percentage of time to be spent on each of the described duties. The petitioner's vague descriptions provide insufficient detail to allow CIS to determine many of the beneficiary's specific responsibilities. 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).

Counsel asserts that the personnel that the beneficiary supervises are professional: the sales representative, the employee in charge of purchasing, and a bookkeeper. The director determined that the petitioner had not demonstrated the beneficiary would be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. Further, the director determined the petitioner failed to demonstrate how the beneficiary's daily activities or the specific scope and nature of the beneficiary's activities will be primarily managerial in nature. Therefore, the director concluded that the beneficiary has not been and will not be employed in a primarily managerial capacity and denied the petition.

On appeal, counsel asserts that "as a manager, [the beneficiary] must only manage an organization, department, subdivision, function or component, which he clearly does. In fact, he not only

controls, but two (sales and finance)." It is not clear if counsel states that sales and finance are a department, subdivision, function or component. Counsel further asserts that the beneficiary manages an essential function "which both finance and sales are." Counsel explains that the beneficiary has the authority to hire and fire, and exercises discretion over day-to-day operations over the activity and function (sales and finance). Counsel states that the beneficiary is not a first-line supervisor and his department "does not have to be physically large in size, and is not, as this is a new office." It is unclear to the AAO why counsel refers to the petitioner as a "new office" when the petitioner was incorporated in 1994, more than four years before this petition was filed.

Additionally, counsel also appears to assert that the beneficiary qualifies as a function manager. Counsel insists that the beneficiary's controls two essential functions: finance and sales. Counsel further refers to an unpublished decision involving an employee of the Irish Dairy Board. In the Irish Dairy Board case it was held that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee of the petitioning organization. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the Irish Dairy Board case. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel explains that the beneficiary manages an essential function of the organization: "His function is that of development and management of the sales division of the company." The AAO acknowledges that a person can qualify as a function manager without directly supervising other employees. However, the evidence demonstrates that, at most, the beneficiary acts as a first-line supervisor and performs tasks necessary to provide a service or produce a product. The job description in the response to the request for evidence states that the beneficiary's duties include "the supervision and control of sales, shipping as well as supervision of accounting services inventory control, billing and collections." As discussed above, the petitioner did not provide the percentage of time the beneficiary spends performing the listed duties. Based on the information provided by the petitioner, the beneficiary appears to be acting, at most, as a first-line supervisor of non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *Matter of Church*

Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition, the petitioner stated the beneficiary's duties include the "planning and implementation of advertising and corporate imaging." These duties primarily appear to consist of marketing tasks. Marketing duties, by definition, qualify as performing a task necessary to provide a service or product. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Id.* Consequently, the beneficiary does not qualify as a function manager.

Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his 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 duties as managerial, but it fails to quantify the time he spends on them. This failure of documentation is important because several of the beneficiary's daily tasks 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. U.S. Dept. of Justice*, *supra* at 24.

Counsel appears to agree with CIS when he declares that the managing of administrative personnel "is not a managerial duty for INA purposes." Counsel explains, "the size of the company does not permit for the existence of a plethora of management positions. Therefore, [the beneficiary's] duties are one of a manager who is qualified to lead other managers" As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to section 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The record does not establish that a majority of the beneficiary's duties will be directing the management of the organization. The petitioner concedes that the beneficiary will not be primarily supervising a subordinate staff

of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. The petitioner asserts that the beneficiary manages the essential function of sales and finance for the petitioner. The AAO notes that it is not until the appeal that counsel asserts that the beneficiary is a function manager. However, the evidence demonstrates that the beneficiary performs tasks necessary to provide a service or produce a product. Consequently, the beneficiary does not qualify as a function manager.

The fact remains that the description of the beneficiary's primary duties indicates that they are not in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.