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U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 179 53840 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, Vermont 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 claims to be engaged in the business of selling leather garments. It seeks authorization to employ the beneficiary temporarily in the United States as its marketing director. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. On appeal, counsel disputes the director's findings and submits several of its employees' pay stubs in support of the appeal.

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 regulations at 8 C.F.R. § 214.2(1)(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 (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.

The U.S. petitioner states that it was established in 1998 and claims to be a subsidiary of Mercury Exports, located in India. The petitioner seeks to employ the beneficiary for an initial period of two years at an annual salary of \$35,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary would be employed in a managerial or executive capacity.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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 support of the petition, the petitioner stated that the beneficiary would perform the following duties:

Overall marketing management, budgeting, policy, and decision making as per marketing objectives of company. Discretionary day to day decision making, report back to Board of Directors.

The director determined that the petitioner failed to submit sufficient evidence regarding its eligibility and, therefore, issued a request for additional evidence on June 17, 2002. The petitioner was asked to identify each of its employees by name and position title, and to provide position descriptions for each employee,

including a breakdown of hours devoted to each of the employees' job duties. The petitioner was also asked to provide its organizational chart describing its managerial hierarchy and current staffing levels.

The petitioner's response included a list of the petitioner's positions and brief job descriptions for each position. The petitioner also provided the following description of the beneficiary's proposed position:

In charge of marketing, sales and budgeting. Establish marketing policy, goals and quotas on a monthly basis. Coordinate with executive committee including President, Vice President, and General Manager, regarding marketing objectives. Unlimited day to day discretionary day to day decision making. Report to Board of Directors regarding marketing policy decision making. [sic]

It is noted that the petitioner failed to submit the requested organizational chart and hourly position breakdowns of each employees' duties.

The director denied the petition determining that the descriptions of duties of the petitioner's employees are insufficient to determine that the beneficiary would be employed in a managerial or executive capacity. The director noted that the petitioner does not appear to employ any sales people to render service to its customers.

On appeal, the petitioner states that the director erred in determining that the petitioner does not employ any sales people. The petitioner claims to employ two sales people whom the marketing director will supervise. While this claim addresses the director's concern, it is inconsistent with the list of employees provided by the petitioner in response to the request for additional evidence. 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 the instant case, the petitioner merely puts forth an altered claim and submits a number of W-2 tax forms and pay stubs of its employees. However, there is no indication that any of the employees named in the submitted documents are the sales people referenced by the petitioner in the statement on appeal. 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). The petitioner has failed to submit sufficient evidence to support its altered claim. Furthermore, the petitioner claims that one of the beneficiary's main duties will be supervising the company's sales people. However, there is no indication that these subordinates are professional, managerial, or supervisory employees. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii).

The petitioner also failed to provide an hourly breakdown of the beneficiary's proposed duties even though instructed to do so in the request for additional evidence. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the instant case, the petitioner has prevented the director and the AAO from determining the nature of the beneficiary's job duties by providing a

broad description of duties without indicating what the beneficiary would be doing on a daily basis. The petitioner also failed to provide a copy of its organizational chart. As such, neither the director nor the AAO can determine where in the petitioner's hierarchy the beneficiary's specific position would fall. The petitioner merely indicates that the beneficiary would report to its board of directors, but does not indicate who the beneficiary's immediate supervisor(s) would be; nor does the petitioner indicate whether the beneficiary has subordinates or explain what they do.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity. The record lacks specific information about the beneficiary's proposed job duties. Therefore, the AAO cannot conclude that a majority of the beneficiary's duties would be primarily managerial or executive. To the contrary, the record suggests that a preponderance of the beneficiary's duties would involve either selling the petitioner's leather products or, in the alternate, supervising the non-professional sales people who would sell those products. Regardless of which scenario would apply, the AAO cannot conclude that the beneficiary would be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that she would otherwise be relieved from performing non-qualifying duties. The record does not demonstrate that the beneficiary would primarily manage an essential function of the organization or that she would operate at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record does not establish that a qualifying relationship exists between the petitioner and a foreign entity as required by the regulation at 8 C.F.R. § 214.2(l)(3)(i). Although specifically addressed in the director's request for additional evidence, the petitioner failed to provide any evidence establishing the ownership and control either of the foreign entity or the U.S. petitioner. The petitioner also failed to provide a detailed description of the beneficiary's job duties abroad, which was requested in the request for additional evidence. As such, the AAO cannot determine whether the petitioner has the requisite one year of employment abroad in a managerial or executive capacity. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). Therefore, for the additional reasons discussed in this paragraph the petition in the instant case cannot be approved.

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.

ORDER: The appeal is dismissed.