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U.S. Citizenship
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[Redacted]

JAN 27 2004

FILE: EAC 01 192 51605 Office: VERMONT 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:

[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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is described as an importer and exporter of steel and men and ladies clothing. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as the chief executive officer of the U.S. entity. The director determined that the petitioner had not established that the beneficiary had been or will be employed in a primarily executive or managerial capacity or that the U.S. entity could support such a position.

On appeal, counsel submits a brief in support of the appeal, disagreeing with the director's determination and asserting that the beneficiary's duties are in fact 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 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 (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.

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 in 1999 as an import/export company of steel and men and ladies clothing, and is a wholly-owned subsidiary of R. K. Steel

Trading Corporation. The petitioner declares three employees and approximately \$165,000 in gross revenue for 2000. The petitioner seeks the beneficiary's services in order to continue the operation of the new office and to render services in a managerial or executive capacity for a period of three years, at an annual salary of \$45,000.

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

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In the petition, the petitioner described the beneficiary's job responsibilities as chief executive officer as:

- Overall planning and management of the company
- Establishing key ties and agreements with large customers
- General supervision of key employees including the hiring and firing thereof
- Establishing the goals and policies
- Monitoring the company's performance
- Reporting to the Indian parent company on a monthly basis
- Forging strategic alliances with suppliers and distributors
- Oversight of marketing of company's products
- Networking with foreign customers to obtain large orders
- Developing new opportunities

The director requested the petitioner submit an organizational chart of the U.S. entity; a comprehensive description of the beneficiary's proposed duties; an indication in writing as to how the beneficiary's duties will be managerial or executive in nature. He requested that the petitioner demonstrate that the beneficiary will function at a senior level, as well as in position title, or that he will be managing a subordinate staff of professionals. The director also requested the petitioner submit position descriptions and educational credentials for all of beneficiary's subordinates in the United States; and to submit a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis.

In response, the petitioner submitted a statement from counsel that described the beneficiary's duties as follows:

- (1) Supervise and direct activities all subordinate staff members.
- (2) Oversee planning and management of company.
- (3) Supervise formation of retail and wholesale stores in the United States.
- (4) Meet with each subordinate staff member to assure increase in projected sales volume of corporation.
- (5) Review weekly reports prepared by staff members.
- (6) Responsible for hiring, firing and promotion of company employees.
- (7) Monitor company's performance.
- (8) Manage the selection and procurement of quality products from U.S. [sic] and abroad.
- (9) Establish and implement company goals and policies.
- (10) Supervise executions of resolutions of shareholder's meeting and board of directors.
- (11) Exercise complete discretionary authority over the daily administration and operations of the company and its employees.
- (12) Review marketing strategies prior to implementation.

Counsel also provided an organizational chart depicting the beneficiary as chief executive officer, a manager under him, and a sales representative under the manager. He also supplied position descriptions, a weekly

breakdown of duties, and a description of educational and work experiences for the two other employees of the U.S. entity.

Counsel contends that the beneficiary has two subordinate employees working for him in the U.S. entity, and that the employees are supervised and managed by the beneficiary.

The director determined that the petitioner had not shown that the beneficiary would function at a senior level within the organization hierarchy other than in position title. The director also determined that the petitioner had not established that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who would relieve him from performing the services of the corporation.

On appeal, counsel asserts that the director was incorrect in its conclusion that the duties that the beneficiary will be performing are not of managerial or executive capacity. Counsel further contends that the service director erred in interpreting the statutory definition and regulations and applying the relevant case law in regard to the issue of determining managerial or executive capacity and arbitrarily discounted and disregarded evidence submitted in support of the petition.

Counsel asserts that the beneficiary's duties listed in the response to the director's notice of action dated June 11, 2001 are of an executive nature customarily associated with the position of chief executive officer. Additionally, counsel cites three precedent decisions, where he contends that on appeal the Commissioner concluded that the beneficiaries were found to be functioning at a managerial or executive capacity within the organizations, without levels of supervision being discussed. In each instance the decisions addressed the controlling issue on appeal, which in neither case involved the issue of establishing managerial or executive capacity using supervisory capacity as the sole factor. Counsel has failed to establish that the facts of the instant petition are in any way analogous to those in the decisions cited.

In the *Vaillancourt* decision the Commissioner concluded that the beneficiary was employed for the entity abroad in a capacity requiring specialized knowledge, and that he would be employed in the United States in a managerial capacity based upon his acquired specialized knowledge. See *Matter of Vaillancourt*, 13 I&N Dec. 654, 656 (Reg. Comm. 1970). There was no issue on appeal addressing the beneficiary's supervisory role as manager or executive for the U.S. entity, hence it was not discussed.

In the *Bocris* decision the Commissioner, in approving the visa petition, noted that the petitioner's intention in requesting an intracompany transfer of the beneficiary, was to allow for a temporary rather than a permanent stay in the United States. See *Matter of Bocris*, 13 I&N Dec. 601, 602-603 (Reg. Comm. 1970). The petition had been denied by the Director based upon evidence that the petitioner was seeking a permanent stay in the United States. Again, the issue of the nature and scope of supervision by the beneficiary was not presented for appeal.

Finally, in the *Pozzoli* matter, the Commissioner addressed the issue of the beneficiary's source of remuneration, and the impact, if any, it would have on qualifying the beneficiary as an intracompany transferee. The Commissioner concluded that although the beneficiary would continue to receive his salary from the foreign entity, he would be rendering his professional services to the U.S. entity and therefore qualified as an intracompany transferee. See *Matter of Pozzoli*, 14 I&N Dec. 569, 573-574 (Reg. Comm. 1974). Again, the issue of managerial or executive capacity to supervise was not presented on appeal, and thus the issue was not addressed by the Commissioner.

Counsel also asserts that the beneficiary supervises two employees, including a manager who holds a bachelor degree and a marketing representative who holds a high school diploma, and thus concludes that the beneficiary is a manager as defined in the Act. Counsel goes on to state that, contrary to the director's decision, the beneficiary's capacity as manager or executive should not be formed solely on the basis of the number of subordinates supervised.

Counsel's argument is not persuasive. The director did not base his decision solely on the number of employees to be supervised by the beneficiary. The director, in rendering his decision, looked to such factors as the vagueness of the description of the beneficiary's proposed job duties, the lack of descriptions connoting the beneficiary's subordinates job duties as professional in nature, the organizations size and nature, and the reasonable needs of the organization in concluding that the petition had failed to establish that the beneficiary would be employed in a managerial or executive capacity by the U.S. entity. Staffing levels were examined, but not used as a sole factor in deciding to deny the visa petition. See Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C); see also *Systronics Corp. v. INS*, 153 F.Supp.2d, 7, 15 (DDC 2001).

Counsel also asserts that the beneficiary manages and oversees essential functions and operations of the company and thus qualifies as a functional manager. Counsel cites several unpublished cases in an effort to bolster his assertions. Counsel specifically refers to an unpublished decision involving an employee of the Irish Dairy Board. In the Irish Dairy Board decision it was held that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee of the petitioning organization. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the Irish Dairy Board case. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

In addition, counsel's assertion that the beneficiary is a functional manager is not supported by the record. In his brief, counsel notes that in addition to the previously described duties, the beneficiary also directs and manages the overall administrative and financial operations of the company including developing and implementing marketing, sales and promotion policies, strategies, programs and goals. Although counsel ascribes the oversight of these functions to the beneficiary, the petitioner does not describe any subordinate employees as performing these duties. The record does not support the additional duties of the beneficiary, which are promulgated by counsel. The record must demonstrate that the beneficiary will be primarily managing or directing, rather than performing the function. The record must further demonstrate that there are qualified employees to perform the functions so that the beneficiary is relieved from performing non-qualifying duties. As noted in the director's decision, the record reveals a business that has employees performing non-professional duties and does not contain the organizational complexity to support a managerial or executive position. The petitioner has not provided persuasive evidence that the beneficiary is a functional manager.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily executive or managerial capacity, nor that he will supervise professional employees. Based upon the evidence presented, the beneficiary's major responsibilities will be in maintaining the day-to-day operations of the U.S. entity, and in supervising non-professional employees. 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). 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.