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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

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APR 19 2004

FILE: EAC 02 252 54686 Office: VERMONT SERVICE CENTER Date:

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 an importer, exporter, and distributor of textile goods. It seeks to employ the beneficiary temporarily in the United States as its general manager. The director determined that the petitioner had not established that the beneficiary had been employed abroad in a primarily managerial or executive capacity. The director also determined that the petitioner failed to submit a Certificate of Incorporation, proof that it has secured sufficient physical premises to house its operation, and a copy of its business plan for commencing the start-up company's business. On appeal, counsel disputes the director's findings and submits the previously requested documents.

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 claims that it was established in 2002 as a wholly owned subsidiary of Aiyar Exports Private, Ltd., located in India. The petitioner seeks to employ the beneficiary in the United States for an initial period of one year at an annual salary of $32,000.

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.

The first issue in this proceeding is whether the petitioner has established that the beneficiary was employed abroad in a primarily managerial or executive capacity. In support of the petition, the petitioner provided the following brief description of the beneficiary's job duties with the foreign entity:

> His major responsibility is to interact with the customers of the Company. This requires extensive travelling. All orders from buyers are got [sic] him. Major decisions in the company are taken in consultation with him. In the present case, L1 Visa is sought by him to

establish import operation in the USA and develop clients who are in the form of major malls and also various importers.

As noted by the director, CIS issued a request for additional evidence on August 8, 2002 asking the petitioner, in part, to submit evidence establishing that the beneficiary's employment abroad was of a qualifying nature. The petitioner was asked to describe the beneficiary's typical managerial responsibilities.

In response, the petitioner submitted a letter stating that the beneficiary has been employed as president of the foreign entity and provided the following list of his duties:

a. Oversee start up operations in the U.S. and coordinate the same with the parent office in Bombay, India.

b. Manage administrative operations including marketing, personnel and general administrative affairs.

c. Develop, formulate, establish and implement plans for long terms [sic] growth, set policies, goals and objectives.

d. Oversee and manage financial operations.

e. Communicate details of transactions with the parent company on a regular basis and coordinate growth and development while receiving only limited supervision or direction from the overseas parent company.

f. Plan, direct and coordinate company activities in relation to operations, sales, and business organization.

g. Develop long-term company goals and objectives.

In addition to the general job duties described above, the beneficiary has been and will continue to perform the following specific job descriptions such as [sic]:

- Meeting with lawyers and accountant.
- Meeting with senior management of client corporations
- Supervising the management
- Coordinating with the parent company, compilation of progress reports, etc.
- Preparing meetings, presentations, monitoring and evaluating policies, long-term corporate goals, business plans.

The petitioner further stated that "in the context of a small business such as McCoy USA, Inc." the executive or manager will perform a broad range of duties that are outside the statutory definitions of "manager" and

"executive." The petitioner did not explain the significance of McCoy USA, Inc. or its relation, if any, to the petitioning entity. On September 23, 2002 the director denied the petition concluding that the petitioner failed to establish that the beneficiary was employed abroad in a managerial or executive capacity.

On appeal, counsel submits a brief asserting that the director's decision "arbitrarily discounted" relevant information regarding the U.S. entity. Counsel failed to address the director's adverse finding regarding the beneficiary's position with the overseas entity.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been employed in a primarily 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). In the instant case, the petitioner initially stated that the beneficiary's primary responsibility was dealing with customers and travelling. Although the petitioner provided a longer list of duties in the response to the request for additional evidence, the duties were little more than vague paraphrases of the statutory definitions. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The petitioner failed to provide a description of duties that would convey a true understanding of what the beneficiary has actually been doing on a daily basis. Simply giving the beneficiary a managerial or executive position title is not enough to determine whether the beneficiary is functioning in a managerial or executive capacity, particularly when the initial description of duties indicated that the beneficiary's main concern was dealing with clients, a task that cannot be deemed managerial or executive. The beneficiary's description of job duties lacks sufficient detail and therefore the AAO cannot conclude that he has been and will be primarily performing managerial or executive job duties. The record does not establish that a majority of the beneficiary's duties have been primarily directing the management of the organization or primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. Nor does the record suggest that the beneficiary was relieved from performing non-qualifying duties. Although counsel discusses the beneficiary's proposed job duties in the United States, he fails to address the director's concern regarding the beneficiary's job duties with the overseas entity. Based on the evidence furnished, it cannot be found that the beneficiary has been 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 provided all of the pertinent documentation initially required for submission and documentation that was subsequently requested in CIS's request for additional evidence. Pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A), the petitioner is required to submit evidence that it has secured sufficient physical premises at the time the petition is filed. In the instant case, the petitioner submitted a number of documents, which included something titled "Check List for Company in USA." That document indicated that the petitioner's initial business premises would be the beneficiary's residence. Therefore, the petitioner was asked to submit proof that it secured physical premises to house its operation in a subsequent request for additional evidence. The petitioner failed to comply with CIS's request. It is noted that failure to submit requested evidence, which precludes a material line of inquiry, as the petitioner did in the instant case, shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As such, the director denied the petition, based in part on the petitioner's failure to submit this crucial initial evidence. Although the petitioner has since submitted a copy of a commercial lease on appeal, the lease is dated November of 2002, several months after the petition was filed. The AAO notes that eligibility must be established at the time of filing. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Therefore, a lease that was signed after the filing of the petition cannot be considered in determining the petitioner's eligibility in the instant case.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) instructs the petitioner to submit evidence demonstrating its ability to support a primarily managerial or executive position within one year of approval of the petition. To clarify this issue, CIS's request for additional evidence instructed the petitioner to submit a business plan providing specific dates for each proposed action over the course of the next two years, starting with July 2002 when the petition was filed. In the response, the petitioner indicated its intent to expand its personnel by providing a list of additional employees it planned to hire in the future. However, the petitioner did not specify any other courses of action with regard to expanding the overall business to meet the petitioner's business objectives. Although the petitioner has submitted the requested business plan on appeal, it must be noted that where a petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, the AAO may disregard that evidence when submitted on appeal. Rather, the AAO may adjudicate the appeal based on the record of proceedings before the director. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, the petitioner may file a new petition. As the petitioner in the instant case failed to submit evidence requested in the director's notice, the business plan submitted on appeal will not be considered.

Finally, the director's denial also noted the petitioner's failure to submit a copy of its Certificate of Incorporation in response to the request for additional evidence. Although the petitioner has since submitted this evidence on appeal, the AAO will not consider such evidence due to the petitioner's failure to submit it when initially requested to do so in the request for additional evidence. *See* id. For the additional reasons discussed above, the instant petition cannot 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.