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

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

D7

FILE: SRC 02 229 52243 Office: TEXAS 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, Texas 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 import, export, and sale of computers to the wholesale market. The petitioner seeks to temporarily employ the beneficiary as its marketing manager, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary would not be employed in the United States in a primarily managerial capacity.

On appeal, counsel for the petitioner contends that the beneficiary, as marketing manager for the petitioning organization's "new business activity," will be employed in a primarily managerial or executive capacity. Counsel submits a brief and additional documentation in support of the appeal.

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(l)(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 (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.
>
> (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 matter is whether the beneficiary will be employed in the United States 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.

In a letter attached to the petition, the petitioner stated that, as the marketing manager for the U.S. company, the beneficiary would be responsible for developing the company's pricing strategy, acting as a representative for the company, and ensuring the satisfaction of the company's customers. The petitioner also explained that the beneficiary would develop the petitioner's "detailed marketing strategy," and, "with the help of subordinates, including product development managers and market research managers, [ ] will determine the demand for products and services offered by the firm and its competitors." Additionally, the beneficiary would identify potential markets, and would work in collaboration with the petitioning organization's sales and product development departments, and other managers to monitor trends in the market. Furthermore, the petitioner stated that as a senior level employee, the beneficiary would exercise broad discretion and have autonomous control over the day-to-day operations.

In her request for additional evidence, the director asked that the petitioner submit the following documentation: (1) evidence of the current staffing in the U.S. company, including all employees' positions, job duties, and educational backgrounds; (2) copies of the petitioner's year 2002 Employer's Quarterly Tax

Returns; (3) an explanation as to how the petitioner could remain viable if, as reflected on the corporate tax return, no wages were paid in 2001; and, (4) a statement explaining the petitioning organization's need for a marketing manager.

In response, the petitioner explained that the U.S. company currently employs two individuals, in addition to the beneficiary, in the positions of president and executive secretary. The president was described as conducting all affairs of the company, including formulating and implementing logistics. The executive secretary, who possesses a high school diploma, was responsible for answering the telephone, inputting information into the computer, preparing correspondence, and making bank deposits. The petitioner also stated that it anticipated hiring two additional employees, an office assistant and a shipping and delivery person, by the year 2003.

The petitioner further explained that the need for the beneficiary's employment as a marketing manager stems from the petitioner's decision to "diversify its business by operating a new product line," specifically selling disposable diapers and accessories. The petitioner stated that the beneficiary would be responsible for overseeing the implementation of the new product line through "full direction and coordination of the marketing, public relations, and advertising activities of the company." The petitioner explained that the beneficiary will also assist the president in establishing international business and policy plans, in developing long-range objectives, and in identifying business opportunities both nationally and internationally.

Additionally, the petitioner explained that because the current two employees of the U.S. organization are officers/shareholders of the company, they "were paid via compensation," rather than receiving a salary. The petitioner referred to the company's gross profit of approximately $108,000 for the year 2001 as evidence that the U.S. entity is a viable company.

In her decision, the director observed that a petitioner must establish that the time spent on purely managerial and executive duties exceeded the time spent on the daily functions and tasks associated with running a business. The director determined that the petitioner had failed to meet this requirement. The director further noted that the only other employees in the operation are the two owners of the entity. The director therefore concluded that the beneficiary would not be employed in a primarily managerial or executive position.

On appeal, counsel explains that although the petitioning organization is not a new company, it is seeking to implement a new and distinct product line. Counsel contends that the beneficiary's "new position [as marketing manager] is an integral and necessary part of its diversification plan." Counsel further states that during the "start-up phase" of the business, the beneficiary's central function in the organization will be increasing productivity of the new product line; once established, the petitioner will hire employees to "engage in the operational activities of the business and perform tasks necessary to provide the services of the organization." Additionally, counsel explains that the beneficiary will be directly responsible for all marketing operations, including "setting organizational goals and policies, hiring personnel, coordinating with the overseas parent company, and making other fundamental business decisions in cooperation with the President."

On review, the record does not establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

When examining the managerial or executive 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* As the petitioner and counsel have asserted throughout the record that the beneficiary will be employed solely in a managerial capacity, the present issue will be reviewed pursuant to managerial capacity only.

The AAO acknowledges that the job description provided by the petitioner includes job duties specific to a manager. The surrounding evidence, however, does not substantiate the petitioner's claim that the beneficiary will actually be employed in this capacity. Specifically, the petitioner stated that "with the help of subordinates," the beneficiary would determine the demand for the petitioning organization's products and services. Additionally, in collaboration with the sales and product development managers, the beneficiary would monitor marketing trends, and oversee product development. While these job duties appear to be managerial, the petitioner has not accounted for the claimed employment of subordinate employees or additional managers, or the existence of other organizational departments. Absent evidence of the employment of other employees or managers, it does not appear that the beneficiary will be employed as a manager in the United States. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, if the beneficiary will perform the above-claimed job duties without subordinate staff, the beneficiary is actually performing the functions of the company. 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).

While both the petitioner and counsel claim that the petitioning organization will hire two additional employees to work subordinate to the beneficiary, this evidence is immaterial to the present issue. 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).

A further inconsistency exists on appeal, as counsel asserts that the beneficiary will be working as a functional manager, rather than managing the above claimed subordinate employees. Counsel contends that the beneficiary will be performing "a central function of the business organization" by implementing a "new financial operation" and increasing productivity of the U.S. entity. Counsel further explains that the beneficiary will be responsible for directing activities of the new "start-up business phase," and that subordinate employees will be hired following the establishment of the new product line. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Id.* A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Furthermore, the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the

function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to 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, supra.* In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Finally, it appears that counsel is attempting to take advantage of the one-year postponement given to new U.S. offices to establish employment of a manager or executive. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). Counsel states on appeal that although the petitioner is not a new company, it will be engaged in a "new business activity," and will be offering a new and distinct line product line. The petitioning organization, which has been operating in the United States since 1997, will not be deemed a new office simply because it is diversifying its product line. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). As noted above, the petitioner must establish eligibility for the benefit sought at the time of filing the petition. *Matter of Michelin Tire Corp., supra.*

For the foregoing reasons, the AAO cannot conclude that the beneficiary would be employed in a primarily managerial capacity in the United States.

Beyond the decision of the director, the record contains inconsistencies as to the existence of a qualifying relationship between the foreign and U.S. entities. The petitioner claimed that the beneficiary's foreign employer owns 66.6% of the U.S. corporation's stock. The petitioner, however, submitted a stock certificate, which identifies the beneficiary's foreign employer as the holder of "1,000 shares" of the petitioning organization's stock. Additionally, while the U.S. company's Articles of Incorporation authorizes the issuance of 500 shares of common stock with a par value of $1.00 per share, Schedule L of the U.S. Corporate Income Tax Return reflects common stock in the amount of $600.00. 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).

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. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.