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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 Eye Street NW
Washington, DC 20536



SEP 10 2003

FILE: EAC 02 220 51827 Office: VERMONT 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:



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, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, [REDACTED], states that it is the subsidiary of a Brazilian business, [REDACTED]. The petitioner describes itself as a manufacturer's representative and wholesale retail business. The U.S. entity was incorporated on April 14, 1999 in the State of New Jersey. In May 2000, the U.S. entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A). CIS approved the petition as valid from May 28, 2000 until May 28, 2002. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for two years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's chief executive officer at an annual salary of \$60,400. On November 19, 2002, the director determined, however, that the beneficiary did not qualify as a manager or an executive. Consequently, the director denied the petition. On appeal, petitioner's counsel asserts that the beneficiary serves in a primarily managerial or executive capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

Under 8 C.F.R. § 214.2(1)(3), an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Pursuant to 8 C.F.R. § 214.2(1)(14)(ii), a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied by:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The only issue in this matter is whether the beneficiary will primarily work as a manager or an executive.

In regard to the issue of whether a beneficiary has been and will be primarily performing managerial or executive duties, section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(1)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are *either* in an executive or managerial capacity. *Id.* In this instance, counsel's January 16, 2003 brief asserts that the beneficiary will be serving as a manager and an executive; therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of each capacity.

The petitioner did not describe the beneficiary's duties on Form I-129; instead, the petitioner's parent company submitted a May 4, 2002 letter that generally described the beneficiary's duties in the United States:

[The beneficiary] has and continues to maintain the position of Chief Executive Officer of Pantanal, a position clearly involving executive functions. In this position, [the beneficiary] supervises and

manages [the petitioner]. [The beneficiary] has devoted his time in the United States to establish[ing] operations in the U.S. market and manag[ing the petitioner].

After reviewing the May 4, 2002 letter and other evidence that the Brazilian entity submitted with the Form I-129, the director issued a request for evidence on August 1, 2002:

Submit a more detailed description of the beneficiary's duties in the U.S. Be specific.

. . . .

Indicate exactly whom the beneficiary directs including their job title[s] and position description[s]. List all employees under the beneficiary's direction. Also, indicate [the] percentage of time spent in each of the listed duties. (Emphasis in original.)

On October 22, 2002, the petitioner responded:

[The beneficiary] has and will continue to perform the duties of a manager/executive with [the petitioner]. [The beneficiary's] duties in the U.S. has [sic] been to set up the U.S. subsidiary, oversee and manage its initial stages of growth, which includes strategic planning and establishing objectives in order to accomplish [the Brazilian entity's] goal of effectively expanding its business in the United States, hire and fire personnel, handle problems that may occur, exercise wide latitude in discretionary authority in the day-to-day operations.

Additionally, the October 22 letter outlined the beneficiary's primary duties:

1. Plan business objectives.
2. Develop organizational policies to coordinate functions and operations.
3. Establish responsibilities and procedures for attaining objectives.

4. Direct and coordinate activities of managerial staff.
5. Revise objectives and plan in accordance with current conditions.
6. Direct, review, analyze and advise managerial staff on their functions and sales/activity reports.
7. Review financial statements to determine progress and status in attaining objectives.
8. Confer with clients and managerial staff to discuss issues, such as sales, problems, and finances.
9. Hire, assign and evaluate the services of managerial employees or fire them.
10. Monitor and review sales, marketing strategies, publicity and purchases through periodical inquiries.
11. Generate a number of different approaches to problems.
12. Examine expenditures to ensure sales and its activities are within budget.
13. Negotiate and enter into contract [sic] on behalf of the company.
14. Write letters and memos.

On appeal, the petitioner assigned percentages to the above duties:

Outline Number	Percentage
1, 2, 3, 5, 11	30
4, 6, 8, 9	25
7, 10, 12	33
13	10
14	2

The duties listed above are too broad to convey an understanding of the beneficiary's daily activities. For example, in several instances, the duties referred to "objectives"; however, the petitioner failed to identify the objectives. Likewise, the petitioner characterized the beneficiary as solving "problems" without specifying the nature of the problems. Furthermore, in several cases, the petitioner described the beneficiary as directing managerial staff. The petitioner did not, however, define directing. Additionally, the petitioner generally paraphrased the statutory definitions of "managerial" and "executive" capacity. See sections 101(a)(44)(A)(i), (iv) and 101(a)(44)(B)(iii) of the Act. For example, the petitioner depicted the beneficiary as hiring and firing personnel as well as exercising wide latitude in discretionary authority over day-to-day operations.

Going on record without supporting documentary evidence is insufficient for the purpose of meeting 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). Thus, the record lacks adequate supporting documentary evidence to demonstrate that the beneficiary's duties are primarily executive or managerial.

Moreover, the petitioner asserts several times that the beneficiary is a manager because he directs a managerial staff. In regard to the beneficiary's staff, the petitioner admits on appeal, [REDACTED] and [REDACTED] are the ones primarily responsible for performing the day-to-day tasks of providing the services of the company." 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). Consequently, the staff whom the beneficiary oversees fails to qualify as managerial. In turn, the lack of supervised managerial staff precludes CIS from classifying the beneficiary as a manager.

On appeal, the petitioner states that the director misinterpreted the facts regarding the names and number of

employees who report to the beneficiary. In short, the director concluded that only one of the four names on the U.S. organizational chart matched the four names reported on the federal Form 941 quarterly income tax return for the period ending March 31, 2002. The petitioner explained that the names on the organizational chart were correct at the time the petition was filed. The petitioner added that the U.S. entity later replaced the beneficiary's three subordinates with three new employees.

The director correctly determined that the names on the organizational chart did not fully correlate with the names on the Form 941. Nevertheless, regardless of the names of the three subordinates, their positions do not qualify as managerial. The current subordinate employees, like the prior subordinate employees, primarily perform tasks necessary to produce a product or provide services. Thus, the current subordinates are not employed in managerial capacities. *Matter of Church Scientology International, supra*. In sum, as discussed previously, the lack of supervised managerial staff precludes CIS from classifying the beneficiary as a manager.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Transkei*, 923 F.2d at 178 (holding burden is on the petitioner to provide documentation); *Ikea*, 48 F.Supp at 24-5 (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.