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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

[redacted]

FILE: SRC-02-149-52211 Office: TEXAS SERVICE CENTER Date: MAR 02 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

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 Board (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a new office incorporated in Texas and engaged in the import and export, sale, rental, and distribution of heavy equipment. It seeks to extend the beneficiary's L-1A status in order to continue the temporary employment of the beneficiary in the United States as a general manager. The petitioner filed a timely petition requesting an extension of two years.

In a decision dated June 24, 2002, the director denied the petition indicating that the petitioner had failed to establish that the beneficiary will be performing in a managerial or executive capacity.

The petitioner filed an appeal on July 17, 2002 stating that the beneficiary's duties include more than day-to-day operations and qualify him as a manager. The petitioner's counsel also indicated that a brief and evidence would be submitted to the AAO within thirty days of the appeal date. To date, no such brief or evidence has been submitted by either counsel or the petitioner. Therefore, the record will be considered complete.

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) indicates that a visa petition involving the opening of a new office may be extended by filing a new Form I-129 and submitting the following evidence:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(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) of this section for the previous year;

(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.

The AAO will address the issue of whether the beneficiary will be employed in a primarily managerial or executive capacity in the petitioning 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.

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 the petition, the petitioner described the beneficiary's duties in the U.S. company as a general manager of lower level managers, superceding the managers' decisions regarding personnel, executing contracts, directing the administration of the company, handling all financial matters, fixing prices for the products and services of the company, and endorsing company checks.

In a request for additional evidence, the director noted that the beneficiary did not qualify as a general manager because, being one of two employees of the petitioning organization, the beneficiary must engage in day-to-day operations of the organization. The director requested, in pertinent part, that the petitioner submit evidence explaining how the beneficiary qualifies as a manager or executive, and thus is not engaged in the day-to-day operations of the business. She further asked that the petitioner provide the duties and educational backgrounds of other employees of the petitioning company.

In its response to the director's request for evidence, the petitioner noted that the beneficiary, as general manager of the U.S. operation, performs the following duties:

> 1) executes contracts in the name of [the petitioner]; 2) represents [the petitioner] before all government authorities; 3) attends all Board of Directors

> meetings; 4) manages lower level managers and supercedes in their personnel decisions (at the present time, there is only one lower level manager in the U.S. company, but there are others in the foreign company); 5) directs the administration of [the petitioner]; 6) offers, sells, and fixes prices for the products and services of [the petitioner]; 7) endorses checks; 8) and handles all financial matters of [the petitioner].

The petitioner also noted that the other employee of the petitioning organization holds a mechanical engineering degree and has worked as both an engineer and a contractor, and most recently, was employed as president of the foreign parent company. This individual's duties were described as assessing the value of heavy equipment, engaging in market analysis, implementing marketing strategies, using his background as a mechanical engineer to achieve objectives of the company, handling all purchase and sales transactions, and interacting with the customers. The petitioner, citing *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472 (5th Cir. 1989), *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), and an unpublished AAO decision, also stated that a "manager" or "executive" is not limited to those who supervise a large number of persons, but rather a person may be a manager or executive even if he is the sole employee of the company where business is complex.

The director denied the petition, concluding that the petitioner failed to show that the beneficiary was a manager or executive. In her decision, the director noted that because the "one year start-up phase" for the petitioner, as a new office, had expired, the petitioning organization must establish a need for an executive or managerial employee. As the petitioner has two employees, including the beneficiary, it has failed to establish that the beneficiary will not be engaged in the daily operations of the business.

On appeal, petitioner's counsel noted that it is because the petitioning organization has only been in operation for just over a year that the petitioner is in need of the beneficiary's managerial skills. Counsel further asserted that the beneficiary's duties of executing contracts for the company, representing the company before all government authorities, and managing and supervising lower level employees substantiate the beneficiary's position as a manager. Counsel again noted that a sole employee of a company may be considered a manager where the business is complex.

The record does not support a finding that the beneficiary will be employed in the petitioning organization as a manager or executive as defined in the regulations at 8 C.F.R. §§ 214.2(l)(1)(ii)(B) and (C).

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii), when filing a petition for a visa extension, the petitioner must provide a statement of duties performed by the beneficiary for the previous year and under the extended petition, as well as a statement describing the staffing of the new operation when the beneficiary will be employed in a managerial or executive capacity. The description must be sufficient to determine that the duties to be performed are primarily managerial or executive in nature.

In the present case, the petitioner has provided a list of eight responsibilities of the beneficiary including executing contracts for the U.S. entity, representing the company, endorsing checks, fixing product prices, and managing the company's one manager. As these statements are very vague, and several are a restatement of the regulations themselves, it is difficult to determine the beneficiary's actual day-to-day activities. Because the beneficiary is contracting with others, representing the company, and fixing prices for the company's products and services, it appears the beneficiary is actually engaged in the daily operations of the company itself rather than managing the employees who are providing the company's services. In addition, the petitioner did not provide specific information as to the type and amount of the contracts in which the beneficiary is binding the U.S. company, and whether the contracts are routine within the organization's guidelines. Therefore, there is insufficient evidence to conclude that the beneficiary is not performing the non-qualifying, daily operations of the company. 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*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner also states that the beneficiary manages not only the one manager of the petitioning organization, but also the other managers in the foreign company. This analysis is misplaced, however, as the regulations require that the beneficiary manage and supervise employees in the new U.S. operation. To be considered a manager, the beneficiary must primarily supervise and control the work of "other supervisory, professional, or managerial employees . . . *within the organization*." 8 C.F.R. § 214.2(l)(1)(ii)(B) (emphasis added).

Therefore, although the beneficiary may continue to supervise employees in the foreign company, this may not be considered evidence in support of the beneficiary's managerial position in the U.S. operation. As such, the description provided by the petitioner is not sufficient to conclude that the majority of the beneficiary's duties are of a managerial or executive nature.

In regards to the beneficiary managing a "professional," as required in the regulations, the AAO acknowledges that the beneficiary's subordinate should be classified as a professional. Section 101(a)(32) of the Act, 8 U.S.C. § 1101, states that "profession" shall include but not be limited to "architects, engineers, lawyers, physicians, surgeons, and teachers . . . ." The petitioner has provided evidence to support a finding that the beneficiary's subordinate holds a degree in mechanical engineering and has worked as an engineer. However, even though the beneficiary may be managing a professional, the beneficiary's position in the U.S. company fails to incorporate the remaining responsibilities of a manager as defined in the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(B). As stated above, the beneficiary seems to be performing more of the daily operations of the company, rather than performing in a primarily managerial capacity. Therefore, the petitioner has failed to establish that the beneficiary is a manager or executive.

Finally, counsel asserts that the beneficiary will be relieved from performing non-qualifying duties because the beneficiary's subordinate will "handle[] all purchase and sales transactions, interact[] with all customers, and handle[] the day-to-day operations of [the petitioner] under the supervision of the beneficiary." These assertions do not establish that the beneficiary will not perform a substantial share of the daily operations of the organization. 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). 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).

In the appeal counsel asserted that the regulations were not meant to limit the title of manager or executive to only those individuals who supervise a large number of persons or a large enterprise. However, counsel has failed to submit a supporting brief on this issue. In the petitioner's response to the director's request for evidence, counsel cites *National Hand*

Tool Corp. v. Pasquarell, supra, and *Mars Jewelers, Inc. v. INS*, supra, in support of the claim that the regulations were not meant to apply only to individuals who supervise large numbers of employees. Yet, counsel failed to note that in *National Hand Tool Corp. v. Pasquarell,* the Court specifically stated that its holding, in which the beneficiary was found not to be a manager or executive, was based not on the size of the organization, but rather on the beneficiary's duties. As in the present case, the director's decision was not based solely on the fact that there is only one other employee. Instead, the record lacks sufficient evidence to prove the beneficiary's duties will be managerial or executive in nature.

Counsel further refers to an unpublished decision involving an employee of the Irish Dairy Board. In the Irish Dairy Board case 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. Again, 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*, supra. Furthermore, while 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests 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.