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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

MAR 11 2004

FILE: EAC 02 246 51757 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

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:

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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, U.S. Billiards, endeavors to classify the beneficiary as a nonimmigrant manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is an affiliate of Sportin, Ltd. located in Israel. The petitioner is engaged in the import and export of billiard tables and equipment. The initial petition was approved for one year to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for two years as the U.S. entity's general manager. The petitioner was incorporated in the State of New York in January 1999 and claims to have three employees.

On February 21, 2003, the director denied the petition and determined that the petitioner had not established that the beneficiary has been and will be primarily performing duties in an executive or managerial capacity.

On appeal, the petitioner refutes the director's decision and states that the beneficiary manages an essential function of the company and oversees the work of other employees.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act 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.

In relevant part, 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 (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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act 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 (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(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 issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties for the United States entity.

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.

On July 23, 2002, the petitioner filed Form I-129. The petitioner stated that the beneficiary "directs the marketing and operations."

On August 28, 2002, the director requested that the petitioner submit additional evidence to assist in determining whether the beneficiary has been and will be primarily employed in a qualifying managerial or executive capacity. In particular, the director requested that the petitioner submit the educational credentials of the U.S. entity's two employees, wages paid to the employees, and an explanation of why the employees appear to reside in California.

The petitioner's response included the following description of the beneficiary's U.S. duties:

Oversee the development and expansion of business in the United States including plan long and short term goals and strategies: 5 hours:

Coordinate with Israeli affiliate and parent company including presenting budgets and financial forecasts to the Board of Directors: 10 hours:

Oversee legal and accounting issues: 5 hours:

Make final decision on all personnel and subcontractor matters including hiring, firing, evaluations, promotions and terms of employment including insuring compliance with administrative policies and procedures: 5 hours:

Approve all marketing and public relation plans and review market and financial reports and research: 3 hours:

Approve agreement with clients, vendors, and manufacturers including pricing and term agreements: 6 hours:

Oversee compliance with import/export laws and customs, represent company to foreign government authorities and to US government authorities: 4 hours.

Represent company at trade and industry events including coordinating and leading US and Israeli delegation at international trade shows: 2 hours.

Other day-to-day operations: 10 hours.

The petitioner also submitted the employees' credentials, provided an explanation for why the employees reside in California, and claimed that within the next twelve months, the U.S. entity expected to hire additional staff according to the proposed personnel structure.

On February 21, 2003, the director denied the petition and determined that the petitioner had not established that the beneficiary has been and will be primarily performing duties in a managerial or executive capacity. The director found that the beneficiary will not be involved in directing the U.S. operation and was engaged in providing sales services to the U.S. organization's clients. The director noted that the petitioning entity employs two salespeople, both of whom are located in California. As such, the director concluded that the beneficiary is primarily engaged in providing sales services to the organization's clients in the east coast rather than primarily directing the organization.

On appeal, counsel claims that although the two employees reside in California, the employees are providing the sales services for the U.S. entity. The petitioner submitted a nationwide report documenting the sales activities of the two employees. Counsel states, "the Service's contention that the beneficiary must be performing the sales for the East Coast customers simply because he is present on the East Coast and his staff is on the West coast is unrealistic." Counsel explains, "in this age of highly sophisticated technology, companies are able to conduct business with clients worldwide, via the internet, video conferencing, telephone, and fax transmission." The AAO concurs with counsel's assertion that the location of the sales staff on the west coast does not limit the ability of the sales staff to provide sales services to clients on the east coast. The fact that the petitioner focuses its sales operations in California with many current customers on the east coast raises a legitimate question; however, counsel provided an adequate explanation. Therefore, the AAO finds that the director did not articulate a reasonable basis for finding the petitioner's business structure to be unreasonable.

When examining the executive or managerial capacity of the beneficiary, the AAO will look to the description of the beneficiary's U.S. job duties to determine whether the beneficiary is primarily acting in a managerial or executive capacity. See 8 C.F.R. § 214.2(l)(3)(ii). On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fail to establish what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "planning long and short term goals and strategies" and "oversee compliance with import/export laws and customs." However, these duties are generalities that fail to enumerate any concrete goals and strategies that the beneficiary has planned and will plan or how the beneficiary will oversee compliance.

Further, the petitioner claims the beneficiary's U.S. duties include tasks such as "approving all marketing and public relation plans, reviewing market and financial reports, and conducting research." However, the record does not indicate who actually performs the marketing and composes the public relation plans. Therefore, although the beneficiary claims to approve plans, it must be evident from the record that the beneficiary does not perform the tasks that he has been assigned to approve. 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).

Counsel also claims that the beneficiary fits the definition of a function manager and manages managers, citing several unpublished decisions to support her assertions. However, the AAO is not persuaded that the beneficiary's duties establish the beneficiary has managerial control and authority over a function of the company. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In the instant matter, the petitioner claims the beneficiary's vital function is "overseeing the management of the company" and "overseeing the operations so that the company performs at a profitable level." The petitioner also claims that because the beneficiary has "total discretionary authority in the operations of the business, including personal matters, subject only to the approval by the Board of Directors," he manages an essential function of the company. However, to allow the broad application of the term "essential function" to include such broad claims, without identifying a specific function, would render the term meaningless.

Moreover, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel. On appeal, counsel claims that the beneficiary "manages managers in addition to managing a vital function of our company – overseeing the management of the company." The U.S. organizational chart submitted on appeal indicates that the beneficiary manages two sales managers, a service and storage manager, an installation manager, and a cues salesman to be hired in May 2003. In return, there are two salesmen under the supervision of the sales manager, three salesmen under the supervision of a second sales manager, a serviceman to be hired in the future under the supervision of the service and storage manager, and an installer to be hired under the supervision of the installation manager. Although the organizational chart represents nine employees, at the time of filing, the petitioner only employed three individuals including the beneficiary. The petitioner claims that since the extension request was submitted "the company has increased its payroll by hiring 7 new workers over the past 6 months" and an installer will be hired in April 2003 and a serviceman and cue salesman will be hired in May 2003. However, the petitioner must establish eligibility at the time of filing. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In addition, 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. At the time of filing, the petitioner had not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The AAO notes that although the petitioner submitted several W-4's and resumes for its employees, this evidence is insufficient to establish that the petitioner has actually hired these employees. 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).

Counsel also claims that the beneficiary does not perform administrative tasks because the petitioner uses the secretarial and clerical services provided in the lease and an independent accountant. However, the invoices provided on appeal are dated after the petition was filed. The evidence submitted does not indicate that these services were provided prior to the time of filing. Again, eligibility must be established at the time of filing. *See Matter of Michelin Matter of Michelin Tire Corp., supra*

In addition, the AAO notes that the unpublished decisions that counsel cites are not binding. While 8 C.F.R. § 103.3(c) states that CIS precedent decisions are binding on all CIS employees, the same is not true of unpublished decisions. Therefore, the AAO is not bound by the unpublished decisions cited by counsel.

After careful consideration of the evidence, the AAO must conclude that the beneficiary has not been and will not be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Although not explicitly addressed by the director, the AAO is not persuaded that the beneficiary has been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). As previously stated to establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. The petitioner has not submitted sufficient evidence to establish that the beneficiary's employment abroad was of a qualifying nature. As the appeal will be dismissed upon the grounds previously discussed, this issue 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.