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

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

D7



FILE: WAC 02 081 54241 Office: CALIFORNIA SERVICE CENTER Date: **MAY 17 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 Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is engaged in the sale of frozen bakery items produced by the foreign company and distributed in the United States. It seeks to extend the temporary employment of the beneficiary as president for an additional two years, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee.

The director denied the petition concluding that the petitioner had failed to establish that the beneficiary is employed as a manager or executive except in title alone. The director also noted that the petitioner had not demonstrated its ability to pay the beneficiary her annual salary of \$60,000.00.

In an appeal filed October 15, 2002, counsel for the petitioner claims that it was "an abuse of discretion for [Citizenship and Immigration Services (CIS)] to conclude that [the] beneficiary's job duties are not primarily managerial/executive." Additionally, counsel contends that the director improperly concluded that the petitioner does not have the ability to pay the beneficiary's wages, as the director had not raised the issue in his request for evidence. Counsel asserts that, in fact, the petitioner does have the ability to pay the beneficiary's proposed salary. Counsel also notes that a brief and evidence would be sent to the AAO within thirty days of filing the appeal. A thorough review of the record has revealed no subsequent submission. As it is now over one year since the appeal was filed, the record will be considered complete.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. In addition, 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.

The regulation at 8 C.F.R. § 214.2(1)(3) further 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 (1)(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.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in the present proceeding is whether the beneficiary will be employed in the United States as a manager or executive.

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 the I-129, Petition for a Nonimmigrant Worker, the petitioner noted that the beneficiary, as president of the company, would have the following responsibilities: (1) oversee the day-to-day operation of the business; (2) have full authority to formulate marketing goals and make decisions; and, (3) utilize her past experience in setting up the business.

The petitioner also provided the U.S. organizational chart, which identified the beneficiary as president, and two subordinates as an account manager and a marketing development manager. The petitioner noted that it planned to hire one or two employees to work under the account manager, and an additional two or three employees to be employed in the marketing development department.

In a request for additional evidence, the director requested that the petitioner submit the following in support of the beneficiary's employment as a manager or executive: (1) a list of the employees at the U.S. company, including a description of their job duties; (2) a copy of the U.S. company's organizational chart describing its managerial hierarchy and staffing levels; (3) a more detailed description of the beneficiary's job duties in the United States, as well as the educational and employment requirements for the position; (4) copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, and Employer's Quarterly Wage Reports for all employees for the last four quarters; and, (5) signed and certified copies of the company's federal income tax returns.

In response, the petitioner provided the following job description for the beneficiary:

The main function of [the beneficiary] as the president is to manage and supervise the U.S. branch and expand [the petitioner's] market. She will formulate goals and policies of the new business venture; recruit, interview and hire new management level employees and additional employees; oversee the day-to-day operations of the branch office; delegate duties to new managers and employees; take responsibility over monthly financial statements and maintain accurate records; evaluate employee's [sic] performances and determine salary; maintain open line of communication with parent company in Korea; hold business meetings with managers and customers etc.

The petitioner further stated that in order to successfully perform in the position of president, one must have extensive experience in researching the market, developing plans in the food manufacturing process, and possess marketing skills.

With regard to the organizational structure of the U.S. company, the petitioner noted that, in addition to the beneficiary, the petitioner has six employees, who are employed in the "noodle manufacturing line" and the "packing line." Their duties consist of transporting ingredients to the proper machines for mixing and preparation of the noodles, and operating the packaging machine. The enclosed organizational chart also identified six prospective employees, including a general manager, production department manager, business department manager, marketing manager, accountant, and an assistant to the marketing manager. In an accompanying letter, the petitioner stated that the beneficiary was the only individual employed in a management position, but that "with the help of the beneficiary's business expertise, it will hire additional managerial personnel." The petitioner claimed that the employees would be hired within six to twelve months.

The petitioner also submitted Form DE-6, which identified three employees for the quarters ending September 30, 2001 and December 31, 2001, and one employee, the beneficiary, for the quarter ending March 31, 2002. The two individuals named as employees for the quarters ending in September and December were different from those employees identified on the submitted organizational chart.

The director concluded that the petitioner had failed to demonstrate that the beneficiary was employed as a manager or executive except in title. The director addressed the fact that the beneficiary is not managing a staff of professional, managerial or supervisory personnel. The director stated that the beneficiary could not be classified as a manager or executive because she is scheduling and supervising the day-to-day work of non-professional employees. Additionally, the director noted that it appeared the majority of the beneficiary's time would be spent on sales activities and routine business operations, which are non-qualifying duties of the U.S. operation. The director further explained that it does not appear that the beneficiary's position satisfies the two elements that generally characterize an executive or manager: (1) the position involves significant authority over generalized policy of an organization or major subdivision, and (2) substantially all of the employee's duties are managerial or executive. Consequently, the director concluded that the beneficiary is not functioning in the U.S. company in a primarily managerial or executive position.

On appeal, counsel contends that it was "an abuse of discretion" for the director to conclude that the beneficiary was not employed as a manager or executive. Counsel asserts that the beneficiary "has and will continue to function at a senior level within the organizational hierarchy and has exercised managerial control and authority over the many functions of the business." Counsel also notes that the beneficiary currently supervises six employees who relieve her from performing non-qualifying duties. Additionally, counsel asserts that the beneficiary is recruiting "people to fill the managerial and supervisory positions that will further enable [her] to focus on formulating goals and policies of the business."

On review, counsel's assertions are not persuasive. When examining the executive or 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(l)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive and/or managerial capacity. *Id.* The petitioner must demonstrate that the beneficiary's responsibilities will meet the four requirements set forth in both statutory definitions for executive capacity and managerial capacity if it is representing that the beneficiary is both an executive and a manager.

In the present matter, the petitioner has neglected to specifically explain the job responsibilities of the beneficiary in the U.S. operation. The only useful job description provided by the petitioner was in its response to the director's request for evidence, in which the petitioner stated that the beneficiary would "manage and supervise the U.S. branch," "formulate goals and policies," "interview and hire new management level employees," "oversee the day-to-day operations," "delegate duties," "determine salary," "evaluate the subordinates' job performances, and maintain monthly financial records. The petitioner failed to identify how these job responsibilities qualify the beneficiary as a manager or an executive; nor has the petitioner specifically indicated in which capacity the beneficiary should be considered. Additionally, many of the above-named job duties are simply a restatement of the requirements of "managerial capacity" and "executive capacity," as these terms are defined in the regulations. As noted above, a petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Rather, the petitioner must provide specifics regarding the beneficiary's actual duties in order to determine the true nature of the employment. *See 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). 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. *Id.*; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The job description provided by the petitioner clearly identifies non-managerial and non-executive functions to be performed by the beneficiary. Specifically, the petitioner stated that the beneficiary will review monthly financial statements, maintain accurate records, evaluate employees' performances, communicate with the parent company, and hold business meeting with the prospective managers and customers. Several of these tasks involve responsibilities typically performed by either an accountant or bookkeeper, managers of a specific department, or by the sales representatives of a company. Rather than supervising these individuals, the beneficiary will be performing the actual non-executive and non-managerial functions, such as record-keeping and selling the petitioner's products to customers. 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).

Additionally, it is not clear from the employee records whether the petitioning organization employs a subordinate staff sufficient to relieve the beneficiary from performing the company's non-qualifying job functions. The petitioner included with the petition a DE-6 form for the quarter ending September 30, 2001 and a Form 941, Employer's Quarterly Federal Tax return ending the same quarter. On the DE-6 form, the petitioner listed three employees, which were also identified on the organizational chart submitted with the petition. Yet, on the quarterly tax return, the petitioner indicated zero employees for that particular pay period. The petitioner subsequently submitted in its response to the director's request for evidence an additional DE-6 form for the period ending March 31, 2002, which reflected one employee, the beneficiary. Therefore, it appears that on January 8, 2002, which is the date of filing the petition, the petitioning organization did not employ anyone other than the beneficiary. As there is no ancillary evidence in the record supporting a different finding, it can only be assumed that the beneficiary was performing all of the non-qualifying functions of the business at the time of filing the petition, and consequently was not functioning in a primarily managerial or executive capacity. Again, 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, supra*.

Furthermore, as addressed by the director, the beneficiary is not supervising and controlling the work of other supervisory, professional, or managerial employees; nor is the beneficiary directing the management of the organization. The petitioner, likewise, acknowledged such in its response to the director's request for evidence, noting that the petitioning organization "employs only the beneficiary in the management level." Therefore, the beneficiary's employment does not meet the qualifications of managerial or executive capacity.

Moreover, it appears that counsel and the petitioner are under the incorrect assumption that, as in the case of a new U.S. office, the petitioner has a period of time before the beneficiary must be functioning as a manager or executive. The petitioning organization was established in the United States on July 10, 1998. As it is now almost six years later, the petitioning organization is required to be operating and sufficiently supporting a managerial or executive position. Although the petitioner noted throughout the record that the company's initial business plan for the U.S. company did not materialize, the petitioning organization is not exonerated from complying with the regulations. As a U.S. business that has been operating for over one year, the petitioner is obligated to employ the beneficiary in a primarily managerial or executive position. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The AAO will next address the issue of whether the petitioning organization has the ability to pay the beneficiary's annual salary of \$60,000.

The director concluded in his decision that the petitioning organization does not have the ability to pay the wages of the beneficiary. On appeal, counsel asserts that it is an abuse of discretion for the director to make this determination when the issue of wages was not raised in the director's request for evidence. Counsel further stated that the petitioner has the ability to pay the beneficiary's salary.

On review, the director's decision, as it relates to the issue of the petitioner's ability to pay the beneficiary's salary, will be withdrawn. The director based his decision, in part, on an improper standard. While the petitioner's ability to pay the proffered wage is a consideration in an immigrant visa petition, the regulations, as they apply to a nonimmigrant intracompany transferee employed in an established U.S. company, do not require that the petitioner demonstrate its ability to pay. Furthermore, as the petitioning organization is not a new U.S. office, the petitioner is not required to establish the foreign entity's financial ability to remunerate the beneficiary. See 8 C.F.R. § 214.2(l)(3)(v)(C)(2). Therefore, the director's decision on this issue is withdrawn.

While the director's decision on the present issue will be withdrawn, it should be noted that counsel's assertion on appeal pertaining to the director's "abuse of discretion" is incorrect. Counsel contends that the director's decision was an abuse of discretion as he did not raise the issue of the petitioner's ability to pay the proffered wage in his request for additional evidence. In fact, the director is not obligated to base his decision solely on those issues addressed in the request for evidence. In the instant case, the petitioner is granted an automatic right to appeal the decision of the service center. See 8 C.F.R. § 103.3. Therefore, the petitioner is given an opportunity to establish eligibility in the appropriate forum, that being the AAO. The fact that the director did not indicate in the request for additional evidence that he would later address the issue of the petitioner's financial status in the denial in no way precludes the petitioner from establishing eligibility for the desired immigration benefit. Although CIS often issues a notice requesting additional evidence prior to denying a petition, there are no statutes, regulations, or case law precedents that guarantee the petitioner that the only issues in a potential denial will be those that were previously addressed in the request for additional evidence. As it has already been determined that the director's decision on this issue will be withdrawn, it is not necessary to address this further.

Beyond the decision of the director, the record is not persuasive in demonstrating that the foreign and U.S. entities are qualifying organizations. See 8 C.F.R. § 214.2(l)(1)(ii)G). The petitioner asserted in its petition that the U.S. company is a wholly-owned subsidiary of the foreign company. However, the petitioner submitted copies of three stock certificates, which reflect two shareholders: the foreign company and an unknown individual. Furthermore, the petitioner noted on Schedule J of its year 2001 California Corporation Franchise or Income Tax Return that not more than 50% of the petitioning organization's voting stock was owned by any single interest or any other corporation. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As the appeal will be dismissed on other grounds, 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.