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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

FILE: SRC 02 266 51253 Office: TEXAS SERVICE CENTER Date: MAR 25 2004

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

The petitioner is described as an import and export 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 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 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.

According to the documentary evidence contained in the record, the petitioner was established in 1998 and claims to be an import and export business. The petitioner states that the U.S. entity is an affiliate of Aarkay International, located in India. The petitioner declares two employees and $239,726 in gross annual income. The petitioner seeks the continuation of the beneficiary's services as its president for three years, at a weekly salary of $923.08.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary 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 a letter of support dated August 28, 2002, the beneficiary's job duties are listed as supervising and controlling all of the business and affairs of the corporation. The beneficiary is also said to preside over all

stockholder meetings and director's meetings; and he signs certificates for shares of stock in the corporation, deeds, mortgages, bonds, contracts, and other instruments that he is authorized to sign. The petitioner continues by stating that the beneficiary shall perform all duties incident to the office of the president, and also handles all marketing of import and export of goods.

In a response letter dated November 26, 2002, the beneficiary's duties are said to include not only duties of the president but also of sales. The petitioner continued by stating that the beneficiary visits clients for the sale of products, and receives orders from the company web site. The beneficiary also checks the client's orders, once they have cleared customs, and before delivery. The petitioner further contends that the beneficiary continues to secure orders for the company product without having to hire other employees and without interfering with his duties as president. The petitioner continued by stating that the accounting services of South Louisiana, Inc. prepares financial statements as well as income tax returns for the U.S. entity. The petitioner also stated that Irwin Brown & Company handles the paperwork for customs and port clearance of the petitioner's goods once they have entered the United States. The petitioner stated in another letter from the U.S. entity dated November 26, 2002, that the U.S. entity's secretary's job duties are on an as needed basis.

The petitioner also submitted an organizational chart depicting the U.S. entity's company structure that shows the beneficiary as president and a secretary under his direction.

The director denied the petition stating that upon review, the evidence as provided was deficient in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The director further states that the evidence shows that the beneficiary is to be employed as a first- line supervisor, overseeing only a secretary. The director concludes by stating that the Service cannot consider the intentions of businesses to hire additional employees, and that a decision must be rendered based on the facts in existence at the time the petition is filed.

On appeal, counsel disagrees with the director's decision and asserts that the documentation previously submitted supports a determination that the beneficiary's position will continue to be managerial or executive in nature. Counsel further contends that although there is only one other individual listed as being employed by the U.S. entity, the beneficiary manages different functions of the organization, and also manages independent contractors, namely the accountant and customs brokers. Counsel also states that the beneficiary manages and supervises storage facilities and trade shows. Counsel has not provided any documentary evidence to substantiate his claim.

Furthermore, 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). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972).

While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other such pertinent factors as the nature of the petitioner's business. These factors can be used as indicators which help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to perform the company's day-to-day operations. In the instant matter, the latter more accurately describes the beneficiary's role. The record demonstrates that the petitioner is in the import and export business. The

record also demonstrates since 1998 the company has only hired two employees. The record also reflects that the secretary is employed on an "as needed basis."

The petitioner has not submitted evidence that it employed any subordinate staff members that would perform the actual day-to-day, non-managerial operations of the company on a full-time basis. Counsel claims that the beneficiary will manage and supervise the functions of independent contractors. However, there has been no evidence produced to demonstrate how the beneficiary will manage or supervise the individuals, what qualifies the independent contractors as professionals, what their functions are to be, or what percentage of time they will spend performing the non-qualifying duties or functions of the organization. The assumption that the beneficiary uses the services of a tax preparer and a customs broker is insufficient to establish that his duties are primarily managerial or executive in nature. In addition, the petitioner has not provided a detailed description of the accountant's or the broker's job duties. There is no evidence to show that the independent contractors will be full-time workers. Based upon the evidence submitted it does not appear that the beneficiary will be supervising anyone other than the secretary, who is employed on an as needed basis. Neither does it appear that the reasonable needs of the petitioning company would require the services of the beneficiary as a manager or executive.

Furthermore, the petitioner has also failed to submit documentation attesting to the existence of formal agreements or contracts dealing with the decision to utilize outside sources to manage the functions of the U.S. entity. To the contrary, the record reflects that the petitioner is doing business with the contractors, rather than maintaining any element of supervision over them. There is no evidence in the record that demonstrates the petitioner is or will be responsible for paying the wages or salaries of the outsourced employees. There is no evidence of record to substantiate that the petitioner's management maintains control over the outside employees' job performance, or over how the services are to be provided. The petitioner has not established how the beneficiary will be managing or supervising professionals in carrying out their daily functions.

Neither does the record establish that the beneficiary has been or 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. To show that the beneficiary is managing or directing a function, the petitioner is required to establish that the function is essential and that 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 essential functions of the U.S. entity by managing the distribution of products, the marketing of products, the storage of products, the custom brokers and annual contracts, the new business and company expansion, the financial affairs of the entity, and the hiring and firing of employees, the record does not demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the functions. The petitioner has failed to provide a comprehensive description of the beneficiary's daily activities. In the instant matter, the record reflects that the organizations only other employee, the secretary, performs her job duties on an "as needed basis." This evidence is insufficient to establish that there are qualified employees to relieve the beneficiary from performing the functions of the organization. Absent details concerning the employees' and independent contractor's position descriptions, daily activities, and percentage of time spent performing each duty, the record is insufficient to establish that the beneficiary will be managing rather than performing the function. 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).

In summary, there has been insufficient evidence presented to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

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.