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**U.S. Citizenship
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FILE: EAC 01 045 54856 Office: VERMONT SERVICE CENTER

Date: FEB 23 2005

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] endeavors to classify the beneficiary as a manager or executive 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 is a subsidiary of [REDACTED] located in India and is engaged in the business of international trading and consultancy. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's president at an annual salary of \$40,000.

On April 19, 2001, the director denied the petition because the petitioner failed to establish that the beneficiary has been or will be employed in a primarily executive or managerial capacity.

On appeal, the petitioner's counsel states that the beneficiary "serves in an executive capacity" and "manages the affairs of the company."

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 meet certain criteria. 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. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(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 (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.

The issue in this proceeding is whether the beneficiary has been and 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.

On November 29, 2000, the petitioner submitted Form I-129. On Form I-129, the petitioner described the beneficiary's duties for the past three years and in the United States as:

Establish goals and policies, business objectives, review activity reports [and] financial statements, [d]irect and [c]oordinate financial programs, plan and develop public relations policies, evaluate performance of executives, set guidelines, attend trade shows, formulate human resource developments, . . . , direct [and] coordinate.

On January 30, 2001, the director requested additional evidence concerning the beneficiary's foreign and proposed U.S. duties.

In response to the director's request for additional information, the petitioner submitted the U.S. and foreign organizational charts and descriptions of the beneficiary's foreign and U.S. duties. The petitioner described the beneficiary's foreign duties as follows:

Manager

[A]nalyzing the manual system and studied the scope of automation of the system, specifications [and] documentation. [The beneficiary] [a]ssisted in the recruitment of the Production Engineers, technicians to implement the project and actively guided them in the whole process of project. [T]rained the department heads to exploit the system features.

Director

[A]ssumed responsibility of timely execution of export contracts, shipments etc. including procurement and domestic sales and international sales. He was also responsible for recruitment of the technical and managerial staff. Formulate corporate policy regarding targets and schedules.

In addition, the petitioner submitted a description of its employees' duties listed on the foreign organizational chart.

In relation to the U.S. business, the petitioner submitted a description of the beneficiary's U.S. duties. The petitioner listed the beneficiary's duties as president:

- Plans, develops and establish[es] policies and objectives of the business organization in accordance with the board of directives and corporation charters.
- Confers with company officials to plan business objectives to develop organizational policies to coordinates [sic] functions and operations between divisions and department and to establish responsibilities and procedures for attaining objectives.
- Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions.
- Directs and coordinates formulations of financial programs to provide funding for new or continuing operations to maximize returns on investments and to increase productivity.
- Plan[s] and develops public relation[s] policies designed to improve company's image and relations with customers, employees, stockholders and public.
- Evaluates performance of executives of compliance with established policies and objectives of firm and contributions in attaining objectives.
- Supervise[s] a team of senior managerial and service managers who provide technical support to projects.

Further, the petitioner claims that the beneficiary, as president, will also be responsible for:

- Supervis[ing] a team of top management person[nel] who run the day-to-day operation, such as vice-president, managers, etc.
- Provid[ing] key strategic technology and project and human resources development policies.
- Set[ting] guidelines for qualify management [sic] and attend trade shows.

The petitioner also claims that the position requires that the beneficiary work 40 hours per week. Additionally, the petitioner is planning to employ other “persons to do day-to-day activity for the [U]nited States firm.”

On April 19, 2001, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily managerial or executive capacity. The director found that the majority of the beneficiary’s time was utilized performing non-qualifying duties.

On appeal, counsel states that the beneficiary will continue “managing the affairs of the U.S. entity” and “carrying on his duties in a true executive capacity.” In addition, the petitioner claims that the beneficiary is “truly responsible for carrying on day-to-day activities of [the] U.S. corporation.”

In 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). On review, the petitioner has provided a vague and nonspecific description of the beneficiary’s U.S. and foreign duties that fails to establish what the beneficiary does on a day-to-day basis. The beneficiary’s duties are described as “analyzing the manual system,” “plan[ning], develop[ing] and establish[ing] policies and objectives of the business organization,” and “coordinat[ing] functions and operations between divisions and departments.” However, these duties are generalities that fail to enumerate any details such as the concrete policies or objectives that the beneficiary will plan, develop, or establish. 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). 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).

Further, the petitioner generally paraphrased the statutory definition of executive and managerial capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as establishing policies. However, 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. *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); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner described the beneficiary's U.S. duties as "plan[ning] and develop[ing] public relation[s] policies designed to improve [the] company's image and relations with customers, employees, stockholders[,] and [the] public." The petitioner's description of the beneficiary's duties suggests that he performs duties that comprise marketing tasks. Marketing duties, by definition, qualify as performing a task necessary to provide a service or produce a product. 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).

Moreover, the petitioner claims that the beneficiary is "truly responsible for carrying on day-to-day activities of [the] U.S. corporation." Based on the current record, the AAO is unable to determine whether the claimed managerial or executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial or non-executive administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial or executive in nature, and what proportion is actually non-managerial or non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The AAO notes that the petitioner stated in its March 5, 2001 response to the director's request for additional evidence that item number six indicated the number of hours devoted to the beneficiary's job duties on a weekly basis. In addition, the petitioner stated that it submitted an organizational chart with an hourly breakdown of the beneficiary's duties in the United States. Although the petitioner indicated that the beneficiary will be working 40 hours per week, the petitioner failed to submit the number of hours the beneficiary will devote to each of the listed duties. 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).

Additionally, the petitioner stated in the March 5, 2001 response to the director's request for additional evidence that the beneficiary "supervises a team of senior managerial and service managers who provide technical support to the projects." However, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. The petitioner has not explained how the services of these employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Again, without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

The petitioner also claimed that it is "planning to employ other persons to do day-to-day activity for the [U]nited States firm." The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

After careful consideration of the evidence, the AAO concludes that the beneficiary has not been and will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Another issue not indirectly raised by the director is whether the petitioner established that the foreign company employed the beneficiary in a primarily managerial or executive capacity. As previously stated, the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. *See* 8 C.F.R. § 214.2(l)(3)(v)(b). On review, the petitioner provided a vague description of the beneficiary's duties that failed to establish what day-to-day duties the beneficiary performs. For instance, on the Form I-129, the petitioner described the beneficiary's foreign duties as "establish[ing] the goals and policies, business objectives, review activity reports [and] financial statements." 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 concludes that the petitioner has failed to establish that the beneficiary has been employed in a qualifying managerial or executive capacity abroad as required by 8 C.F.R. § 214.2(l)(3)(v)(b). For this additional reason, the petition may not be approved.

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 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).

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 appeal will be dismissed.

ORDER: The appeal is dismissed.