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U.S. Citizenship
and Immigration
Services

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FILE: SRC 03 141 53313 Office: TEXAS SERVICE CENTER Date: JUN 09 2005

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:

SELF-REPRESENTED

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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the evidence contained in the record, the petitioner was established November 12, 1997, and claims to be engaged in the sales and marketing of tattooing products. The petitioner claims to be a subsidiary of Sarl Impex, located in France. The petitioner's new office petition was initially approved allowing the beneficiary to enter the United States in an L-1A classification on March 18, 1998. The petitioner subsequently received two extensions allowing the beneficiary to remain in the United States in L-1A status. The petitioner now seeks another extension of its authority to employ the beneficiary temporarily in the United States as its president for two years, at an annual salary of \$46,500.00. The director determined that the petitioner had failed to submit sufficient evidence to demonstrate that the beneficiary had been or would be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, the petitioner disagrees with the director's determination and asserts that the beneficiary's duties have been and will continue to 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.

The issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary has been and will be employed by the U.S. entity 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 of support, dated March 17, 2003, the petitioner described the beneficiary's duties as:

As President, [the beneficiary's] duties and responsibilities includes [sic] the overall direction and management of the American Subsidiary. More specifically, [the beneficiary's] executive and managerial duties includes [sic] planning, developing and establishing the policies and objectives of [the U.S. entity.] She reviews activity reports and financial statements to determine progress and status. She is in charge of the budget. Furthermore, she performs cost analysis and establishes pricing policies. She is in charge of the budget. Moreover, [the beneficiary] supervises the development of new products and technics [sic].

The petitioner submitted a copy of the U.S. entity's organizational chart that depicted the beneficiary as president and one other employee as vice-president. The chart also listed a number of vacant positions. The petitioner submitted copies of IRS Form W-2, which demonstrated that the U.S. entity employed the beneficiary and [REDACTED] during 2002. The petitioner submitted a copy of the U.S. company's Articles of Incorporation, that demonstrated the entity was incorporated on November 12, 1997.

The director determined that the instant petition was submitted without sufficient documentation and requested that the petitioner submit the following evidence:

Please submit evidence of a lawful entry. Please submit a copy of the I-94 issued to you when you entered the U.S....

Establish the beneficiary is acting primarily in an executive/managerial capacity. ...list the names and titles of those performing the routine tasks of the business, and submit supporting documentation.

Please submit copies of Form 941 for the four quarters of 2002 and the first quarter of 2003. Please include the attachments, names of employees, social security numbers and wages earned, and evidence of payment.

Please submit a copy of the corporate federal tax return for 2002.

In response to the director's request for evidence, the petitioner stated that the U.S. entity employed a vice-president who "takes care of the production of the parts." The petitioner also listed the names of six machine companies and stated that they were representative of sub-contractors who performed the entity's production of machine parts. The petitioner listed a sales representative and accountant as employees of the U.S. entity. The petitioner submitted copies of the U.S. entity's IRS Form 941, Employer's Quarterly Federal Tax Returns for the quarters as requested by the director, but without attachments.

The director subsequently denied the petition. The director noted that the petitioner had failed to comply with the request for evidence in that it had failed to submit attachments to the entity's Form 941, quarterly reports. The director also noted that assertions, in the absence of supporting evidence, were insufficient to demonstrate that an employee is performing in a primarily managerial or executive capacity. The director concluded that it appeared from the record that the beneficiary had been and would be performing the daily activities

associated with operating a business rather than primarily performing duties that were managerial or executive in nature.

On appeal, the petitioner disagrees with the director's decision and asserts that the former vice-president no longer works for the U.S. entity, and that the petitioner had hired a new full-time employee. The petitioner also asserts that the beneficiary is the only remaining manager or executive in the United States to supervise the organization's operations. The petitioner contends:

[The beneficiary] possesses overall administrative and executive authority and responsibilities of the business. She exercises all latitude in discretionary decision-making and ensure that the goals and policies are followed. She possesses the authority to hire and fire the employees. She reviews activity reports and financial statements to determine progress and status. [The beneficiary] is in charge of the administration, the development of new markets, the budget, and pricing policies.

The petitioner further contends that the U.S. entity distributes permanent cosmetic supplies and can operate with a very limited number of employees. The petitioner also contends that sub-contractors do all the company's manufacturing. The petitioner claims that the U.S. entity now employs a full-time worker who is primarily involved in the sale and production of its product in that she contracts with sub-contractors for the production and repair of the company's equipment.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The evidence shows that the petitioner had been doing business in the United States for more than one year prior to the filing of the instant petition. Therefore, it will not be considered a new office pursuant to 8 C.F.R. § 214.2(l)(10)(ii)(F) for purposes of evaluating the beneficiary's position in the U.S. entity. Throughout the petition the petitioner indicates that it plans to hire additional employees in the future. However, 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). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the evidence demonstrates that the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. It is not clear from the evidence which of the beneficiary's duties are considered managerial and which are considered executive. Nor has the petitioner submitted sufficient evidence to demonstrate that the beneficiary's position has and will involve significant authority over generalized policy or that the job duties she performs primarily are managerial or executive in nature.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include planning, developing and establishing the policies and objectives, and supervises the development of new products and techniques. The petitioner did not, however, define the beneficiary's goals, policies, or clarify who actually develops the petitioner's products and techniques. 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).

Rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive 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 directing the entire operation of the organization, establishing goals and policies of the organization, and exercising sole discretionary decision making. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. 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.).

Even though the petitioner claims that the beneficiary directs and manages the petitioner's marketing, finance, record keeping, and administrative activities, it does not claim to have anyone on its staff to actually perform the marketing, finance, record keeping, and administrative functions. Thus, either the beneficiary herself is performing the marketing, finance, record keeping, or administrative functions or she does not actually manage those functions as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing the petitioner's marketing, finance, record keeping, and administrative activities, the AAO notes that 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 of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In the instant matter, the petitioner claims that the U.S. entity employs a vice-president, sales representative, an accountant, and sub-contractors who produces and repairs the company's equipment all of whom are under the direction of the beneficiary. However, the record shows and the petitioner admits that the petitioner employs only the beneficiary and one other person, [REDACTED]. Since it appears from the evidence that the beneficiary actually performs the day-to-day functions of the business, it can be concluded that she has been and will be performing tasks necessary to provide a service or product and such duties will not be considered managerial or executive in nature. 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*.

Further, although the petitioner asserts that the company employs independent contractors who manufacture and produce machine parts and repair company equipment, there has been no evidence submitted to substantiate this claim or to show that the independent contractors were employed on a full-time basis by the U.S. entity, or that they received any form of managerial or supervisory instruction from the U.S. entity. There is also a lack of evidence to establish to what extent the independent contractors' time will be spent relieving the beneficiary from performing non-qualifying duties of the organization. The evidence shows that

the independent contractors consist of non-affiliated machine parts manufacturers. There is no indication from the record that the duties of the parts manufacturers qualify as performing a major function of the U.S. entity or providing a major service that would allow the entity to achieve its goals. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. 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, supra*. In this matter, the petitioner has failed to overcome the objections of the director.

Based upon a review of the record, it appears that the U.S. entity has not yet reached a level of complexity sufficient to support a managerial or executive position. Further, the record does not support a finding that the beneficiary has been and will be employed by the U.S. entity in a primarily managerial or executive capacity. For this reason, this petition may not 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.