

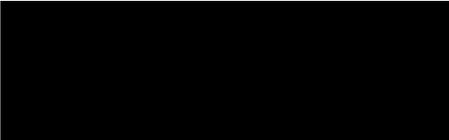
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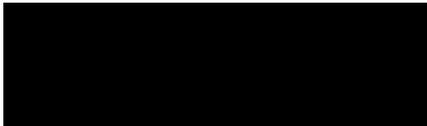
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FILE: SRC 01 201 55196 Office: TEXAS SERVICE CENTER Date: **APR 21 2004**

IN RE: Petitioner:  
Beneficiary:



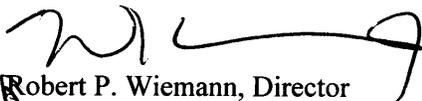
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 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 is described as an importer and exporter of leather goods. It seeks to employ the beneficiary temporarily in the United States as the sales manager of its new office. The director determined that: (1) the petitioner had not established that it had secured sufficient physical premises to house the new office; (2) the beneficiary's proposed employment did not involve executive or managerial authority; and (3) the petitioner had not established that the intended U.S. entity, within one year of the approval of the petition, will support an executive or managerial position.

On appeal, counsel submits a brief in opposition to the director's decision. Counsel states that the petitioner has submitted sufficient evidence to establish that it has acquired sufficient physical premises to house the new office, that the beneficiary will be employed in a managerial executive capacity, and that the proposed U.S. entity will be able to support an executive or managerial position within one year of operation.

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)(1)(ii) states, in part:

*Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary 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(1)(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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2001 as an exporter and importer of leather goods. The petitioner declares four prospective employees and does not declare any projected or actual gross revenue. The petitioner seeks the beneficiary's services in order to open a new office and render services in a managerial or executive capacity for a period of one year, at a yearly salary of \$32,000.00.

The first issue in this proceeding is whether the petitioner has secured sufficient physical premises to house a new office. The petitioner initially submitted a copy of a lease agreement between the petitioner and the "Handbag Depot," which has been made a part of this record. The director concluded that the evidence was not sufficient to establish that the petitioner had secured sufficient physical premises to house a new office, and thereafter requested additional evidence to explain why the petitioner stated that the U.S. company involved the import and export of leather goods and the lease agreement, on the other hand, stated that the leased premises was only to be used for "courier" purposes. The petitioner subsequently included in its response, a copy of a new lease agreement between the petitioner and Airport Trade Center for rental of commercial space 1,000 sq. ft. in diameter. The petitioner also submitted photos of the new business premises and a copy of the Occupational License with the corresponding new address included.

The director subsequently denied the petition based partially on the fact that the petitioner had failed to submit evidence to establish that sufficient physical premises had been acquired to house the new office. In her decision, the director noted that the blank space in the section that read "tenant's use" on the face of the lease agreement prevented her from being able to determine what the petitioner would be allowed to do on the premises. On appeal, counsel for the petitioner submitted a registration document for the U.S. entity listing it as a "courier, WHSLS, Export of leather"; and a letter from the Airport Trade Center stating that the petitioner is a tenant at the Airport Trade Center.

In the instant case, the petitioner has not submitted sufficient evidence to establish that it had secured sufficient physical premises at the time of filing to house the new office. The lease agreement submitted by the petitioner, in response to the director's request for additional evidence, was executed July 31, 2001, after the date the petition

was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Citizenship and Immigration Services (CIS) cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). In addition, there is insufficient evidence to demonstrate that the leased premises is sufficient to accommodate the four proposed employees and the planned import and export functions.

The AAO now turns to a second issue in this proceeding regarding whether the petitioner has established that the beneficiary 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 described the beneficiary's proposed position as "sales manager," in which the beneficiary will be in charge of the administration, management, and supervision of the staff of the sales department.

In a letter of support, dated October 17, 2001, it was stated that the beneficiary's priority in the U.S. entity would be to identify and locate distributors and suppliers of electronics equipment that would be exported to Colombia and leather goods that would be imported to the United States. It was also stated in the letter that the beneficiary will negotiate the purchase and export of the electronics equipment and that he will coordinate the shipping of such equipment to Colombia for distribution and sale.

The petitioner submitted a proposed organizational chart depicting the U.S. entity's hierarchy. It demonstrated that the sales manager will have an import and export manager, a shipping and receiving department, clerks, and salespersons under its direction.

In response to the director's request for additional evidence, the petitioner described the beneficiary's proposed duties for the U.S. entity as:

Directs and coordinate[s] activities of sales department of company; directs staffing, training, and performance evaluations to develop and control [sic] sales program. Coordinates sales distribution, by establishing sales territories, quotas, and goals and advises dealers, distributors, and clients concerning sales and advertising techniques. Analyzes sales statistics to formulate policy and promoting sales. Reviews market analyses to determine customer needs, volume potential, [and] price.

The director determined that the evidence provided by the petitioner was insufficient to show that the beneficiary's proposed employment involved executive or managerial authority over the U.S. entity, or that the petitioner, within one year of operation, would support an executive or managerial position.

On appeal, counsel asserts that the petitioner has provided sufficient evidence to show that the beneficiary will be employed in the United States in a managerial or executive capacity. Counsel contends that the beneficiary, as sales manager, will devote one hundred percent (100%) of his time to managerial duties and that he will not spend any time as a first-line supervisor supervising employees. Counsel also asserts that the beneficiary will not be

engaged in production labor. Counsel states that the beneficiary will control the work of other employees and will have the authority to hire, fire and make recommendations concerning personnel actions. Counsel further contends that the beneficiary will analyze markets, set strategies, plan goals, set sales quotas and expenses, develop advertising, and promote company products in the United States. Finally, counsel states that the beneficiary will coordinate the activities of the U.S. entity's operations departments. Counsel does not address the director's concerns regarding the U.S. entity's ability to support a managerial or executive position within one year of operation, therefore, the director's decision pertaining to that issue will not be disturbed.

Counsel's assertions are not persuasive. On review, the record as presently constituted does not demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity. In evaluating the proposed managerial or executive duties of a beneficiary, Citizenship and Immigration Service (CIS) will look first to the petitioner's description of the beneficiary's job duties. 8 C.F.R. § 214.2(I)(3)(ii). The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. The following duties are without any context in which to reach a determination as to whether they are qualifying: responsible for directing and coordinating sales department activities; coordinating sales distribution; analyzing sales statistics; and reviewing market analysis to determine customer needs. Furthermore, there is insufficient detail regarding the actual duties of the assignment to overcome the issues raised by the director. Without clarification or documentation to substantiate the petitioner's claims, the beneficiary's proposed job duties cannot be construed as being managerial or executive in nature.

Further, the record does not contain a comprehensive description of the beneficiary's day-to-day activities or a breakdown of the percentage of time to be spent by the beneficiary performing managerial and non-managerial tasks. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "develops sales program, review market analysis, and directs staffing and training," do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The beneficiary's position title cannot be used to substitute for a concrete description of the beneficiary's actual duties. The limited information contained in the record regarding the beneficiary's proposed duties indicates that the beneficiary will primarily perform the duties associated with the day-to-day operation of the business. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service 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 addition, the record does not establish that within one year, the beneficiary will function at a senior level within the organization or that the new office would be able to support a managerial or executive position. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervising personnel who can relieve him from performing nonqualifying duties. Nor has the petitioner submitted sufficient evidence to establish that the beneficiary will be managing a function of the organization.

The assertions made by counsel in the support brief 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). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The assertions of counsel without documentary evidence cannot be used to establish that the beneficiary will be acting in a primarily managerial or executive capacity.

On review of the record of this proceeding, the petitioner has not established in the record that the beneficiary will be primarily employed in a managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established that the U.S. and the foreign entities are qualifying organizations. The record contains little documentary information regarding the extent of ownership and control between the parent's and the petitioner's business operations, thus raising the issue of whether there is a qualifying relationship between the U.S. entity and the foreign entity pursuant to 8 C.F.R. §214.2 (1)(1)(ii)(G). As the appeal will be dismissed, these issues need not be examined further.

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.