



U.S. Citizenship
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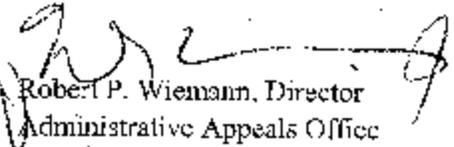
IN RE: Petitioner:
Beneficiary:

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 Director, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, HEG Enterprise Limited, states that it is a branch office of an Indian business, HEG Limited. The petitioner states that it manufactures graphite electrodes for steel mills. In February 2001, the U.S. entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A). CIS approved the petition as valid from April 5, 2001 through April 5, 2002. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for three years.¹ The petitioner seeks to employ the beneficiary's services as the U.S. entity's sales and marketing manager at an annual salary of \$40,000.

On September 17, 2002, the director concluded that the beneficiary's proposed duties do not qualify as managerial. Therefore, the director denied the petition.

On appeal, counsel contends that the beneficiary's duties qualify as managerial.

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 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.

Under 8 C.F.R. § 214.2(l)(3), 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)(C) 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.

In this matter, the petitioner asserts only that the beneficiary will be primarily performing managerial functions. 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;

¹ On Form I-129, the petitioner erroneously indicated that the beneficiary was coming to the United States to open a new office.

- 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.

When examining the managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(D)(3)(ii). The petitioner's Form I-129 described the beneficiary's proposed duties as: "Hire and supervise staff, manage sales and marketing, customer relationship[s]."

On June 14, 2002, the director issued a request for evidence. The request instructed the petitioner to list all of the beneficiary's proposed duties, the percentage of time to be spent on each duty, the number of subordinates the beneficiary would supervise, and the titles and duties of the U.S. entity's employees.

On July 23, 2002, the petitioner responded that the beneficiary would devote 60 percent of his time to providing technical services to customers, 30 percent of his time to sales tasks, and 10 percent of his time to office maintenance. The proposed technical service tasks include:

- Testing products at customers' sites to ensure quality;
- Providing a free "furnace analyzer" service to customers; and
- Resolving customer complaints.

The proposed sales responsibilities encompass:

- Visiting plants regularly to identify new business;
- Providing price quotations to customers;
- Executing purchase orders so that warehoused items reach customers;
- Collecting payments from customers; and
- Tracking market conditions.

The proposed office maintenance duties include:

- Filing Internal Revenue Service tax forms;
- Recording accounting expenses;
- Corresponding with customers;
- Sending documents to a custom broker and keeping track of material; and
- Forwarding payments to a custom broker, trucking businesses, and warehouses.

The job duties described above establish that the beneficiary will spend 70 percent of his time providing technical services to customers and maintaining the branch office. Consequently, the beneficiary will primarily be performing tasks necessary to produce a product or provide a service. Moreover, the remaining 30 percent of the beneficiary's time will be spent marketing the petitioner's products. Marketing duties, by definition, qualify as performing a task necessary to provide a service or produce a product.

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). In sum, all of the beneficiary's proposed duties will involve producing a product or providing a service; therefore, none of the beneficiary's proposed duties qualify as managerial.

On appeal, counsel asserts that the beneficiary supervises contract employees. Counsel also claims that the U.S. entity has one employee in addition to the beneficiary. The record, however, contains no job descriptions of any employees other than the beneficiary. Going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F. Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Truskei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, counsel's assertions do not constitute evidence. *Matter of Ohaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the petitioner has not demonstrated that the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing nonqualifying duties. See section 101(a)(44)(A)(ii) of the Act.

Citing *Ikea US, supra*, as support, counsel claims that the beneficiary's "multiple contracts with American companies qualifies him to be designated as a functional manager." As noted above, however, counsel's assertions do not constitute evidence. *Matter of Ohaighena, supra*; *Matter of Ramirez-Sanchez, supra*. Furthermore, in *Ikea*, the court held that a beneficiary did not qualify as a "functional manager" where the petitioner failed to document what proportion of the proposed duties would be managerial or executive functions. *Id.* at 25. In this matter, the petitioner presented the percentages of time that the beneficiary would devote to each of his tasks; however, as explained previously, none of the beneficiary's proposed duties are managerial. Therefore, counsel's citation to *Ikea* is inapposite to this matter.

Finally, counsel cites an unpublished case to support its position that the beneficiary is a manager. Although AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. 8 C.F.R. § 103.3(c). Given that the cited case is unpublished, it has no precedential effect in this matter.

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.