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**U.S. Citizenship
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FILE: SRC 02 168 50957 Office: TEXAS SERVICE CENTER Date:

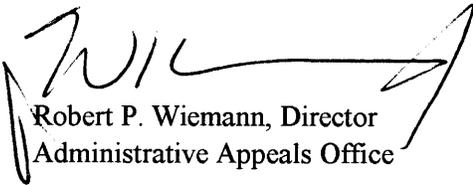
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 is engaged in the business of advertising and sales. It seeks to temporarily employ the beneficiary in the United States as a manager, and, on May 8, 2002, filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. In a decision dated June 10, 2002, the director denied the petition concluding that the petitioner had not established that the beneficiary would be acting in a managerial or executive capacity in the United States.

On appeal, counsel for the petitioner submits a brief and asserts that the evidence rebuts the director's finding that the petitioner had not met its burden of proof with respect to eligibility of the L-1A visa.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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 (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.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in the present matter is whether the beneficiary will be employed in the United States 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 a statement attached to the petition, the petitioner indicated that the beneficiary's position as manager in the U.S. entity would involve job duties similar to those she had been performing in the foreign company. The petitioner stated that as a co-owner of the foreign company, the beneficiary has "directed and coordinated the company's activities to obtain optimum efficiency and economy of operations and maximize profits," has planned, developed, and implemented the foreign company's policies and goals, and has directed and coordinated promotion of the company's services to develop new markets, increase market share, and obtain a competitive position in the industry.

In a request for additional evidence, the director outlined the criteria necessary for "managerial capacity" and indicated that the petitioner had failed to establish that the beneficiary qualified as a manager or executive. The director, therefore, requested that the petitioner submit the following: (1) a list of all employees in the U.S. organization, their job titles, and job responsibilities; (2) copies of wage reports for all U.S. employees; (3) evidence of business premises secured in the United States; and, (4) a list of the employees in the foreign entity, and their job titles and duties.

In response, the petitioner explained that the position of Manager offered to the beneficiary “involves Executive Functions.” The petitioner further provided the following:

[The beneficiary] will plan and develop business objectives of the Company, formulate financing programs, administer organizational policies, long-term goals and objectives in accordance with the growth of the Company, coordinate functions of the Company relating to review of activity reports and financial statements in order to ascertain Company’s progress, hiring and firing of personnel, etc. The duties, which this position carries, comprise essentially the same duties [the beneficiary] handled so ably at the Parent office in Belize.

With regard to employees of the U.S. entity, the petitioner provided a copy of the Year 2001 Form W-2 Wage and Tax Statement for the beneficiary’s sole subordinate employee. Although the petitioner noted that a job description for this employee was included as an exhibit, the petitioner failed to provide it in its response to the director’s request. A detailed organizational chart of the foreign entity identifying the beneficiary’s position as “Boss” was included.

The director denied the petition concluding that the petitioner had failed to demonstrate that the beneficiary would be performing in a primarily managerial or executive capacity in the United States. The director noted that although the U.S. entity had been in operation since 1992, the company employed only two individuals, including the beneficiary. As a result, the director concluded that “[CIS] is not persuaded that the beneficiary’s duties in this position will be primarily those of an executive or manager.” The director noted that it appeared the beneficiary would instead be engaged primarily in day-to-day operations of the business. As the petitioner had not met its burden of proof, the director denied the petition.

In his brief on appeal, counsel for the petitioner explains that the petitioner presently employs one individual who performs the company’s day-to-day operations, and again provided Tax Form W-2 as evidence of the individual’s employment. With regard to the petitioner employing only one individual, counsel asserts that “there is no minimum number of employees required under the L-1 application as long as the beneficiary’s functions are managerial in nature.” Counsel further provides that the nature of the U.S. business “may not necessarily be employee intensive,” but that the beneficiary’s transfer to the U.S. company will have “effecting benefits beyond mere employees.”

In addition, counsel disputes the director’s finding that the beneficiary’s duties will include the day-to-day operations of the petitioning organization. Counsel claims that the petitioner’s sole employee runs the daily operations of the company, which also “relies heavily on the services provided by its attorneys, accountants and their staff.”

Finally, counsel, citing the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D), claims that the beneficiary possesses specialized knowledge of the petitioner’s “product, service, techniques and other interests in its application in international markets.”

On review, the record is not persuasive in establishing that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

When examining the managerial or executive 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). As required in the regulations, the

petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

In the present matter, the petitioner has failed to provide a comprehensive description substantiating the petitioner’s claim that the beneficiary will be employed as a manager in the United States. The petitioner claimed that the beneficiary will “plan and develop business objectives,” “formulate financing programs,” “administer organizational policies,” and hire and fire personnel. The brief and generalized description of the beneficiary’s responsibilities fails to specifically identify the tasks to be performed by the beneficiary in her role as manager or executive. Although the petitioner uses language found in the definitions of managerial and executive capacity, the descriptions are too vague to infer how the beneficiary’s position is predominately executive or managerial in nature. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

In addition, despite the director’s request that the petitioner specifically address the criteria required for “managerial capacity” as that term is defined in the regulations, the petitioner failed to identify how the beneficiary’s proposed position is primarily managerial. For instance, the petitioner neglected to provide the position title of the petitioner’s sole employee or define the specific job duties performed by this individual. The petitioner indicated only that the employee “runs the day-to-day operations of the Company.” It is, therefore, impossible to ascertain whether the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees as required in the regulations. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). Moreover, merely giving the beneficiary the title of manager is not sufficient to establish she is actually functioning as a manager as the term is defined in the regulations. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Also, the 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 evidence in the record suggests that the beneficiary will primarily perform the non-qualifying functions of the business. The size of the personnel staff is especially important when determining whether the petitioner has sufficient staff to relieve the beneficiary from performing non-qualifying duties. *See Systronics Corp. v. I.N.S.*, 153 F.Supp. 2d 7 (D.D.C. 2001). Although counsel asserts on appeal that the present employee of the petitioning organization “runs the day-to-day operations,” he did not provide any further description as to the employee’s specific responsibilities. The job description, which is both vague and broad, makes it impossible to conclude that the petitioner employs sufficient staff to relieve the beneficiary from performing non-managerial and non-executive functions. 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*, *supra*. Further, 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). The record does not demonstrate that the beneficiary's assignment will be performing primarily managerial or executive duties.

It should also be noted that counsel, on appeal, incorrectly assumes that the beneficiary's position in the United States should be considered managerial or executive because of the nature of the job duties performed by the beneficiary in the foreign company. Counsel's analysis is misplaced. Neither the number of individuals employed in the foreign company, nor the job duties performed by the beneficiary abroad, is a consideration in whether the beneficiary will be employed in the United States in a managerial or executive role. The regulations clearly indicate that an intracompany transferee must render services of a managerial or executive nature while employed in an organization in the United States. See 8 C.F.R. § 214.2(l)(1)(ii)(A). Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, *supra*.

Moreover, as addressed above, the petitioner cannot claim that some of the duties of the beneficiary's position entail executive responsibilities, while other duties are managerial. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. In the present matter, the petitioner has failed to provide a detailed description sufficient to establish that the duties to be performed are either primarily managerial or primarily executive in nature. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, *supra*.

Finally, counsel asserts on appeal that the beneficiary possesses specialized knowledge. However, counsel, citing the term "specialized knowledge" as it is defined in the regulations, simply restates the definition as evidence that the beneficiary has specialized knowledge. Specifically, counsel states that the beneficiary "falls into the above category" because of her "specialized knowledge regarding product, service, techniques and other interests in its application in international markets." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, *supra*; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Additionally, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, *supra*; *Matter of Ramirez-Sanchez*, *supra*.

For the foregoing reasons, the director correctly concluded that the petitioner failed to demonstrate that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

Beyond the decision of the director, the minimal documentation regarding ownership of the foreign and U.S. companies raises the issue of whether the two businesses possess a qualifying relationship sufficient to establish each as a qualifying organization. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G) a qualifying relationship may be demonstrated as a parent, branch, affiliate, or subsidiary, as each is defined in the regulations. See 8 C.F.R. § 214.2(l)(1)(ii)(I) - (L). Although the petitioner asserted in the petition that the foreign and U.S. companies are affiliates, the record does not sufficiently establish such a relationship. The Company Register supplied by the petitioner fails to adequately identify the shareholders of the organization that the petitioner claimed owned and controlled the U.S. entity. As the petition will be dismissed on other grounds, this issue need not be further addressed.

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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.