

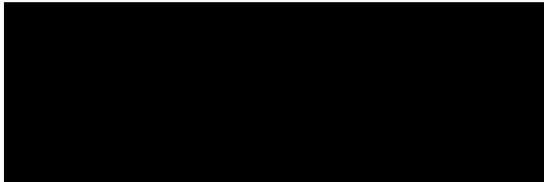
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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



**U.S. Citizenship
and Immigration
Services**



File: SRC 02 259 51830

Office: TEXAS SERVICE CENTER

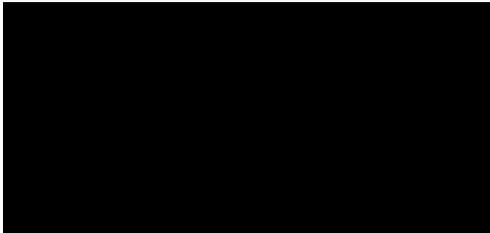
Date: **MAR 25 2004**

ON RE: Petitioner:
 Beneficiary:



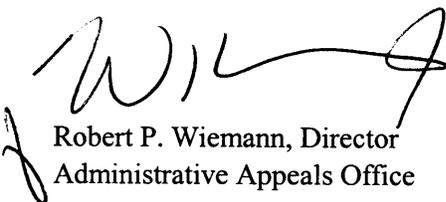
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 on appeal. The appeal will be dismissed.

The petitioner is engaged in the retail marketing and sale of watches, jewelry, gifts and related products. It seeks to continue to employ the beneficiary temporarily in the United States as its executive director. The director determined that the petitioner had not established that the beneficiary would be acting in a primarily managerial or executive capacity.

On appeal, counsel argues that the beneficiary has been primarily performing the duties of an executive. Counsel states that by virtue of functioning at the senior most level of the organization, the beneficiary manages the functions of the organization, has overall supervision and control of other employees, has the authority to hire and fire employees or recommend those as well as other personnel actions (such as promotion and leave authorization) and exercises discretionary authority over day to day operations. Counsel argues that the beneficiary's proposed duties are also executive in nature as he is primarily responsible for directing the management of the organization, consulting with the foreign company to develop and establish the goals and policies of the organization, and exercising discretionary decision-making powers.

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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

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 requirement of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee of the petitioning organization. However, counsel has furnished no evidence to establish that the facts of the instant case are in any way analogous to those in the Irish Dairy Board case. Simply going on record without supporting documents 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 Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

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.

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.

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:

"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:

"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.

The petitioner describes the beneficiary's job duties as follows:

Mr. Nizar Khetani is being offered continued employment with Cash Quest, Inc. in his current position of executive director for a temporary period of three years. The position of executive director includes the following duties and responsibilities:

- Establish policies and procedures for marketing, sales, inventory requisition, contact procurement and contract negotiation;
- Direct the hiring, firing, supervision and placement of employees;
- Develop, implement and revise as necessary company policies, procedures and business plans;
- Oversee and evaluate the implementation of company policies, procedures and plans and provide ongoing assessment as to the extent to which same are achieved;
- Formulate strategies to establish and develop the new enterprise and oversee the implementation of such strategies;
- Plan, develop and implement business expansion strategies for new enterprise, oversee staffing and investigate adding potential additional locations once the main retail establishment is in place;
- Research and develop plans to establish and expand regional sales, including company promotional and marketing schemes;
- Function as liaison between Cash Quest, Inc. and the parent company abroad;
- Direct, oversee and be solely responsible for the day-to-day operation, activities and development of Cash Quest Inc.;
- Evaluate, assess and revise current financial operations, budget, procedures, policies, accounts and other aspects of the enterprise on an on-going basis with a view toward achieving corporate goals.

In performing the above-defined duties, all of Mr. Khetani's time will be involved in directing the enterprise and engaging in executive functions. He will exercise

complete discretion with regard to any decision making and will have sole authority to engage in business activities without requiring the approval or consent of any other entity, individual or director.

The petitioning entity was incorporated on June 7, 1999. On August 30, 2002, the date the visa petition was filed, the petitioning corporation had a staff of four persons including the beneficiary as executive director. The petitioner lists the other filled positions as those of a general manager, assistant manager and administrative assistant, all supervised by the beneficiary. The petitioner's U.S. Corporation Income Tax Return for the 2001 tax year shows that the company had gross receipts or sales of \$178,709 and total income of \$84,319. The firm paid only \$19,500 in salary and wages for the entire year and showed taxable income of \$6,319 for the period.

It appears that the beneficiary would be performing the necessary operations of the petitioner. An employee who primarily performs the tasks necessary to produce a product or 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 has provided no in-depth description of the beneficiary's daily activities that would demonstrate that the beneficiary will be primarily engaged in managing or directing the management of a function, department, subdivision or component of the company. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy.

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. That burden has not been met.

ORDER: The appeal is dismissed.