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FILE: EAC 02 093 51282 Office: VERMONT SERVICE CENTER Date: **APR 12 2004**

IN RE: Petitioner:
Beneficiary:

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

The petitioner claims to be engaged in the business of purchasing and exporting logs. It seeks to employ the beneficiary temporarily in the United States as its vice president. The director determined that the petitioner had not established that the beneficiary has been or would be employed in a primarily managerial or executive capacity or that the petitioner would support a managerial or executive position within one year of approval of the instant petition. The director also determined that the petitioner failed to submit sufficient evidence showing that the beneficiary has been employed in a managerial or executive capacity for one year of the three years prior to filing this petition or to establish that it has a qualifying relationship with a foreign entity. On appeal, counsel disputes all of the director's findings and submits a brief in support of his assertions.

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 regulations at 8 C.F.R. § 214.2(l)(3)(v) state 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 (l)(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.

The U.S. petitioner states that it was established in 2001 in the state of Pennsylvania and indicates in the petition that it is a branch of Koneks Insaat Orman, located in Turkey. The petitioner seeks to employ the beneficiary in the United States in order to open the new office at an annual salary of \$36,000.

The first 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 Immigration and Nationality Act ("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 support of the petition, the petitioner provided the following description of the beneficiary's prospective job duties:

Will report to the President. Responsible for day-to-day marketing and duties such as extensive client contacts, sales and advertisement arrangements, and other duties as assigned by the President.

On February 26, 2002, CIS requested that the petitioner submit additional evidence regarding the beneficiary's foreign and proposed U.S. employment describing the beneficiary's past and proposed duties.

The petitioner's response included the following description of the beneficiary's job duties abroad:

Making the latest control of the goods with the quality and dimensions complying with the customer orders, to forward purchase approvals. The senior purchase director directly responsible for all the foreign purchases. [sic]

The petitioner also submitted an organizational chart of the foreign entity showing the beneficiary's position, along with three others, under the vice president. The chart suggests that the beneficiary supervises the company's inspector position. In addition, according to a letter from the petitioner's president and co-owner of the foreign entity, the beneficiary's primary area of expertise is inspecting wooden logs for quality and customer relations. He further stated that the beneficiary inspected the foreign company's shipments for customers in "East Russia" for approximately one year and did the same job for customers in Rumania and the Ukraine for approximately one and a half years.

Based on the evidence submitted, the director denied the petition, concluding that the record lacked evidence to establish that the beneficiary has been employed abroad or will be employed in the United States in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary handles all foreign purchases and "is the authority in his department above many employees." Contrary to this claim, the foreign entity's organizational chart shows only one employee directly under the beneficiary's supervision. Since the petitioner failed to comply with CIS's request for a description of duties of all employees, the AAO is unable to determine what the beneficiary's sole subordinate employee actually does or how he assists the beneficiary. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the instant case the various descriptions provided of the beneficiary's duties suggest that the beneficiary's role in the company requires him to be actively involved in dealing with customers and inspecting of merchandise.

Counsel further states that the beneficiary has the title of vice-president and refers to an affidavit that discusses the beneficiary's ownership of 20% of the foreign entity's shares. However, counsel's points in no way help establish that the beneficiary has been and will be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Neither the beneficiary's executive title nor his part ownership of either company help to establish that the duties he performs and will be

performing are primarily of an executive nature. To the contrary, the president of the petitioning entity has stated that the beneficiary's key role is inspecting the wood prior to and after it is cut to make sure it meets with customer expectations. While the beneficiary's contribution is germane to the success of the business, his duties are not of a managerial or executive nature.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The fact that the beneficiary has discretionary authority and performs a key function does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. Rather, the record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he will be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function. To the contrary, the evidence submitted suggests that the beneficiary will primarily be performing an essential function both initially and in the future. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

The other issue in this proceeding is whether the petitioner has established that it has a qualifying relationship with a foreign entity.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(I) state:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(J) state:

Branch means an operation division or office of the same organization housed in a different location.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(K) state:

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, in pertinent part:

Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In the petition the petitioner claimed to be a branch of the foreign entity. However, evidence of the petitioner's incorporation in the state of Pennsylvania suggests otherwise. In CIS's request for additional evidence, the petitioner was instructed to submit evidence documenting the ownership and control of the foreign entity.

The petitioner's response contained documents which indicated that the beneficiary owns 20% of the foreign company's shares. However, the stock certificate submitted regarding ownership of the petitioning entity's shares indicates that the beneficiary owns 51% of the company and therefore has controlling interest. While counsel is correct in pointing out on appeal that a person can own less than 51% of the issued shares and still have controlling interest, such is not the case in this instance. The beneficiary is one of a total of five owners, each of whom owns an equal 20% of the shares of the foreign entity. Therefore, it cannot be concluded that the beneficiary owns controlling interest of the foreign entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International at 595*. In the instant case, the foreign entity is equally owned and controlled by five individuals. The U.S. entity is majority owned and controlled by the beneficiary. Thus, the two entities are not similarly owned and controlled. Therefore, the AAO concludes that there is no qualifying relationship. For this additional reason the petition cannot be approved.

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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.