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

File: EAC 02 160 52239 Office: VERMONT SERVICE CENTER

Date: **OCT 01 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)

IN 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 nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims it is a corporation established in 2000. It is an import and export company. It seeks to temporarily extend the employment of the beneficiary as its managing director. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims that it is affiliated with [REDACTED] located in Tanshan, China.

The director denied the petition concluding that the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director improperly stated that the beneficiary would be employed in an executive capacity. Counsel clarifies that the petitioner has always claimed that the beneficiary would be employed in a managerial capacity. Counsel contends that this mistake and other statements in the decision suggest that the director wrongly denied the petition.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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 this proceeding is whether the beneficiary will be employed in a managerial capacity for the United States entity.

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.

The petitioner initially stated that the beneficiary would “continue to oversee the day-to-day activities of the Sales Managers at [the petitioner]; liaise with Mr. Sang Shujun [the petitioner’s owner] and other personnel in China; monitor shipments from China to the US; hire additional personnel; liaise with clients where necessary, offering volume discounts and other incentives; and continue to grow [the petitioner].”

On May 30, 2002, the director requested: (1) a complete position description for all of the petitioner’s employees, including a breakdown of the number of hours devoted to each of their duties; (2) evidence of the number of and wages of contractors, if used; and, (3) copies of Internal Revenue Service (IRS) Forms 941, Employer’s Quarterly Tax Returns.

In a July 7, 2002 response, the petitioner stated:

The Beneficiary has been given complete control over the daily activities of the Petitioner by its Chinese owner, Mr. Shujun, who is kept informed about the Petitioner’s business activities with regular daily communications. The Beneficiary has complete authority to hire and fire employees, make decisions regarding the daily operation of the

Petitioner, make binding deals with customers, etc. Since January of this year, the Beneficiary has only performed managerial duties, and will continue to perform purely managerial duties in the future, as follows:

Direct and coordinate Petitioner's daily activities: Research new markets; Update a marketing plan and operating procedures; Assign new sales territories and set quotas and sales targets for sales personnel; Prepare budget estimates; Arrange bank fund transfers; Meet payroll requirements; Prepare personnel evaluations; Make recommendations to Chinese affiliate regarding market trends; the Beneficiary will devote an average of 20 hours per week fulfilling these duties.

Oversee the management of customer accounts: Schedule shipments of orders from China to the US and coordinate with Chinese counterpart to ensure shipping documentation is accurate and shipment schedules are adhered to; Convey all necessary information to Chinese affiliate for customizing orders to customers needs (eg. Print special trademarks or logos for each customer who wants to use their own brand name.) Monitor quality control and analyze customer feedback; Ensure customers are satisfied with products received; Maintain a customer information database; Liaise with top-level customers to negotiate contracts and offer suitable incentives; Intervene in customer disputes with sales personnel over price and quality of products. The Beneficiary will devote an average of 20 hours per week fulfilling these duties.

Miscellaneous duties: Interview and hire additional staff when appropriate; Attend Trade Shows; Ensure Accountant files Petitioner's taxes in a timely manner; The Beneficiary will devote whatever time he deems necessary to fulfill these duties when they arise.

The petitioner also indicates that the two sales representatives were responsible for generating sales of disposable gloves, maintaining good business relationships with customers, and assisting the beneficiary at trade shows.

The director determined that the description of the beneficiary's duties was indicative of an individual primarily involved in performing the operational duties of the organization. The director observed that the beneficiary and the two sales representatives "are predominantly involved in soliciting the sales transactions that are part and parcel of [the petitioner's] organization." The director concluded that the record did not demonstrate that the beneficiary supervised professional or managerial employees or that the petitioner had sufficient staff to relieve the beneficiary from primarily performing the mundane duties of the organization.

On appeal counsel for the petitioner asserts that the beneficiary has not been primarily involved in performing the petitioner's operational duties since the addition of the two sales personnel to the staff in January 2002. Counsel claims that the beneficiary manages the petitioner's sole function that is marketing disposable rubber gloves. Counsel references an unpublished decision to support his contention that the beneficiary functions at

the most senior-level within the petitioner's hierarchy, exercises discretion over the day-to-day operations of the petitioner, supervises and controls the work of other employees, and has authority to hire and fire.

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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In this matter, the petitioner has clarified that the beneficiary's position is in a managerial capacity. On appeal, counsel further clarifies that the petitioner is claiming that the beneficiary's position is a functional manager position.

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.

In this matter, the petitioner has identified the petitioner's sole function as marketing disposable rubber gloves. However, the petitioner has not provided evidence that the beneficiary's primary responsibility is to manage this function. 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).

The petitioner's description of the beneficiary's duties indicates that the beneficiary researches new markets, makes recommendations regarding market trends, assigns sales territories, sets quotas and sales targets, monitors quality control, intervenes in customer disputes, and prepares personnel evaluations. These duties are the duties of a market analyst and a first-line supervisor. 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. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). 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. *See* section 101(a)(44)(A)(iv) of the Act. The petitioner has not claimed and the record does not support that the individuals performing sales duties hold professional positions. In addition, the petitioner indicates that the beneficiary is responsible for arranging bank fund transfers, meeting payroll, scheduling shipments, and conveying customized orders. These are administrative tasks necessary to continue the petitioner's operations.

Even though the petitioner lists the beneficiary's duties as managerial, the beneficiary's daily tasks incorporate a myriad number of non-qualifying duties. The petitioner fails to acknowledge or quantify the time the beneficiary spends on the non-managerial duties. This failure of documentation is important because these duties do not fall directly under traditional managerial duties as defined in the statute. 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 AAO cannot conclude that the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel's citation to unpublished cases carries little probative value. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished cases. Moreover, unpublished decisions are not binding on Citizenship and Immigration Services (CIS) in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

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.