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U.S. Citizenship and Immigration Services

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[redacted]

FILE: SRC 02 105 52284 Office: TEXAS SERVICE CENTER Date: JAN 27 2004

IN RE: Petitioner:
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:

[redacted]

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 a wholesaler and retail business, specializing in intimate women's apparel. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its marketing manager. The director determined that the evidence was not sufficient to establish that the beneficiary has been or would be employed primarily in a qualifying managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will be managerial or 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.
>
> (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;

B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);

C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

E) Evidence of the financial status of the United States operation.

According to the documentary evidence contained in the record, the petitioner was incorporated August 25, 2000 as a wholesaler and retailer, whose principal activity is the sale of intimate apparel. The petitioner states that the U.S. entity is a subsidiary of Kiby's Ltda, CRA, located in Colombia. The petitioner declares two employees. The petitioner seeks to continue the beneficiary's services as its marketing manager for a period of three years, at a yearly salary of $30,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been or 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.

In a letter of support dated January 31, 2002, the beneficiary's job duties are described as:

> Mr. [redacted] will continue to fill the position of Marketing Manager in the Miami, Florida, U.S.A. office of our firm as he has been very successful in his position.
>
> Mr. [redacted] will be supervising a team of approximately 10 marketing and sales associates and personnel in our market expansion project.
>
> Furthermore, he will be creating contracts and business relationships with providers and clients in order to establish a niche for our company in the United States.
>
> He will be responsible for day-to-day discretionary decisions involving sales contracts, marketing programs, advertising, personnel, payroll, and other administrative duties.

In response to the director's request for additional evidence, counsel stated in a letter dated July 26, 2002, that the U.S. entity employed two full-time employees, one being a sales representative and secretary and the other being the beneficiary as company president. Counsel also stated that there was two full-time commission-based, independent sales representatives whose income was solely based on commission sales.

The director determined that the record did not establish that the beneficiary had been or would be employed in either a managerial or executive capacity.

On appeal, counsel asserts her disagreement with the director's decision. Counsel further states that the number of employees must be considered in relation to the reasonable needs of the business and its stage of development. Counsel states that the U.S. entity has employees who fulfill the day-to-day activities of the organization and who are directly supervised by the beneficiary. Counsel also contends that since the U.S. entity is mainly a sales and import and export company it does not need an extraordinary amount of employees at its current stage of development. Counsel further asserts that size of the organization is irrelevant and that the number of employees supervised is not determinative. Counsel states that the petitioner's letter of support supports the fact that the beneficiary is supervising and is not involved in the day-to-day operations of the business. Counsel submits no further evidence on appeal to substantiate her claims.

Without documentary evidence, the assertions of counsel cannot be used to establish that the beneficiary is acting and will be acting in a primarily managerial or executive capacity. 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).

Counsel's assertions are not persuasive. The petitioner has failed to present sufficient evidence to establish that the beneficiary's job duties for the U.S. entity have been managerial or executive in nature. The petitioner claims that the beneficiary has been employed by the U.S. entity as its marketing manager. However, the position descriptions given by the petitioner of the beneficiary's job duties are too general and broad to convey an accurate impression of the beneficiary's actual day-to-day duties. Further, the following duties are without any context in which to reach a determination as to whether they are qualifying: responsible for supervising a team of marketing and sales representatives, creating contacts and business relationships, and responsible for the day-to-day discretionary decisions. 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 U.S. entity as a marketing agent and sales representative who specializes in the sale of women's intimate apparel. In the absence of clarification regarding the subordinate employees' job duties, and the percentage of time spent by the beneficiary and his subordinate performing the duties of the organization, it cannot be established that the beneficiary directs the management of the U.S. entity or that he supervises and controls the work of others who can relieve him from performing non-managerial duties.

Furthermore, the record as presently constituted is not persuasive in demonstrating that the beneficiary will supervise professional, managerial, or supervisory employees. Based upon the evidence presented, the beneficiary's major responsibilities will be in maintaining the day-to-day operation of the business. An employee, who primarily performs the tasks necessary to produce a product or to provide a service, is not viewed as an employed in a managerial or executive capacity. *Matter of Church Scientology International,* 19 I&N Dec. 593, 604 (Comm. 1988).

Upon further review of the record, there are a number of ambiguities and grave discrepancies in the number of employees to be employed by the petitioner and variances in the beneficiary's job titles. In the instant case, the petitioner stated that the beneficiary would continue to manage ten sales and marketing representatives. Counsel stated that the company employed two full-time employees and two full-time commission-based, independent sales representatives. There has been no evidence submitted to establish any relationship between the

independent contractors and the beneficiary. Other evidence of record confirms that only two individuals, inclusive of the beneficiary, were employed by the U.S. entity at the time the instant petition was filed. In the petition, the petitioner identifies the beneficiary's title as marketing manager. Counsel for the petitioner identified the beneficiary as company president in her response letter dated July 26, 2002. In addition the petitioner stated that the beneficiary would continue to manage the marketing division. On the other hand, counsel stated that the beneficiary would, in fact, be supervising other employees. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho,* 19 I&N Dec. 582, 591 (BIA 1988).

Although counsel accurately concludes that company size cannot be the sole basis for denying a petition, that element can nevertheless be considered. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp.2d 7, 15 (DDC 2001). This is particularly true in light of other pertinent factors, such as the nature of the petitioner's business, which help to determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant case, the latter more accurately describes the beneficiary's role. At the time of filing the petition in 2002, the petitioner had been established since 2000 and claimed to have employed the beneficiary as marketing manager along with one other employee. The petitioner did not submit evidence that it employed any subordinate staff members that would perform the actual day-to-day, non-managerial operations of the company. Counsel contends that the company has realized a substantial growth in sales since its inception in 2000, which is evidenced by its bank statements and sales. However, with growth comes additional responsibility, and the petitioner has not submitted evidence to show how the beneficiary is relieved of such responsibility. There has been no independent documentary evidence submitted to establish that additional individuals have been hired by the petitioner to handle the additional day-to-day services of the business. Based upon the evidence submitted, and the absence of subordinates to manage, it does not appear at this time that the reasonable needs of the petitioning company would plausibly be met by the services of the beneficiary in a primarily managerial or executive position.

On review of the complete record, it cannot be found that the beneficiary has been or will be employed in a managerial or executive capacity. Therefore, the appeal will be dismissed.

Beyond the decision of the director, the minimal documentation of the parent's and the petitioner's business operations raises the issue of whether there remains a qualifying relationship between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). This lack of documentation also raises the issue of whether the foreign entity will continue doing business during the alien's stay in the United States. As the appeal will be dismissed, however, 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.