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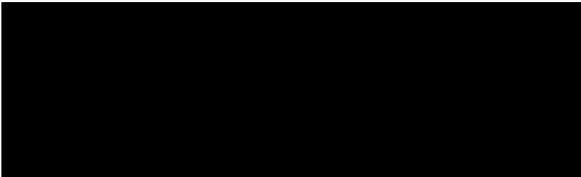
U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
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Services

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APR 19 2004

FILE: SRC 01 272 51694 Office: TEXAS 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 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, Texas 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 designing and manufacturing clothing. 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 has been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits documentation and an appellate brief in support thereof.

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.

Regulations at 8 C.F.R. § 214.2(l)(3)(v) states 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 regulations at 8 C.F.R. § 214.2(l)(ii)(F) provide the following definition of *new office*:

New office means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

The U.S. petitioner was established in the year 2000 and states that it is a subsidiary of S.C. House of Mary's, S.R.L., located in Romania. The petitioner seeks to employ the beneficiary in the United States for three years at an annual salary of \$35,000.

At 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 in the United States:

[The beneficiary] will initialize a market campaign, and ads will be delivered through newspapers [sic], magazines, video-mail [sic], and more.

Moreover, [she] will be in charge of hiring and firing the personnel, general supervision over all the company's activities. Report directly to the main company in Romania about the progress of our subsidiary in Florida. Scheduling weekly training and safety meeting[s] in or new procedures implemented by the manufacturers in order to insure the highest quality of services provided.

* * *

Furthermore, [the beneficiary] will continue the employment of the already existing personnel (by purchasing a business), who consist of one individual skilled in the textile field and a secretary/clerk for the Florida office, enabling her to establish our company within our time frame. The clerk will attend telephone calls, write invoices to the customers, and take orders.

On November 16, 2001, the Director issued a request for additional evidence instructing the petitioner to provide the names, list of duties, and the educational background of the employees the beneficiary supervised abroad.

The petitioner's response included the names of the four employees the beneficiary supervised at the foreign entity. However, instead of listing their job duties and educational backgrounds, the petitioner listed either the department or position title of each employee.

The director also instructed the petitioner to submit a description of the proposed staffing levels by the end of the petitioner's first year of operation. Although the petitioner submitted the names and job titles of both of the individuals it employed at the time of the request, the petitioner did not submit the projected staffing levels after one year of operation.

On May 20, 2002, the director denied the petition concluding that the petitioner failed to submit sufficient evidence to establish that the beneficiary was employed abroad in a managerial or executive capacity.

On appeal counsel states that the petitioner is not a new office and refers to the foreign entity's payroll records as proof that it has been doing business for over one year. The definition of "new office" at 8 C.F.R. § 214.2(l)(1)(ii)(F) states that a new office is an organization that has been doing business *in the United States for less than one year*. (Emphasis supplied).

Counsel further asserts that the director placed undue emphasis on the beneficiary's role as a personnel manager and failed to consider the beneficiary's role as a function manager. Counsel's argument is not

persuasive. In order to determine that the beneficiary was a function manager abroad, the petitioner must submit evidence that the beneficiary was managing rather than performing the essential function(s) of the foreign entity. Consequently, a description of the beneficiary's job duties abroad is key evidence in allowing the director to make such a determination. In the instant case, the petitioner has not provided a description of the beneficiary's job duties abroad. Rather, in regards to her previous job duties, the petitioner has submitted a letter from a trade company that dealt with the beneficiary throughout her employment abroad. In that letter, the beneficiary was described as "the creator of the clothes and the co-ordinator [sic] of the production activity." This description suggests that the beneficiary had two roles--participating in the actual making of the product sold and supervising those that actually performed the duties associated with production. If the dominant role was that of clothes maker, then the beneficiary was performing an essential function. According to precedent case law, 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). However, if the beneficiary's dominant role is that of personnel manager, the petitioner must identify the job duties and educational levels of the employees the beneficiary claims to have supervised. As previously stated, the petitioner failed to provide the director with this essential information.

The record does not demonstrate that the beneficiary primarily directed an essential function or that she primarily supervised a subordinate staff of professional, managerial, or supervisory personnel. Based on the evidence submitted, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.