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U.S. Citizenship
and Immigration
Services

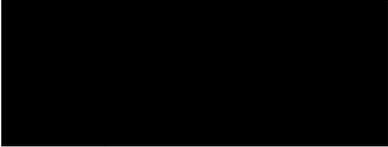


FILE: EAC 02 185 52802 Office: VERMONT SERVICE CENTER Date **MAR 19 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

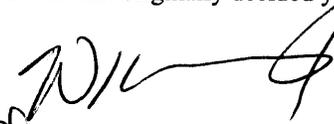
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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

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**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a diamond importer and wholesaler business. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been or would be employed primarily in a 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)(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.

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 (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);
- 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 2000 and claims to be a diamond importer and wholesaler business. The petitioner claims that the U.S. entity is a subsidiary of Bhadiyadra Gems, located in India. The petitioner declares four employees and \$3,058,686 in gross annual income. The petitioner seeks to continue to employ the beneficiary's services as president of its U.S. entity for three additional years, at a yearly salary of \$35,000.

The issue to be addressed 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.

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.

The record included a letter of support dated August 20, 2002, that detailed the beneficiary's day-to-day job duties to include the following:

1. Managed the entirety of marketing business operations of Bhadiyadra Gems (approx. 40% of time)
2. Hired, supervised marketing agents of our company and independent contractors (approx. 5% of time)
3. Developed and devised marketing strategies, short and long term business plans and implementation mechanisms (approx. 25% of time)
4. Oversaw sales of polished, cut diamonds to our company's clients, including foreign wholesalers (approx. 10% of time)
5. Managing advertising, promotion and public relation activities of our company (approx. 10% of time)
6. Represented our company at international shows, exhibits and other promotional events, including frequent trips to Belgium, Thailand to maintain secure relationships with our clients (approx. 10% of time)

The petitioner goes on to state the following in reference to the beneficiary's job duties:

[The beneficiary] has been personally engaged in planning, organizing and controlling our entire marketing function and working with his subordinates to achieve our organization's goals to expand the scope of our business operation and generate increased revenues. Essentially, Mr. [REDACTED] has been the individual responsible for developing, establishing and implementing our marketing policies and objectives and ensuring their proper implementation.

The petitioner submitted an organizational chart of the U.S. entity that depicts the beneficiary as the president with a sales manager, sales representative, and a secretary as his subordinates. The chart also depicts [REDACTED] as an independent shipping contractor, and an accountant (C.P.A.) as an independent contractor. The petitioner has not submitted documentary evidence to substantiate any contractual relationship between the U.S. entity and the independent contractors.

In response to the director's request for additional evidence the petitioner described the beneficiary's duties as follows:

1. Directing, managing, and overseeing the day-to-day activities of the company, particularly, the diamond marketing operations of the U.S. subsidiary (approx. 50% of time)
2. Managing, directing and coordinating marketing advertising, promotion and public relations activities, policies and functions; representing the company at selected international shows, exhibits and conferences (approx. 10% of time)
3. Overseeing, directing and managing the overall financial operations of the company under his ultimate authority over budgetary allocations and handling all related fiscal affairs, particularly: arranging for financing and credit with banks and other financial institutions (approx. 10% of time)
4. Overseeing the importation, marketing and distribution of diamond and precious gems imported to the U.S. company from the parent company in India (approx. 10% of time)
5. Following the market trends in the diamond industry in the United States, India and worldwide (approx. 5% of time)
6. Analyzing and reviewing the sales and related performance reports submitted by the Sales Manager with a view of sustaining the company's rapid growth (\$3,058,686.00 in sales for the fiscal year ending on March 31, 2002) (approx. 5% of time)
7. Devising plans for long-term growth development which includes establishing long term marketing, sales, credit standards and corporate policies, goals, strategies and objectives (approx. 5% of time)
8. Hiring and terminating staff as necessary to ensure the smooth functioning and growth of our entire operations (approx. 5% of time)

The petitioner also submitted job descriptions for employees under the beneficiary's direction, including:

[REDACTED] (Manager) supervises the sales representatives

[REDACTED] (Sales Representative) performs sales transactions; executes contracts, invoices, and effectuates shipments; coordinates with the manager sales procedures; assists the manager in preparing the periodical sales reports for the president's review; and enters the account data into the computer data system.

[REDACTED] (Sales Representative) performs sales transactions, executes contracts, invoices, and effectuates shipments; coordinates with the manager sales procedures; assists the manager in preparing the periodical sales reports for the president's review; and enters the account data into the computer data system.

[REDACTED] (Secretary) receives and connects phone calls; makes appointments; packs and mails business correspondence; and performs light typing.

The director denied the petition stating that upon review, the evidence as provided did not demonstrate that the beneficiary's duties involved responsibilities that were primarily managerial or executive in nature. The director went on to state 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 organization. The director concluded by stating that based upon the size and nature of the petitioner's business, the beneficiary would more likely than not be engaged primarily in the non-managerial, day-to-day operations involved in producing a product or providing a service.

On appeal, counsel disagrees with the director's decision and submits a brief and evidence in support of his contention. Counsel contends that the U.S. entity, as a new business, is still in its developmental stages but is showing signs of expansion and financial growth sufficient to comply with regulatory and statutory requirements. Counsel also contends that the petitioner provided clear and comprehensive descriptions of the beneficiary's current and proposed duties to demonstrate that he currently manages, and will continue to manage, an essential function for the organization. Counsel goes on to assert that the beneficiary is functioning as the de facto chief executive of the company, and lists the beneficiary's additional duties as: ". . . directing and managing the overall administrative and financial operations of the company including developing and implementing marketing strategies, programs and goals . . . responsible for handling all personnel decisions including the hiring and termination of employees." There has been no evidence submitted to substantiate counsel's contentions. Counsel also states that the beneficiary serves as a functional manager in that he manages and oversees essential functions and operations of the company. Counsel further contends that the beneficiary supervises important managerial personnel.

Counsel's assertions are not persuasive. On review of the record as presently constituted, it is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The record reveals that the U.S. entity was incorporated in 2000 and that it has been doing business for more than one year prior to the filing of this petition. Therefore, it is not a new office pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(F). The petitioner indicated in its response to the director's request for additional evidence that it plans to hire additional managers and employees in the future, and that it anticipates expansion and future growth. Counsel further contends that the CIS should take into consideration the fact that the U.S. entity is a new establishment, that it is still growing, and that it anticipates additional growth in the future. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year from the date of approval of the petition to support an executive or

managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant case, the petitioner has failed to present sufficient evidence to establish that it has reached the point where it can employ the beneficiary in a predominantly managerial or executive position.

Counsel further asserts that similar extension of new office petitions have been granted by the AAO, and cites to unpublished decisions in support of his contentions. However, while 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Further, an unpublished decision carries no precedential weight. *See Chan v. Reno*, 113 F.2d 1068, 1073 (9th Cir. 1997) (citing 8 C.F.R. § 3.1(g)). As the Ninth Circuit says, “[U]npublished precedent is a dubious basis for demonstrating the type of inconsistency which would warrant rejection of deference.” *Id.* (citing *De Osorio v. INS*, 10 F.3d 1034, 1042 (4th Cir. 1993)).

Counsel 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. 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).

The petitioner presented inconsistent descriptions of the beneficiary’s job duties. The job duties described in support of the petition differ from those described in the response to the director’s request for additional evidence. In addition, the organizational chart presented by the petitioner before the director’s decision was made differs from the organizational chart submitted on appeal. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the record does not establish that the beneficiary will be primarily managing a function of the organization. The beneficiary’s job descriptions depict an individual in charge of the day-to-day services of the organization, not that of a functional manager. When a beneficiary is said to be managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function performed. The petitioner must demonstrate that the executive or manager does not directly perform the function. Although counsel argues that the beneficiary will be managing an essential function of the U.S. entity by overseeing the overall operations of the organization, the record does not demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. The petitioner has failed to provide a detailed position description specifying exactly how the beneficiary will manage the overall operations of the U.S. entity. The record must further demonstrate that there are qualified employees to perform the function so that the beneficiary is relieved from performing non-qualifying duties. In the instant matter, the petitioner submitted an organizational chart of the U.S. entity that lists the manager as being under the direction of the beneficiary, and responsible for managing the sales representatives. This evidence is vague, non-descriptive and is insufficient to establish that there will be qualified employees to relieve the beneficiary from performing the function of the overall operations. Absent details concerning

the employees' position descriptions, daily activities, and percentage of time spent performing each duty on a weekly basis, the record is insufficient to establish that the beneficiary will be managing rather than performing the function.

Contrary to counsel's contentions, the record does not support a finding that the beneficiary qualifies under the supervisory managerial category pursuant to section 101(a)(44)(A) of the Act, in that he will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. There is no detailed description of the job duties to be performed by the subordinates listed as being under the beneficiary's direction within the U.S. entity. The record does not reflect the managerial, supervisory or professional status of any subordinates who will be supervised by the beneficiary. While the title of [REDACTED] implies a supervisory role this fact alone does not make the beneficiary's subordinate staff supervisory or professional if the duties they perform are not actually supervisory or professional in nature. Other than the description given that the sales manager manages the two sales representatives, there has been no evidence submitted to show exactly what the manager's functions will be.

Counsel submits a revised organizational chart on appeal. However, it appears from the record that the evidence did not exist at the time the petition was filed, and therefore cannot be considered on appeal. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The record reflects that the beneficiary will continue to perform the services necessary to maintain the petitioner's business, namely producing a product. Position title alone is insufficient to establish that the beneficiary will be functioning primarily in a managerial or executive capacity.

In addition to examining the size of the enterprise and the number of staff, Citizenship and Immigration Services (CIS) must also take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

In the instant matter, at the time of filing, the petitioner was a one and one-half year-old diamond import and wholesale company that claimed to have a gross annual income of \$3,058,686. The firm employed the beneficiary as president, plus a manager, sales representative, and a secretary. The petitioner did not submit evidence that established that it employs subordinate staff members that would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly require the beneficiary to work primarily as a manager or executive. On review of the record, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The vague and general outline of the beneficiary's position description is insufficient to establish that the beneficiary's past or proposed job duties are managerial or executive in nature. The petitioner has not provided persuasive evidence to establish that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company, or that he is at a senior level of the organizational hierarchy. The record does not demonstrate that the U.S. entity contains the organizational complexity to support a managerial or executive position. While it is apparent that the beneficiary's experience is an asset to furthering the petitioner's business objectives, it does not appear

that the petitioner is prepared to employ the beneficiary in a primarily managerial or executive capacity. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The numerous assertions made by counsel are not supported by evidentiary facts. 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). 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; *Republic of Transkei v. INS*, 923 F.2d 175,178 (D.C. Cir. 1991)(holding burden is on the petitioner to provide documentation); *Ikea US, Inc. v. U.S. Dept. of Justice*, 48 F.Supp.2d 22, 24 (D.D.C. 1999) (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.