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U.S. Citizenship and Immigration Services

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JUN 03 2004

[redacted]

FILE: EAC 02 111 51832 Office: VERMONT SERVICE CENTER Date:

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 Director, Vermont 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 operating as an import-export company of surgical instruments. It currently employs the beneficiary as its president, and seeks to extend the beneficiary's temporary employment for an additional two years. The petitioner filed a petition to extend the beneficiary's classification as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary has not been and would not be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel states that Citizenship and Immigration Services (CIS) based its denial on an "erroneous legal standard," and asserts that as president, the beneficiary performs a wide variety of executive and managerial duties, which were outlined in documentation submitted with the petition. Counsel also refers to an unpublished AAO decision, and contends that the beneficiary is a functional manager. Although counsel states that a brief would be provided within thirty days of appeal, no additional documentation was subsequently submitted by counsel.

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) 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 is whether the beneficiary has been and 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 letter accompanying the petition, the chairman of the foreign company provided the following description for the beneficiary's current "managerial and executive position" in the United States:

Since his arrival in the US, [the beneficiary] has been involved in full decision making responsibilities, such as, incorporating and registering of US company, selecting a site for the office, negotiating the terms and conditions of the lease, setting up the office, negotiating agreements with our customers in the US, communicating with our office in Pakistan about the goals, policies and operation of the US for which he has full powers. Additionally, [the beneficiary] is fully managing our US company. [The beneficiary] expects to [hire] additional staff including a full time office manager, marketing and sales manager and sales

> staff in the future. At the moment all the administrative work is performed by an administrative secretary. [The beneficiary] devotes approximately eighty (80) percent of his time meeting our customers in the US soliciting business, evaluating the market, setting goals and policies, discussing his future plans with us in Pakistan and managing our business operations in the US. These activities require approximately 30 hours per week of his time. The rest of his time is spent overseeing the day to day operation that requires approximately 10 hours per week.

In an additional letter submitted by counsel, counsel explained that as president of the U.S. company, the beneficiary is responsible for:

> . . . overseeing [the U.S. entity's] operation as well as formulating the policies for budgeting, financial affairs, personnel structure and both short and long term goals for expansion. . . . [The beneficiary] is primarily responsible for establishing the organizational goals and policies to ensure the steady growth, profitability and financial independence of the US entity. He is also responsible for developing business ties, laying out the groundwork and day to day operation of the US based entity.

In a request for additional evidence, the director outlined the regulatory requirements for establishing managerial capacity and executive capacity, and stated that the petitioner had failed to demonstrate the beneficiary's employment in a qualifying capacity. The director noted that although the U.S. entity has been in business for two years, it has failed to hire any employees, except for an administrative secretary, which the petitioner claims to employ. The director further stated that the beneficiary's job duties resemble those performed by a sales agent or representative of the foreign company, rather than the responsibilities of a manager or executive. The director also requested that the petitioner submit evidence documenting the use of contractors and the duties performed by each.

In response, the petitioner submitted a letter from the chairman of the foreign company, in which the chairman refuted the director's conclusion that the beneficiary was performing as a sales agent of the foreign company, and reiterated that the beneficiary has a broad range of managerial and executive powers. The chairman stated that unlike a salesperson, the beneficiary determined the location in which to incorporate the U.S. company, negotiated and signed the office lease, acquired a warehouse facility, and determines the price of all surgical instruments sold in the United States. The Chairman also stated:

> all the budget related decisions for our subsidiaries in the USA are made by [the beneficiary]. He is solely responsible for approving all expenditures, allocation of funds for further investments and all tax related issues. [The beneficiary] is the one who approves and signs the tax returns. Such important policy making, financial, marketing, advertising and administrative decisions just to name a few do not and cannot be performed by a sales person.

In addition, the Chairman noted that the beneficiary selected two companies to act as the petitioner's representatives in the solicitation of orders and the sale of the petitioner's products in the United States and Europe. The petitioner enclosed copies of the agreements. The petitioner also submitted the U.S. company's state Employer Report of Wages Paid for 2001, in which the petitioner indicated the employment of two employees: the beneficiary, and an additional worker whose position was not identified.

In his decision, the director determined that the record did not establish that the beneficiary has been functioning in a primarily managerial or executive capacity in the United States. The director noted that since the company's establishment in 1998, the corporation has not employed any workers other than the beneficiary and a claimed administrative assistant, whose specific duties have not been described. The director also stated that the petitioner's two sales agreements with outside contractors "[do] not sufficiently establish that the beneficiary would be supervising any of the employees for these organizations or what specific role [the beneficiary] would play in relation to these organizations." Finally, the director acknowledged the petitioner's claim that the U.S. company is still in the initial start-up phase of operations, but clarified that the initial start-up period granted to a new business is one year. The director consequently denied the petition.

On appeal, counsel asserts that CIS' denial of the petition is based on an "erroneous legal standard" and an "arbitrary and capricious analysis" of the record. Counsel states that the beneficiary's "wide variety of executive and managerial duties" was outlined in great detail in the documentation submitted with the petition. Additionally, counsel refers to an unpublished AAO decision, and states that "[a] person may be a manager or executive . . . even if he is the sole employee of the company where he utlizes [sic] outside independent contractors or whose business is complex." Counsel further states that "[the] alien may be a functional manager." As previously noted, although counsel indicated that a "detailed" brief would be submitted within thirty days of the September 10, 2002 appeal, no subsequent submission was made.

On review, counsel's assertions do not establish the beneficiary's employment in the United States in a primarily managerial or executive capacity.

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). 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.* Moreover, the petitioner must 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, while the petitioner asserted that the beneficiary performs "a broad range of managerial and executive powers," the petitioner failed to specifically demonstrate that the beneficiary's job duties satisfy each of the four requirements for each capacity. Rather, the petitioner described job responsibilities from each capacity in an attempt to qualify the beneficiary as a hybrid "executive/manager." Specifically, the petitioner stated in its January 2002 letter submitted with the petition that the beneficiary has been and would continue to "manag[e] our US company," set goals and policies, oversee the day-to-day operations of the company, and exercise "full decision making responsibilities." In an accompanying letter, counsel stated that the beneficiary "establish[es] the organizational goals and policies," and directs and oversees the operation of the U.S. entity. Furthermore, in response to the request for evidence, the petitioner stated that the beneficiary performs managerial and executive duties, yet neglected to clearly define how these duties meet the criteria of both managerial capacity and executive capacity. While a beneficiary need not be employed as both a manager and an executive to qualify as an intracompany transferee, if a petitioner claims employment of the beneficiary in each capacity, the petitioner is

responsible for demonstrating that the beneficiary's responsibilities will meet the requirements of each capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner failed to satisfy this burden.

Additionally, the majority of the job duties outlined above are merely restatements of the definitions of managerial and executive capacity. 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*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). 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.* The petitioner, therefore, failed to specifically qualify the beneficiary as either a manager or an executive.

Moreover, counsel's assertion on appeal that the beneficiary is a functional manager fails to establish employment in the required capacity. The claim that the beneficiary is employed as a functional manager was first raised by the petitioner on appeal, rather than in the petition. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Also, even if the AAO were to consider the beneficiary's employment as a functional manager, counsel's reference on appeal to an unpublished decision involving an employee of the Irish Dairy Board is not persuasive. In the unpublished Irish Dairy Board decision, the AAO determined 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. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the Irish Dairy Board matter. Again, although counsel noted his intent to submit a brief, none was provided. 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 AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based on the evidence presented, the AAO cannot conclude that the beneficiary has been or would be employed in the United States in a primarily managerial or executive capacity.

Beyond the decision of the director, the record does not contain sufficient evidence to establish the existence of a qualifying relationship between the foreign and U.S. entities. The petitioner stated on the petition that the U.S. entity is a subsidiary of the foreign company. The petitioner submitted no evidence, however, to establish a parent-subsidiary relationship. Proper evidence would include stock certificates, the corporate stock certificate ledger, the stock certificate registry, and the minutes of relevant annual shareholder meetings. 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.* For this additional 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. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.