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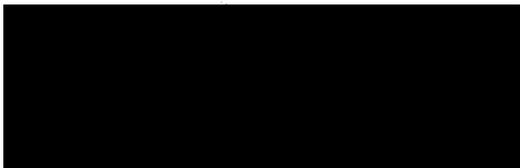


FILE: WAC 02 033 52219 Office: CALIFORNIA SERVICE CENTER Date: MAY 24 2004

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

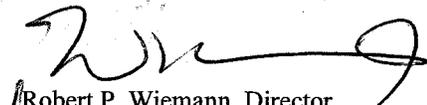
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 nonimmigrant visa petition was denied by the [REDACTED]. The matter is now before the Administrative Appeals Office (AAO) on appeal.

The petitioner is described as a seller of the [REDACTED] manufactured in the United States by Rexair, Inc. It seeks to employ the beneficiary temporarily in the United States as an office manager. The director determined that the evidence was not sufficient to establish that the beneficiary would be employed primarily in a qualifying managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will be managerial or executive in nature.

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 regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) 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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

According to the documentary evidence contained in the record, the petitioner was incorporated as a seller of [REDACTED]. The petitioner states that the U.S. entity is an affiliate of [REDACTED]. The petitioner declares six employees and \$1,500,000 in gross annual income. The petitioner seeks the beneficiary's services as office manager at a yearly salary of \$24,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been or 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:

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.

The petitioner described the beneficiary's proposed duties as: conducting, training, and supervising agents employed to expand operations to the Hispanic market.

The petitioner submitted an organizational chart for the U.S. entity that depicts the beneficiary as [REDACTED] with no subordinates listed under his control.

The beneficiary's proposed job duties in the United States are listed as follows:

- Conduct Open House & Interviews 5%
- Conduct or supervising new dealers training class 30%
- Field Supervision-New Dealers 5%
- Conduct o [sic] Supervising of Full Time & Part Time advanced training 25%
- Lead o [sic] supervising groups in field registration 5%
- Records Boards/ Appointments Ledger 5%
- Progress Boards 5%
- Total Program Records 5%
- Sales Log/Financing Procedures 5%
- Attend weekly meetings with managers 5%
- Attend weekly meetings with dealers 5%

The director determined that the evidence was not sufficient to establish that the beneficiary will be employed primarily in a managerial or executive capacity. The director stated that just because the petitioner claims that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee. The director also stated that the record showed that the beneficiary would be performing many aspects of the day-to-day operations of the business. The director further noted that where the evidence shows that the beneficiary is performing the function rather than managing the function, it will view the position as a staff officer or specialist, not as an executive. The director continued by stating that based upon the evidence of record it appeared that the only persons the beneficiary may be directing are dealers of the petitioner's product. The director concluded by stating that there was insufficient evidence to show that the dealers were to be employees of the U.S. entity, contract or otherwise, and therefore the beneficiary would have no authority to direct the contractors, only to train them.

On appeal, counsel asserts his disagreement with the director's decision and contends that the evidence establishes that the beneficiary has been and will be employed primarily in a managerial or executive capacity. Counsel proceeds by reiterating the beneficiary's job functions noted in the initial petition and provides explanations and clarifications. He further asserts that the beneficiary is charged with the responsibility of overseeing the overall operations of the company. Counsel continues by stating that the

beneficiary will have full authority over the U.S. company's new office in regards to marketing, negotiation of contracts, and financial decisions. Counsel states that the beneficiary will plan and develop the U.S. entity's business and operational policy and strategies. Counsel further maintains that the beneficiary will select the types of contract that the U.S. entity will enter into and the direction that the company should take. Counsel asserts that the beneficiary has wide latitude in discretionary decision making, and has sole discretion over all decisions affecting the [REDACTED] concludes by averring that the beneficiary makes all decisions regarding operational and business policies, that as the business expands he will have sole authority to hire and fire all personnel, and that he has overall control of the U.S. entity and reports directly to the parent company. There has been no evidence submitted to substantiate counsel's assertions.

Counsel's assertions are not persuasive. The petitioner has not provided sufficient evidence to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

The information provided by counsel shows that the petitioner wishes to transfer the beneficiary to its office in the United States for the purpose of starting a new office through the existing office. It is explained that the beneficiary will hire a subordinate staff for the new office subsequent to his being transferred to the United States. Counsel further maintains that as the new office develops, the beneficiary will have the authority to hire and fire all personnel. On review, the record reveals that the petitioner has been doing business for more than one year. In the instant matter, the petitioner does not qualify as a "new office" pursuant to 8 C.F.R. § 214.2(1)(3)(v)(C) which allows the petitioning business one year to become sufficiently operational. The evidence submitted does not establish that a [REDACTED] office or division currently exists within the U.S. entity's organizational structure. The employment projections made by counsel, for the creation and development of that office are speculative and indefinite in nature. The fact that the petitioner is in a preliminary stage of organizational development with respect to the additional U.S. office is considered, but does not relieve it from meeting statutory requirements. 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.

[REDACTED]

On appeal, counsel cites [REDACTED] as support for petitioner's position. [REDACTED] raised the question of whether the beneficiary qualified as a manager or executive for purposes of obtaining a permanent immigration visa under the previous [REDACTED] category. Counsel has not established that the facts in the [REDACTED] are analogous to the facts in the instant case or that the statutory and regulatory provisions used are applicable. [REDACTED] decision, the petitioner was requesting an extension of stay for the beneficiary. The court ruled that the size of an organization was not to be considered as a sole factor in determining the beneficiary's eligibility. However, in the current petition, the petitioner is seeking the beneficiary's services for the first time in the United States, and company size was not considered the controlling factor in determining the beneficiary's ineligibility as an intracompany transferee. Accordingly, counsel's reference [REDACTED] persuasive.

Counsel also cites to an unpublished decision to bolster its arguments regarding beneficiary's status as a manager or executive. While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. The case,

therefore, adds no precedential weight to the matter at hand. Furthermore, counsel has not established that the facts of the unpublished case are parallel to those of the current case.

In evaluating the claimed managerial or executive duties of a beneficiary, the CIS will look to the petitioner's description of the beneficiary's job duties. 8 C.F.R. § 214.2(I)(3)(ii). The information provided by the petitioner describes the beneficiary's duties only in broad terms. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Without clarification, the following duties to be performed by the beneficiary cannot be construed as being managerial or executive in nature: conducting open houses and interviews, conducting or supervising new dealers training class, conducting or supervising full time and part time advanced training, and leading or supervising groups in field registration. Evidence of record demonstrates that more than 60 percent of the beneficiary's time will be spent performing training activities and carrying out the day-to-day activities of the organization. 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 [REDACTED]

Furthermore, the petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he will be directing the management of the organization or a major component or function of the organization, that he will be establishing goals and policies, or that he will be exercising a wide latitude in discretionary decision-making. On appeal, counsel provides a description of the beneficiary's job duties that distinctly paraphrases the regulation, which is insufficient to demonstrate that the beneficiary has been or will be acting in a managerial or executive capacity. 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. [REDACTED]

[REDACTED] Furthermore, the assertions of counsel do not constitute evidence. *Matter* 19 I&N Dec. 533, 534 (BIA 1988); [REDACTED] going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. [REDACTED]

Absent details concerning the beneficiary's and his subordinates' daily activities and the percentage of time to be spent by the subordinates performing each duty, the record is insufficient to establish that the beneficiary will be managing rather than performing the basic functions of the petitioning enterprise. Counsel claims that the beneficiary will be the office manager of the U.S. entity. However, rather than managing a major department, subdivision, function, or component of the organization, it appears that he will actually be performing the services for the business. The record reflects that the beneficiary will primarily be training independent dealers to market and sell the [REDACTED]. There is no evidence to show that, based upon the independent nature of the trainees, the beneficiary will have any authority to supervise or control their daily activities. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service is not considered to be employed in a managerial or executive capacity. [REDACTED] It must be shown that the managerial or executive employee has authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *Id.*

Further, the petitioner's evidence is not sufficient in establishing that the beneficiary will be managing a subordinate staff that will relieve him from performing non-qualifying duties. The U.S. entity's organizational chart does not depict any subordinates under the beneficiary's direction or control. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. It appears that the beneficiary will, at best, be employed as a trainer or supervisor of non-professional employees. Supervisors who plan, schedule and supervise the day-to-day work of non-professional employees are not employed in a managerial or executive capacity. Both the Act and the [REDACTED] that a first-line supervisor is not considered to be acting in a managerial or executive capacity merely by virtue of the supervisor's supervisory duties, unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The record indicates that a preponderance of the beneficiary's duties will be directly performing the operations of the organization by training independent dealers to market and sell the organization's products, and by performing other non-qualifying duties. [REDACTED] is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the record is not persuasive in demonstrating that a qualifying relationship exists between the petitioner and a foreign entity as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner is [REDACTED]. The record shows a relationship between [REDACTED]. The Articles of Incorporation, stock certificates, 1999 Corporate [REDACTED] wage report submitted as evidence are all in the name [REDACTED]. There is no evidence to show any relationship between [REDACTED] and the beneficiary [REDACTED]. Although the petitioner claims that [REDACTED] is doing business as [REDACTED] no evidence was submitted in support of this claim. For this additional reason, the petition may not be approved and the appeal must be dismissed.

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.