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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N. W.
Washington, D.C. 20536

[redacted]

FEB 03 2004

FILE: WAC 02 142 50047 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be an importer and retailer of Japanese artifacts. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for a period of two years. The director determined that the petitioner failed to establish that the beneficiary would be employed by the U.S. entity primarily in an executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties will continue to be executive in nature.

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 Unite 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.

* * *

According to the documentary evidence contained in the record, the petitioner was incorporated in 1998 and claims to be an importer and retailer of Japanese artifacts. The petitioner claims that the U.S. entity is a subsidiary of Juno Company, Ltd., located in Japan. The petitioner declares three employees and $63,000 in gross annual income. The petitioner seeks the continuation of the beneficiary's services as president for a period of two years, at an annual salary of $30,000.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily executive capacity.

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 a letter of support, dated March 18, 2002, the petitioner described the beneficiary's job duties as follows:

> Assuming the position of President of Juno-Susie in November 1998, Mr. Kosaka has been involved in establishing and monitoring business goals and plans, including assigning functions, job duties, etc. with regard to personnel in order to increase visibility, sales and profitability; exercising control over the operating budget and financial matters to ensure adequate capital, including negotiations with the parent company, financial institutions, and creditors; developing sales projections, analyzing market trends,

determining effective marketing and promotional methods, and other related areas; supervision over all matters involving regulatory compliance including financial, personnel, international trade and administrative matters; and maintaining relationships with the parent company in Japan to apprise the corporation of developments and standing.

In response to the director's request for additional evidence the petitioner submitted the following descriptions of the beneficiary's job duties:

1) Corporate Financing

(A) Preparation of financial forecasts related to company cash requirements and evaluation of financial strategies available to the corporation in order to provide for capital requirements based on short and medium term business projections;

(B) Management of the overall financial activities of the company including decision making responsibility related to loan classifications and amounts, negotiation of loan terms and related with banks, tracking of loan proceeds including scheduling of loan rollovers and payoffs;

(C) Maintaining corporate relationships with banks and financial institutions that participate in various company loans by reporting financial data, cash flow and earnings estimates, end-of-month debt estimates, and other financial data on periodic and an as needed basis.

2) Cash Flow Management

(A) Analyzing the company's business plan in order to generate both annual and monthly cash flow estimates; Control of company disbursements based on the cash flow schedules;

(B) Providing available financial resources to allow for seasonal and market adjustments as well as determining needs for corporate decision making purposes.

3) Financial Management

(A) Preparation of capital expenditure data for appraisal purposes;

(B) Preparation of business forecasts for negotiation with banks and investors;

(C) Overseeing corporate compliance with lease and contractual covenants and providing regular reports based on corporate financial results and forecasts.

4) Oversight of the Corporate Cost Accounting and Calculation System

(A) Final and ultimate decision making authority over all financial and accounting practices of the corporation. Makes all final budget and economic decisions based on financial projections and models ensuring compliance with regulatory agencies and parent company policies;

(B) Responsibility [sic] for developing and maintaining short and long term budgets, sales projections, and overseeing market trends to identify business growth areas;

(C) Supervision of the preparation of all government mandated tax reports including preparation of financial documents and materials for presentation to the company's accounting professionals;

(D) Preparation of regular reports for transmission to the parent company in Japan to accurately and effectively appraise the parent corporation of all essential accounting and financial information regarding the U.S. subsidiary.

The petitioner also stated that the beneficiary has complete authority for supervision of the day-to-day operations of the U.S. entity.

The director determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary will be employed primarily in a managerial or executive capacity. The director continued by stating that the record indicates that a preponderance of the beneficiary's duties will be directly

providing the services of the business. The director concluded by stating that there is no indication that the beneficiary will exercise significant authority over generalized policy or that the beneficiary's duties will be primarily managerial or executive in nature.

On appeal, counsel asserts that the director's decision was in error and that the evidence submitted by the petitioner supports a finding that the beneficiary, as president of the U.S. entity, will be employed in an executive capacity. Counsel further contends that the beneficiary will continue to be in control of the direction, policy, philosophy, major decisions, and strategy of all U.S. business operations. Counsel also asserts that the beneficiary will continue to oversee all current and future management personnel, who will in turn conduct the day-to-day operations of the business. Counsel states that the beneficiary will have the sole authority to hire, fire, and evaluate all present and future management positions in the company, and that he will direct and control all aspects of the U.S. business operations, exercising wide latitude over all decisions which affect the business. Counsel further states that the U.S. entity is adequately staffed with other employees who perform the everyday services of the business.

The petitioner also provided an organizational chart of the U.S. entity that depicts the beneficiary as president, and a subordinate purchasing retail sales manager and sales clerk as being under his direction.

On review of the complete record, it cannot be found that the beneficiary will be employed primarily in an executive or managerial capacity. The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as preparation of financial forecasts, maintaining corporate relationships, and analyzing company business plans are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive in nature.

The record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he will be directing the management of the organization or a major component or function of the organization, that he will be establishing

goals and policies, that he will be exercising a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals. Counsel's description of the beneficiary's job duties, including: sole authority to hire and fire personnel; evaluate all present and future management positions; direct and control all aspects of the U.S. business operations; and exercise wide latitude over all decisions which effect the business, in fact, paraphrase the regulation. Paraphrasing the regulation as a substitute for a day-to-day description of the beneficiary's job duties is insufficient to demonstrate that the beneficiary will be employed in an executive capacity. There is no evidence submitted to show the number of hours attributed to each of the beneficiary's executive versus non-executive duties. The record does not contain any evidence of a subordinate staff that would relieve the beneficiary from performing the day-to-day non-executive duties of the business. Although counsel claims that the U.S. entity is adequately staffed with other employees who perform the everyday services of the business, the evidence shows that the additional employees are employed only on a part-time basis. The petitioner claims that the beneficiary will be president of the overall organization. However, rather than serving in an executive capacity, it appears that the beneficiary will actually be performing the services 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).

Further, the petitioner's evidence is not sufficient to establish that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The record demonstrates that the two additional employees are part-time workers, whose positions as sales manager and sales clerk are not sufficient to establish the need for an executive or manager position, given the current corporate structure. There is no evidence in the record to establish that the two employees are professional or that they manage or supervise professional employees. Counsel contends that the two employees can and do perform the every day services of the business. However, there has been no evidence produced to establish that the two employees are capable of or in a position to relieve the beneficiary from performing non-qualifying managerial or executive duties. In addition, 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 is acting and will be acting in a primarily managerial or executive capacity.

The petitioner has not provided sufficient evidence to establish that the beneficiary will be employed as a functional manager. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Moreover, there is no evidence to show that the U.S. entity has the financial ability to remunerate the beneficiary for his services. Based upon the evidence furnished, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

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.