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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 046 53295 Office: TEXAS SERVICE CENTER Date: APR 01 2004

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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas 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 import and export business of merchandise, computers, office supplies, software, electronics and other goods. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its executive 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(l)(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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

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);

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.

According to the documentary evidence contained in the record, the petitioner was incorporated October 2, 2000 and claims to be an import and export business of merchandise, computers, office supplies, software, electronics and other goods. The petitioner claims that the U.S. entity is a subsidiary of Intersupply Cory, C.A., located in Venezuela. The evidence shows the petitioner employs one employee. The petitioner seeks to continue to employ the beneficiary's services as its executive manager for three additional years, at a yearly salary of $33,800.

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.

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 provided a nontechnical job description of the beneficiary's duties as:

> As the executive manager [the beneficiary] will continue directing and overseeing our new subsidiary. In this first year Mr. [redacted] has established our subsidiary successfully. His responsibilities are to plan, manage, and supervise the company's every day operations. Mr. [redacted] will be making contacts, buying technology and equipment. He will get new clients and suppliers and will arrange the exportation of the company's products purchased in the U.S.A.

In the petition, the petitioner describes the beneficiary's proposed job duties at the U.S. entity as:

> Mr. Melendez took the first steps necessary for the establishment of the company in the U.S. After incorporating the company, Mr. [redacted] developed the company's marketing strategies. He will continue managing and overseeing the company's day to day operations related to financial investments, purchasing or merchandise, technology, electronics, and other products to export to Venezuela. He will analyze the market of the products that are going to be exported to Venezuela. The company is now running and Mr. [redacted] will need to hire an employee to help him with the different activities. In addition he will continue in charge of all the importing and exporting process. [sic]

In a letter of support dated November 14, 2001, the executive manager of the foreign entity describes the beneficiary's future duties as:

> At this time Intersupply USA, Inc. wishes to retain Mr[redacted] services in the capacity of Executive Manager for an additional period of three years. The need to retain Mr. [redacted] services for an additional period has arisen because of the ambitious expansion plans that are currently undertaken by Intersupply Cory, C.A. Mr.[redacted] has had a key role in the expansion plans and his continuing presence is essential to bring the expansion of the business. He will have to implement new marketing strategies so that the company can reach a profitable stage. He will have overall authority to manage and budget all financial resources of the company. He will of course [sic] to maintain the corporate structure of Intersupply USA, Inc. and will have to comply with all legal requirements in the United States (federal tax, payrolls, etc...). He will enjoy wide latitude in his discretionary decision-making authority but he will report to Intersupply Cory's Board of Directors.

In response to the director's request for additional evidence regarding the beneficiary's duties, the petitioner submitted a translated response by the foreign entity, which stated that the beneficiary has fully dedicated himself to work in the planning, organization and development of the U.S. entity. It is also stated that the beneficiary has been aware of how important it is to establish a complete structure of the company that will allow him to comply with its objectives at the national as well as international level. The representative further stated that the beneficiary continues working to comply with the projected plans of the U.S. entity and to achieve its development. It was also stated in the correspondence that the beneficiary has established contacts with important American companies, is working in supervising the services rendered, and anticipates the subcontracting of such services, which, in turn, will allow employment of other persons.

The director determined that the beneficiary is not performing in a managerial or executive capacity since the beneficiary is not managing other professionals or managers. The director also determined that since the beneficiary is the only employee, it appears that he would have to engage in the day-to-day business activities of the company.

On appeal, counsel disagrees with the director's decision and submits a brief in support of his assertions. Counsel asserts that the beneficiary manages a function within the U.S. entity. Counsel further contends that the beneficiary will be in charge of the operation and the development of the business.

Counsel's assertions are not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The record reveals that the U.S. entity was incorporated in 2000 and has demonstrated that it has been doing business for more than one year prior to the filing of this petition. Therefore, it is not a new office pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(F). The petitioner indicated in its response to the director's request for additional evidence that it anticipates expansion and future growth. Counsel further contends that CIS should take into consideration the fact that the U.S. entity is a new establishment, that it is a sole proprietorship, that it is still growing, and that it anticipates additional growth in the future. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant case, the petitioner has failed to present sufficient evidence to establish that it has reached the point where it can employ the beneficiary in a predominantly managerial or executive position.

The record does not establish that the beneficiary will be primarily managing a function of the organization. The beneficiary's job descriptions depict an individual in charge of the day-to-day services of the organization, not that of 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 contends that the beneficiary will be managing an essential function of the U.S. entity by overseeing the overall operations of the organization, the record does not demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function.

The petitioner has failed to provide a detailed position description specifying exactly how the beneficiary will manage the overall operations of the U.S. entity. The beneficiary's duties have been described as: " . . . in charge of the operation. He will be in charge of the development of the business, and will direct and develop the business on a personal level and generally supervise the enterprise." This description is not sufficient to establish that the beneficiary will be managing a function of the organization rather than performing the function. 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 matter, the beneficiary is the sole employee of the U.S. entity. Absent details concerning the beneficiary's 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.

The record reflects that the beneficiary will continue to perform the services necessary to maintain the petitioner's business, namely providing a service. The beneficiary's position title of executive manager alone is insufficient to establish that the beneficiary will be functioning primarily in a managerial or executive capacity.

In addition to examining the size of the enterprise and the number of staff, Citizenship and Immigration Services (CIS) must also take into consideration the reasonable needs of the enterprise. 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.

In the instant matter, at the time of filing, the petitioner had been established for over one year. The firm employed the beneficiary as executive manager. The petitioner did not submit evidence that established that it employs subordinate staff members that would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as manager or executive. In any event, 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) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

On review of the record, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The vague and general outline of the beneficiary's position description is insufficient to establish that the beneficiary's past or proposed job duties are managerial or

executive in nature. The petitioner has not provided persuasive evidence to establish that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company, at a senior level of the organizational hierarchy. The record does not demonstrate that the U.S. entity contains the organizational complexity to support a managerial or executive position. 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 employ 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 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 assertions of counsel without documentary evidence cannot be used to establish that the beneficiary is acting in a primarily managerial or executive capacity.

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.