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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]

FILE: WAC 02 176 50872 Office: CALIFORNIA SERVICE CENTER Date: FEB 03 2004

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 a seller of soccer sports uniforms and other materials. It seeks to employ the beneficiary temporarily in the United States as its operations manager. The director determined that: (1) the petitioner had failed to establish that a qualifying relationship exists between the U.S. and foreign entities; and (2) the evidence failed to establish that the beneficiary has been employed by the foreign entity primarily in a qualifying managerial or executive capacity.

On appeal, the petitioner asserts that the evidence submitted establishes that there is a qualifying relationship between the U.S. and foreign entities, and that the beneficiary has been employed by the U.S. entity primarily in a managerial or executive capacity.

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 regulations at 8 C.F.R. § 214.2(l)(3) state 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.

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, Soccer Supplies LLC was established in 2000 and claims to be a seller of soccer sports uniforms and other soccer materials. The petitioner is claiming that a subsidiary relationship exists between 3R Representations & Distributions company, located abroad, and the Soccer Supplies LLC company, located in the United States. Soccer Supplies LLC seeks to utilize the beneficiary's services as operations manager at a yearly salary of $12,000.

The first issue in this proceeding is whether a qualifying relationship exists between the U.S. and foreign entities.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

> *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> > (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
> >
> > (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
> >
> > (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

In pertinent part, the regulations define "parent," "branch," "subsidiary," and "affiliate" as:

> *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

Branch means an operation division or office of the same organization housed in a different location.

* * *

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

* * *

Affiliate means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

8 C.F.R. §§ 214.2(l)(1)(ii)(I), (J), (K), and (L).

In the instant matter, the petitioner claims that Soccer Supplies LLC is a subsidiary of 3R Representations & Distributions company.

The director denied the petition after determining that the evidence submitted did not establish that a qualifying relationship exists between the U.S. and foreign entities. The director also stated that a review of the entire record indicated that no qualifying relationships existed between the foreign and U.S. entities because there was no information regarding the ownership of both entities.

On appeal, counsel asserts that the director's decision was incorrect. Counsel further states that the petitioner submitted a copy of the income tax return from the foreign entity for the last year as requested. Counsel also states that the petitioner submitted as evidence of ownership, a copy of two

stock certificates: No. 1, which was issued to 3R Representation & Distribution for 51 shares; and No. 2, which was issued to Hector Ramirez for 49 shares. Counsel concludes by stating that, with respect to the total amount of shares, there are no other outstanding shares of stock other than those issued as indicated.

In the instant case, the petitioner has provided sufficient evidence to establish a subsidiary relationship between the foreign and U.S. entities. A copy of the articles of incorporation for the U.S. entity indicates the stock distribution as noted above. The petitioner has also submitted copies of two stock certificates, issued on November 1, 2000 to the 3R Representation & Distribution company and to Hector Ramirez respectfully for the indicated number of shares. The evidence of record establishes that 3R Representation & Distribution is the parent company which owns, directly or indirectly, more than half of the U.S. entity and controls the entity in compliance with 8 C.F.R. § 214.2(1)(1)(ii)(K). Therefore, the director's decision with respect to the qualifying relationship issue will be overturned.

The second issue in this proceeding is whether the petitioner has established that the beneficiary has been 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.

In the petition, the petitioner stated that the beneficiary has been employed abroad as administrator and sales director, with responsibilities for the sales of soccer uniforms and sports caps, marketing and distribution, purchase of raw material, and budget and financial analysis.

In a letter of support, dated January 25, 2002, the petitioner described the beneficiary's job duties with the foreign entity as:

> [The beneficiary] is a Columbia national who has been continuously working as the General Manager and Sales Director since the inception of 3R Representation & Distributions. His duties involve the design, dressmaking, and sales of the sport clothes. He is also responsible for the sales budget, purchase of raw materials, the production and quality control.

The director determined that the evidence initially submitted with the petition did not contain sufficient information in which to determine the beneficiary's eligibility as an intracompany transferee and there after requested that the petitioner submit: (1) payroll records evidencing the beneficiary's employment abroad; and (2) the foreign entity's organizational chart evidencing the beneficiary's alleged position as manager or executive. The director specifically requested that the petitioner include a brief description of job duties, educational levels and annual salaries for all employees under the beneficiary's supervision.

In response to the director's request for additional evidence, the petitioner submitted a translated document, which read in part:

> Beneficiary works for the company since July 15, 1993, which is the date the company was created.
>
> After company creation, beneficiary carried out sales rep tasks, visiting actual and potential company clients. When the need to contract more sales reps arose, he became sales head, coordinating job tasks of two additional sales reps. He is currently in the position of sales director, where four people report to him: Assistant, Manufacturing Coordinator and two sales reps.

The petitioner submitted a translated version of the 3R Representation & Distribution organizational chart that depicted the beneficiary as sales director of the organization, and a manufacturing coordinator, assistant, and two sales reps under the beneficiary's direction. Other than titles and employee names, the petitioner did not provide any additional descriptive information pertaining to the employees in the chart.

The petitioner also provided a translated version of performance descriptions of the sales director, assistant, manufacturing coordinator, and sales rep as:

> SALES DIRECTOR. Carry out and execute company sales budget. Carry out and execute sales area expense budget. Control and follow-up on sales representatives. Take customer orders. Visit special clients. Present suggestions for new product design. Sales director should bear professional title and display tangible product sales experience. Must be skilled in computer management, and know about Word, Excel and PowerPoint as well as Internet.
> Annual dollar equivalent salary: US$10,000 plus benefits.
>
> ASSISTANT. Execute secretarial tasks. Make and take telephone calls. Receive and sent facsimile messages. Carry administrative and sales director's agendas. Transcribe texts, letters and memos.
> Assistant must display university studies and must be knowledgeable in computer skills: Word, Excel, PowerPoint and facsimile handling.
> Annual dollar equivalent salary: US$1,600 plus benefits.
>
> MANUFACTURING COORDINATOR. Receive orders sent by sales director. Request raw material and necessary supply dispatch from suppliers in order to meet orders. Send raw materials and supplies to cutting, stamping, stitching or sewing workshops. Receive finished product. Send orders to clients. Control raw material, supplies, in-process and finished product inventories.
> Must be recently graduated professional or be last-semester college student.
> Show computer skills: Word, Excel, PowerPoint, and Internet.
> Annual dollar equivalent salary: US$3,600 plus benefits.
>
> SALES REP. Visit actual and potential company clients. Introduce products and services offered. Collect competitor's price and promotional information.
> Must have university degree or equivalent as experience and be skilled in computer management: Word, Excel, and PowerPoint.

Annual dollar equivalent salary: US$1,000 plus benefits.

The director, in denying the petition, stated that the evidence submitted with the petition was insufficient to demonstrate that the beneficiary has been functioning in a managerial or executive capacity. The director stated that the petitioner had failed to provide information regarding the job duties, educational level and annual salaries for each of the employees listed in the foreign entity's organizational chart. The director further stated that there had been no evidence submitted that indicated that the beneficiary has been exercising significant authority over generalized policy or that the beneficiary's duties have been primarily managerial or executive in nature.

On appeal, counsel disagrees with the director's findings and submits a brief and evidence in support of his contentions. Counsel contends that the record is clear that the beneficiary has been exercising significant authority over generalized policy and that his duties have been primarily managerial or executive in nature. Counsel further asserts that substantially all of the beneficiary's duties are at the managerial or executive level. Counsel states that the foreign entity's organizational chart shows that the beneficiary supervises and controls the work of other supervisory employees. Counsel also submits on appeal a new version of the beneficiary's and his subordinates' job descriptions.

On review of the complete record, it cannot be found that the beneficiary has been employed in a primarily managerial or executive capacity. Contrary to counsel's contentions that the petitioner attempted to respond to the director's request for additional evidence without the advice and guidance of counsel, and therefore he is submitting on appeal a brief description of duties, educational levels and annual salaries to fully comply with that request, the evidence submitted on appeal will not be considered by the AAO. On appeal, the petitioner submits evidence that was not submitted to the director and which was in existence at the time the petition was filed. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner submits on appeal copies of job descriptions for employees of the foreign entity. 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the

application or 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,* 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).

The regulation at 8 C.F.R. § 103.2(b)(11) states:

> *Submission of evidence in response to a Service request.* All evidence submitted in response to a Service request must be submitted at one time. The submission of only some of the requested evidence will be considered a request for a decision based on the record.

Furthermore, the assertions of counsel without documentary evidence cannot be used to establish that the beneficiary is performing in a primarily managerial or executive capacity abroad. 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).

Even if the AAO were to consider the newly admitted evidence, the record would still not be sufficient to establish that the beneficiary had been exercising significant authority over generalized policy or that the beneficiary's duties have been primarily managerial or executive in nature. There has been no evidence submitted to demonstrate how the beneficiary interacts with the subordinates to support a managerial or executive capacity claim. There has been insufficient evidence submitted to establish whether the subordinates are employed full-time or part-time, or how much of their time is actually spent performing each of their daily tasks. In the instant matter, there is no evidence to show the percentage of time spent by the beneficiary performing managerial versus non-qualifying duties for the U.S. entity. *See Ikea US, Inc. v. US Dept of Justice, INS,* 48 F.Supp.2nd 22, 24-5 (D.D.C. 1999) (requiring the petitioner to provide adequate documentation). The petitioner has not shown that the beneficiary functions at a senior level within the foreign entity's organizational hierarchy other than in position title.

Likewise, the petitioner has failed to present sufficient evidence to establish that the beneficiary's job duties for the foreign entity have been managerial or executive in nature. The record reflects that the beneficiary has been employed by the foreign entity as one of its directors. The position descriptions given by the petitioner of the beneficiary's job duties with the foreign entity are vague, general, and describe duties that are not managerial or executive in nature. The following duties are without any context in which to reach a determination as to whether they are qualifying: responsible for the sales of soccer uniforms and sports caps, marketing and distribution, purchase of raw material, budget and financial analysis, design, dressmaking, taking customer orders, visiting clients, and production and quality control. Further, there is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director.

In addition, evidence presented by the petitioner fails to demonstrate that the beneficiary has managed the organization, department, subdivision, function, or component of the organization. Based upon the evidence presented, it appears that the beneficiary has been employed by the foreign entity as a sales representative, administrator, first-line supervisor, and performs the day-to-day service functions of the organization. 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). The petitioner has not provided documentary evidence to show how the beneficiary's daily activities interrelate to those of the other employees. The record does not support a finding that the beneficiary has been supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties.

The petitioner's evidence is not sufficient to establish that the beneficiary directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives. The beneficiary's position title cannot be used to substitute for a concrete description of the beneficiary's actual duties.

On review of the complete record, it cannot be found that the beneficiary has been employed in a managerial or executive capacity. There is insufficient detail regarding the actual

duties of the assignment to overcome the objections of the director. Therefore, the appeal will be dismissed.

Beyond the decision of the director, evidence in the record demonstrates that the U.S. entity, although incorporated on October 25, 2000, has not yet commenced doing business in the United States. As a new company, the petitioner has not established that the U.S. entity had secured sufficient physical premises to house the new office at the time the petition was filed. Neither does the evidence submitted establish the proposed nature of the U.S. office, the scope of the entity, its organizational structure, the size of the United States investment, the financial ability of the foreign entity to remunerate the beneficiary, and the financial ability of the U.S. entity to commence doing business in the United States. Although not explicitly addressed in the decision, there is no evidence to show that the U.S. entity would support a managerial or executive position within one year of the petition being approved. 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.