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U.S. Citizenship
and Immigration
Services

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FILE: LIN 03 151 52398 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

JAN 05 2004

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:



*identifying data deleted to
prevent disclosure of
invasion of personal privacy*

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, Nebraska Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, [REDACTED] states that it is a wholly-owned subsidiary of a South African company, [REDACTED]. The petitioner states that it performs commercial and industrial cleaning services. The U.S. entity was incorporated in the State of Florida in November 2000. The petitioner now endeavors to hire the beneficiary as a new employee. Consequently, in April 2003, the U.S. entity filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee (L-1) for three years. The petitioner seeks to employ the beneficiary as the U.S. entity's chief executive officer and corporate development manager at an annual salary of \$30,000.

On August 14, 2002, the director concluded, however, that the beneficiary will not perform managerial or executive duties in the United States. Additionally, the director determined that the beneficiary had not performed managerial or executive duties for one continuous year during the three years prior to the filing of the petition. Consequently, the director denied the petition.

On appeal, the petitioner's counsel avers that the beneficiary performed primarily executive duties for one continuous year during the three years prior to the filing of the petition. Furthermore, counsel asserts that the director should have considered the beneficiary's proposed duties in the United States pursuant to the new office regulations.

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 meet certain criteria. 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. Furthermore, 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.

Under 8 C.F.R. § 214.2(l)(3), 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.

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)(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.

Initially, the AAO will determine whether the beneficiary’s proposed duties in the United States are executive or managerial. When examining the executive or managerial 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). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are *either* in an executive *or* managerial capacity. *Id.*

On Form I-129, the petitioner stated that the beneficiary's proposed duties in the United States will be to "[p]rovide strategic direction and coordination of activities and operation of the corporation." On April 4, 2003, the petitioner supplemented the Form I-129 with additional documents including a description of the beneficiary's proposed duties in the United States. The director accurately listed all of the proposed duties in his decision; therefore, rather than restate the duties, the AAO incorporates the list into this decision. Additionally, the director's decision correctly stated:

The petitioner also submitted an organizational chart [with Form I-129] indicating that the United States entity currently employs an assistant manager, three supervisors, and eight part-time cleaning crew workers. The business plan describes the assistant manager position as "responsible for personnel management including training, weekly time sheets, call backs and inventory control." The "other" positions [were] described as "two full-time and various part-time cleaners as required. These positions will require that the employee is 16 years of age and therefore college students suit very well." There is no description of the alleged supervisory positions.

The director determined that the descriptions provided with Form I-129 were inadequate to establish that the beneficiary would be performing executive or managerial duties. In turn, as the director's decision correctly observed:

[O]n April 10, 2003, the [director] issued correspondence requesting, among other items, detailed and comprehensive descriptions of the beneficiary's . . . proposed employment in the United States and copies of the United States entity's "Employers Quarterly Federal Tax Form" (Form 941) and "State Unemployment Compensation Report Form" for the prior year. [T]he petitioner was requested to clarify the generalized job descriptions provided, including specific examples of the vague duties initially provided, and requested specifically to discuss the "hands-on work" and the selling of the skincare products on the [I]nternet along with a clarification of the proportion of the time involved in the performance of these duties.

On May 15, 2003, the petitioner responded to the request for evidence with various documents including a description of the beneficiary's proposed duties in the United States. The director accurately listed all of the proposed duties in his decision; therefore, rather than restate the duties, the AAO incorporates the list into this decision.

In response to the request for evidence, counsel stated, "[The beneficiary's] duties are 100% management. [The beneficiary] does not do any of the cleaning herself; she has subordinate managers and staff do the actual cleaning." The assertions of counsel do not constitute evidence, however. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, the proposed duties depicted in the April 4 and May 15, 2003 job descriptions establish that the beneficiary will devote much of her time to preparing schedules, tracking inventory, performing accounting tasks, ensuring that governmental regulations are met, and assuring customer satisfaction. Consequently, the beneficiary will primarily be performing tasks necessary to produce a product or provide a service. Moreover, the remainder of the beneficiary's duties will entail marketing duties. For example, she will locate new customers, negotiate agreements with clients, and evaluate statistical data to determine where to expand the petitioner's business. An employee who primarily performs the tasks necessary to produce a product or

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).

The duties listed on the April 4 and May 15, 2003 submissions are too broad and nonspecific to convey an understanding of the beneficiary's proposed daily responsibilities. For instance, the job descriptions use terms such as "plans," "directs," "defines," "assesses," "establishes," "maintains," "coordinates," "hands on," "enforces," "locates," "appraises," "investigates," "collects," and "interprets" to describe the proposed duties. The petitioner failed to define these terms with concrete, quantifiable examples. Going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F. Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, specifics are 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).

Moreover, the AAO notes that the executive summary of the petitioner's business plan, an undated letter from Avon Products, Inc., and a December 30, 2001 letter from Annique Skincare Products indicate that the beneficiary plans to sell skin care products in the United States. The director's request for evidence asked the petitioner to state the percentage of time spent on each of her proposed duties, including any tasks relating to the petitioner's cosmetics business, as well as to provide Federal Tax Forms 941 and state unemployment compensation report forms. However, the petitioner did not specify the percentage of time the beneficiary planned to spend selling the skin care items and the percentage of time she planned to devote to the cleaning business. Also, the petitioner failed to provide the requested tax and unemployment compensation forms. "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition." 8 C.F.R. § 103.2(b)(14); see also *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Finally, the petitioner has not demonstrated that the beneficiary primarily will supervise a subordinate staff of professional, managerial, or supervisory personnel who can relieve her from performing nonqualifying duties. See section 101(a)(44)(A)(ii) of the Act. In particular, section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[T]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

The beneficiary will supervise an assistant manager. The petitioner provided no information about the required education for the subordinate position. Therefore, it is unclear whether the supervised employee will perform tasks that require at least a baccalaureate degree. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). As explained above, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, *supra*; *Republic of Transkei v. INS*, *supra*; *Matter of Treasure Craft of California*, *supra*. At the time of filing, the assistant manager was not acting as a

supervisor of the non-professional cleaning staff and did not relieve the beneficiary from performing these duties. According to the petitioner's business plan, the beneficiary is training the assistant manager to "be responsible for personnel management including training, weekly time sheets, call backs and inventory." After training the assistant manager to assume these responsibilities, the beneficiary will apparently continue performing such nonqualifying tasks as accounting, ensuring that governmental regulations are met, assuring customer satisfaction, locating new customers, negotiating agreements with clients, and evaluating statistical data to determine where to expand the petitioner's business. Therefore, at most, the beneficiary will function as a first line supervisor.

In sum, the beneficiary's production-oriented activities, vaguely defined responsibilities, failure to provide requested evidence, and supervision of a non-professional, non-managerial subordinate preclude CIS from classifying the beneficiary as a manager or executive.

The AAO now turns to the question of whether, within the three years preceding the beneficiary's application for admission into the United States, the foreign entity employed the beneficiary in a qualifying managerial or executive capacity for one continuous year.¹ See 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv). The AAO notes that, rather than providing cleaning services, the South African business sells cosmetics and provides manicure services. On Form I-129, the petitioner stated that the beneficiary's duties in South Africa are to "[p]rovide strategic direction and ensure[] overall success of business." On April 4, 2003, the petitioner supplemented the Form I-129 with additional documents including a description of the beneficiary's overseas duties. The director accurately listed all of the proposed duties in his decision; therefore, rather than restate the duties, the AAO incorporates the list into this decision. Additionally, as the director's decision correctly stated: "[T]he foreign entity employs five workers in addition to the beneficiary: a Manager/ Bookkeeper/Buyer, a full-time assistant-manageress [*sic*], a weekend manager, a weekend shop assistant, and a full-time nail technician."

The director determined that the descriptions provided with Form I-129 were inadequate to establish that the beneficiary performed executive or managerial duties abroad. Therefore, on April 10, 2003, the director requested "detailed and comprehensive descriptions of the beneficiary's employment abroad . . ." On May 15, 2003, the petitioner responded to the request for evidence with various documents including a description of the beneficiary's duties in South Africa. The director accurately listed all of the duties in his decision; therefore, rather than restate the duties, the AAO incorporates the list into this decision.

In response to the request for evidence, counsel stated, "[The beneficiary] spends 90% of her time [abroad] on pure management duties and less than 10% of her time involved with actual sales." As noted previously, the assertions of counsel do not constitute evidence. *Matter of Obaigbena, supra*; *Matter of Ramirez-Sanchez, supra*. Furthermore, the overseas duties depicted in the April 4 and May 15, 2003 job descriptions establish that the beneficiary spends much of her time performing accounting tasks, satisfying customers and clients, purchasing and delivering stock for the business, and operating the store herself during vacation time or late night shopping. Consequently, the beneficiary was primarily performing tasks necessary to produce a product or provide a service. Moreover, the remainder of the beneficiary's duties entail marketing duties. For example, she arranges for advertising and analyzes retail trends. As established earlier, an employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International, supra*.

¹ The AAO notes that, on appeal, the petitioner asserts only that the beneficiary served primarily as an executive abroad.

In addition, the overseas duties are vague and undefined; thus, they cannot convey an understanding of the beneficiary's daily responsibilities in South Africa. For example, the job description does not define such terms as "directed all company operations," "controlled finances," "establish[ed] operational goals," "direct[ed] staff in company policies and procedures," and "implement[ed] operational changes." Again, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*; *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*. Likewise, specifics are 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, supra*.

Furthermore, the petitioner has not demonstrated that the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel who can relieve her from performing her nonqualifying overseas duties. See section 101(a)(44)(A)(ii) of the Act. As noted earlier, the relevant question is whether the supervised positions require an advanced education. The petitioner's evidence provides no information about the required education for the five subordinate positions abroad. Therefore, it is unclear whether the five subordinates perform tasks that require at least a baccalaureate degree. See section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32); *Matter of Sea, supra*; *Matter of Ling, supra*; *Matter of Shin, supra*. Moreover, none of the five subordinates performs managerial or supervisory duties; instead, they provide direct customer services and conduct such routine activities as running the cash register and ordering inventory. Given that the subordinates are not fulfilling managerial or supervisory duties, the beneficiary is at most serving as a first-line supervisor for the overseas entity. In sum, the beneficiary's production-oriented activities, vaguely defined responsibilities, and supervision of non-professional, non-managerial subordinates preclude CIS from classifying the beneficiary as an executive.

Finally, on appeal, counsel asserts that the director incorrectly treated this matter as a petition for an extension of a visa. Counsel states that the director should have treated this matter as a new office petition. The record establishes that, in January 2001, HTW Investments, Inc., petitioned to classify the beneficiary as a manager or executive so that she could open a new office in the United States. The petition (SRC 01 077 51460) was granted as valid from March 16, 2001 through March 16, 2002. The petitioner had planned to sell cosmetics as does the South African parent; however, during the petitioner's first year of operation, the U.S. entity was unable to establish a successful cosmetics business. The petitioner avers that, as a result, the U.S. entity established a cleaning service, instead. The U.S. entity petitioned to extend the petition's validity and the beneficiary's stay. However, on September 25, 2002, the director denied the petition to extend. Consequently, the beneficiary returned to South Africa.

As indicated above, the evidence establishes that the U.S. entity in this matter, HTW Investments, Inc., is the same entity that already received a new office approval for the period March 16, 2001 through March 16, 2002. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations allowing for an extension of this one-year period. Therefore, the director properly judged the beneficiary's duties against standards applicable to a manager or executive who was initially granted one year to open a new office and now seeks to extend the validity of that petition.

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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.

ORDER: The appeal is dismissed.