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U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: LIN 01 094 52683 Office: NEBRASKA SERVICE CENTER Date: **APR 13 2004**

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 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.

Handwritten signature of Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 is a new U.S. company engaged in the manufacturing and sale of jewelry to wholesalers. It seeks to temporarily employ the beneficiary as its director, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee.

The director denied the petition concluding that the beneficiary was not employed for one continuous year in the three year period preceding the filing of the petition in a managerial or executive capacity pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v)(B). In an appeal filed September 28, 2001, counsel for the petitioner asserted that the beneficiary was the manager of the foreign company's "overseas department," which has three professional employees, each of whom graduated from an accredited university. The appeal was not timely filed; therefore, the director treated the appeal as a motion to reopen. On review, the director again determined that the petitioner failed to establish that the beneficiary's job duties abroad were managerial.

In appeal dated January 22, 2002, counsel asserts that the resumes of the beneficiary's subordinates establish that each is employed as a professional. Additionally, counsel contends that the beneficiary's job duties in the "overseas sales department" satisfy the requirements of a manager. Counsel submits additional evidence on appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. In addition, 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.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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 (l)(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 services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or 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;
- (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 issue in this proceeding is whether the beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in a managerial or executive capacity pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v)(B).

In a letter submitted with the present petition, the petitioner stated that the beneficiary has been employed as a manager of the foreign company's management and foreign marketing department since March 1993. The petitioner also included a certificate of employment from the chief executive officer of the foreign company verifying employment of the beneficiary in this position, and submitted the beneficiary's Certificate of Graduation and transcript from a Korean university.

In a request for evidence, the director asked that the petitioner submit a statement from an authorized official describing the beneficiary's employment abroad. The director requested that the statement include the following information: (1) the beneficiary's dates of employment; (2) job titles; (3) the specific job duties performed by the beneficiary; (4) the employees supervised by the beneficiary; (5) the level of authority; and, (6) the level of authority of the beneficiary's immediate supervisor. The director also asked that the petitioner provide an organizational chart of the foreign company identifying the beneficiary's current position in relation to other employees.

In response, the petitioner submitted a letter from the president of the foreign corporation. In the letter, the company's president stated that in 1998 the beneficiary started the company's overseas department under the supervision of the chief financial officer. He noted that the beneficiary "has been in charge of North and South America, the Middle East, including Turkey, and Japan," and that the company "has enjoyed millions of export volume" since the beneficiary established the department.

The petitioner also provided additional evidence, including an organizational chart of the foreign company, in which the petitioner identified the beneficiary as a member of the "Overseas Sales" department. An additional notation indicates that there are three employees in that department. The petitioner also submitted several contracts evidencing the beneficiary's contact and correspondence with wholesalers for the purchase of the foreign company's products.

In her decision, the director determined that the beneficiary had not been employed abroad in a managerial capacity. The director acknowledged the various e-mails and sales contracts submitted by the petitioner in its response to the director's request for evidence. The director, however, concluded that because the correspondence pertained to negotiating prices and determining the items to be sold, the beneficiary was performing duties typical of a salesperson rather than a manager. The director also noted that the organizational chart did not identify employees subordinate to the beneficiary. The director consequently denied the petition.

On the petitioner's motion to reopen, counsel asserted that the beneficiary's authority in the foreign company is "well above and beyond that of a sales person," and submitted a sales contract signed by the beneficiary as evidence that the beneficiary possesses managerial authority. Counsel also recognized it was unclear from the organizational chart previously submitted whether the beneficiary managed any employees in the overseas sales department. Counsel stated that there were three employees subordinate to the beneficiary, each of whom graduated from an accredited university in Korea, and "are members of the working professional [sic]." Each of the subordinate employees' resumes was also provided. In addition, counsel submitted a letter from the president of the foreign corporation who stated that the beneficiary's main responsibility is to oversee the productivity of the overseas sales department, and to direct the department's members, which includes "three professionals" and three support personnel. The president also noted that the beneficiary has discretion regarding the hiring and firing of personnel in his department.

In a subsequent decision, the director determined that the additional evidence did not establish that the beneficiary had been employed abroad as a manager. The director noted that it is not clear from the evidence whether the beneficiary manages three subordinates, and if so, whether the employees' duties are managerial in nature. The director also stated that the description of the beneficiary's job duties, specifically the beneficiary's responsibility to oversee the department regarding productivity and potential contacts overseas, does not demonstrate a managerial capacity. The director affirmed the previous decision, and denied the petition.

In the present appeal, counsel resubmits resumes for the beneficiary's three subordinate employees, which counsel asserts establishes that the employees are professionals. In addition, counsel contends that the beneficiary's job duties in the foreign company satisfy the requirements of a manager. Counsel also submits a contract for the sale of jewelry in the amount of approximately \$50,000, which is signed by the beneficiary. Counsel asserts that the contract demonstrates the beneficiary's authority "well above and beyond that of a sales person."

On review, the record is insufficient to establish that the beneficiary has been functioning abroad in a primarily managerial 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). As required in the regulations, the

petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* In the present matter, the petitioner failed to submit adequate detailed evidence that the beneficiary is primarily managing a department and subordinate supervisory, professional, or managerial employees, rather than performing functions of the department. Although the petitioner had four opportunities to submit specific supporting evidence, the record contains only a brief job description that the beneficiary is responsible for overseeing the productivity of the overseas sales department, and directing the department's members in potential sales contacts. Additionally, the petitioner failed to provide documentation pertaining to the director's request for the beneficiary's specific job duties, and the employees supervised by the beneficiary. The actual duties of the beneficiary reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The AAO is therefore unable to determine the beneficiary's true function in the foreign corporation.

As addressed by the director, the additional documentation submitted by the petitioner indicates that the beneficiary is primarily performing the duties of the overseas department rather than managing the department's employees. The petitioner submitted several sales contracts, which the beneficiary signed on behalf of the company. Counsel asserts that because the beneficiary signed the documents, his authority is demonstrated to be "well above and beyond that of a sales person." While the AAO acknowledges that the beneficiary may have the authority to bind the foreign company in a contract for approximately \$50,000, this is not sufficient to establish that the beneficiary has been functioning as a manager. The petitioner has not explained whether the beneficiary is simply verifying and signing off on a contract made by one of his subordinate employees, which is a common responsibility of a manager, or whether the beneficiary actually obtained the sale himself. The surrounding evidence supports a finding that the beneficiary is actually selling the foreign company's products. Specifically, in written correspondence to the beneficiary, buyers of the foreign company's products are inquiring about the company's inventory and prices, requesting catalogs, verifying shipments and receipt of payment, and arranging meetings with the beneficiary. Additionally, purchase orders are being made directly to the beneficiary. 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).

With regard to the beneficiary's subordinate employees, the director was correct in concluding that the record was insufficient to establish that the employees are professionals. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

In the present matter, counsel submitted a resume and certificate of graduation for each employee, verifying that two employees graduated from a university, and a third employee graduated from an institute of technology. Counsel asserts that a "careful look at their resumes" confirms that the beneficiary's subordinates

are professionals. The job duties listed on the three resumes include: design and develop products for export, manage exporting manufacturing line and outsourcing line, manage internet shopping mall, research overseas market, and research overseas buyers on the internet. Contrary to counsel's assertion, the minimal description on the subordinates' resumes does not demonstrate that they are professionals. In addition, the petitioner has not provided any evidence that the department operates a manufacturing or outsourcing line, an internet shopping mall, or designs and develops products. 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). Also, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). As the record lacks specific description regarding the job duties of the beneficiary's subordinate employees, and the functions of the department, it is impossible to determine whether the positions actually require a baccalaureate degree. Therefore, the AAO cannot conclude that the beneficiary's subordinates are employed as professionals.

Lastly, the petitioner is inconsistent in its reference to the beneficiary and the department that the beneficiary manages. The petitioner submitted a certificate of employment for the beneficiary, stating that the beneficiary was employed as a manager of the "Management and Foreign Marketing" department. On the organizational chart, however, the beneficiary is identified as being employed in the "Overseas Sales" department. Additionally, on the petition and correspondence in the record, the beneficiary is referred to as a director; yet, in the petitioner's response to the director's request for evidence the petitioner indicates that the beneficiary is employed as a sales manager. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

For the foregoing reasons, the AAO cannot conclude that the beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in a managerial or executive capacity.

Beyond the decision of the director, the record does not contain evidence that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International, supra*. In the context of this visa petition, ownership refers to the direct and 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, supra* at 595.

In the present matter, the petitioner stated on the petition that the U.S. company is a subsidiary of the foreign corporation. In a letter submitted with the petition, however, the petitioner identified the U.S. entity as a branch office. There is no evidence in the record, such as Articles of Incorporation, stock certificates, or a stock ledger, evidencing a qualifying relationship between the two entities. Additionally, the petitioner failed to demonstrate that the foreign entity funded the establishment of the U.S. company. Going on the record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*.

An additional issue not addressed by the director is whether the U.S. entity, within one year of approval of the petition, will support the beneficiary in a primarily managerial position. In a letter submitted with the petition, the petitioner outlined four job duties of the beneficiary's position in the United States, including directing the "initial set-up processes," hiring and training workers, promoting sales and marketing, and coordinating corporate policies with the foreign company. The petitioner also asserted that because the beneficiary was employed in the foreign company as a manager of the management and foreign marketing department, he is qualified for the position of director of the U.S. entity. The petitioner has not submitted a business plan, or a proposed organizational chart, that would substantiate the claim that the beneficiary will be employed in a managerial capacity within one year of approval of the petition. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena, supra; Matter of Ramirez-Sanchez, supra.*

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.