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U.S. Citizenship
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FILE: SRC 03 044 52483 Office: TEXAS SERVICE CENTER Date: JUN 10 2005

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

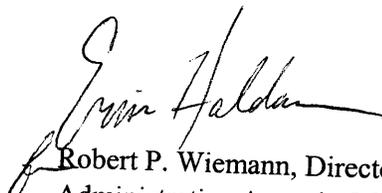
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, International Summit Services, Inc., 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 claims to be a wholly owned subsidiary of [REDACTED] Fabrimuvel), located in Colombia and is engaged in the business of designing, manufacturing, and exporting custom made residential and corporate furniture. The initial petition was approved to allow the petitioner to open a new office. The beneficiary was subsequently granted a two-year extension of stay and the petitioner now seeks to extend his stay for an additional two years as the U.S. entity's general manager. The petitioner was incorporated in the State of Florida on June 22, 1999 and claims to have three employees.

On April 10, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity.

On appeal, the petitioner's counsel refutes the director's findings and asserts that the director placed undue emphasis on the number of employees supervised by the beneficiary.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, 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)(14)(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 primarily performing executive or managerial duties 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.

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, 2002, the petitioner filed the Form I-129. On the Form I-129, the petitioner described the beneficiary's proposed U.S. duties as "direct[ing] the management of the company, establish goals and policies, as well as negotiate contracts on the clients behalf." Additionally, in a supporting letter signed by the U.S. entity's chief financial officer, the petitioner described the beneficiary as "establishing the organizational goals and policies, selecting personnel, prepar[ing] corporate reports and supervising of corporate operations."

The petitioner also submitted an organizational chart depicting a president, the beneficiary as vice president, a sales and marketing director (Guillermo Herrera) and two unidentified sales representatives, a chief financial officer (Neyarit Briceno) and an unidentified financial assistant. The petitioner indicated on Form I-129 that it has three employees. The petitioner submitted

Forms 941, Employer's Quarterly Federal Tax Return for the last three quarters of 2001 and the first quarter of 2002. In each quarter, the petitioner reported one employee and paid wages of \$3,600, or \$1,200 per month.

On January 20, 2003, the director requested additional evidence. Specifically, the director requested an explanation of how the beneficiary is acting in a managerial capacity; the need for two managers and one additional employee; the duties that each employee performs and the percentages of time spent on those duties; a copy of the petitioner's Form 941, Employer's Quarterly Federal Tax Return for the fourth quarter for 2002 with a list of the employees' names; and, an explanation as to why the current wages do not appear to be sufficient to cover the employees' salaries.

In response, the petitioner's counsel submitted a March 13, 2003 letter explaining that the beneficiary's total estimated managerial and executive job duties "ranges between 45-60 hours a week." Counsel stated that the beneficiary "conduct[s] all hiring, firing and supervision of personnel and/or independent contractors. Many times a company will opt to cut payroll records by utilizing independent contractors and [the petitioner] has chosen to pursue this method." Counsel also claimed, "Most labor is sought through independent contractors as needed and funded through parent and subsidiary cashflow." Counsel explained that the company has "3 professional decorators whom also act as sales representatives on behalf of the company" and recently hired a production manager to assist the beneficiary therefore "the company now employs two managerial officers with [the beneficiary] maintaining his supervisory capacity." Counsel submitted Exhibit A, a U.S. organizational chart indicating the beneficiary's position and subordinates and Exhibit B, a copy of the Form 941 and Form 941-C, supporting statement to correct information reporting two employees for the quarter ending December 31, 2002. The petitioner stated that the other employee is the beneficiary's personal assistant and indicated that she was initially not included on the Form 941 due to a clerical error. The petitioner submitted a Form W-2c indicating that this employee received total wages of \$1,600 in 2002. The U.S. organizational chart indicated that the beneficiary oversees a production and a logistics manager who, in turn, oversee three sales representatives/decorators, a production supervisor, an import freight and delivery coordinator, and the trucking company for deliveries; however, the chart does not identify any employees by name or include the claimed personal assistant. Counsel also listed the beneficiary's U.S. duties and time allotted to each of the listed duties:

1. Attend and head weekly staff meetings. 2.0
2. Review corporate, financial, and operating reports for the Colombian corporation and U.S. subsidiary. 3.0
3. Develop long and short term business plans in corporation with projected growth and demand for product 5.0
4. Review and approve all matters involving import/export documentation, such as letters of credit, bills of lading, shipping insurance, and tariffs on imported and exported products. 8.0
5. Prepare marketing and pricing strategies for both the Colombian & U.S. subsidiary to market service contracts and sale of products 2.0
6. Prepare and submit all sales and import tax returns to Colombian government for shipments received 3.0

7. Create, coordinate, and supervise the production of promotional literature for clients & exhibitions both in Colombia & internationally. 3.0
8. Negotiate large purchase orders with new and established clients to obtain the best terms 3.0
9. Coordinate, authorize, and supervise all shipment products from both national and international. 2.5
10. Attend monthly Chamber of Commerce business meeting for businesses 2.0
11. Review and authorize all corporate expenditures submitted by bookkeeper/accountant. 3.0
12. Review and authorize international sales orders submitted by U.S. subsidiary. 1.5
13. Review accounts receivables and inventory shipments. 1.0
14. Direct & manage all aspects of company's marketing & product development activities, primarily for financial services industry. 5.0
15. Review weekly corporate expense reports and bank reconciliation statements. 1.0
16. Review and authorize payroll distribution. 1.5
17. Prepare bank deposits and deposit funds and checks into accounts. 1.0

On April 8, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The director found that the beneficiary was primarily engaged in the day-to-day operations of the business. The director also found that there was insufficient evidence to establish that the U.S. company employed additional workers and that these employees were actually paid. The director noted that the petitioner failed to submit the requested list of employees' names.

On appeal, counsel states that the director "erred in [her] denial on the grounds of lack of employees in that this was a business decision of [the petitioner] and does not remove managerial capacity of the beneficiary, take note that [the petitioner] is a labor intense company, a part in which [the beneficiary] does not participate." Counsel cites an unpublished decision in support of his assertion that "a sole employee of the company may qualify as an executive, provided his or her purpose is to plan, organize, direct and control the organization's major functions through other people." In addition, counsel states that the beneficiary has "[m]anaged the U.S. development including establishing goals, restructuring activities for optimum production, locating & employing outside companies to complete labor necessities, keeping corporate records & reports." Counsel also states, "In the minimum it is requested that petitioner be granted the opportunity to finalize business operations in the U.S."

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). On review, the petitioner has not established that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The beneficiary's described duties are general and vague. For example, the petitioner described the beneficiary's duties as "direct[ing] the management of the company" and "[d]evelop[ing] long and short term business plans." However, it is unclear how the beneficiary will direct the management or develop long and short-term business plans. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of

proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, the petitioner generally paraphrased the statutory definition of executive. 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 the organizational goals and 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.). 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. *Id.*

In addition, the petitioner described the beneficiary as being involved in “[p]repar[ing] marketing and pricing strategies for both the Colombian & U.S. subsidiary to market service contracts and sale of products.” However, although the record indicated that there were two sales representatives, no names or a description of their claimed duties were provided in the record. Therefore, it is unclear as to who would actually perform the service. The petitioner submitted insufficient evidence that it employed workers to perform such duties; therefore, this leads the AAO to conclude that the beneficiary himself will be performing the listed sales and marketing tasks nor is there any evidence of wages paid to any employees or contractors other than the beneficiary and his personal assistant. 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).

Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary’s duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. In the response to the director’s request for additional evidence, the petitioner claimed that the beneficiary oversees a production and a logistics manager who, in turn, oversee three sales representatives/decorators, a production supervisor, an import freight and delivery coordinator, and the trucking company for deliveries. The AAO notes that the petitioner initially submitted a substantially different organizational chart which depicted a Sales and Marketing Director, two sales representatives, a chief financial officer, and a financial assistant. However, there is insufficient evidence to establish that the petitioner actually employed any of these workers. The Forms 941, Employer’s Quarterly Federal Tax Return, appear to indicate that at most only one employee, the beneficiary is compensated at a rate that would indicate full-time employment. It appears that the petitioner hired a single part-time employee during the last quarter of 2002, but there is no evidence of wages paid to any other payroll employees. Additionally, although the petitioner claimed that “[m]ost labor is sought through independent contractors as needed and funded through parent and subsidiary cashflow,” the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. The petitioner also has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner’s

business. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The AAO notes that the director requested that the petitioner to list the names of the subordinate employees and a description of their duties. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). Without evidence of wages paid to employees or job descriptions for the claimed staff, the AAO must conclude that the beneficiary does not supervise any managerial, supervisory, or professional subordinate employees.

Moreover, a critical analysis of the nature of the petitioner's business indicates that there are no subordinate employees to relieve the beneficiary from performing non-qualifying duties. Rather, it appears from the record that the only individual operating the business is the beneficiary. In the March 13, 2003 letter, counsel claimed, "Most labor is sought through independent contractors" and "the company has 3 professional decorators whom also act as sales representatives on behalf of the company and recently hired a production manager to assist the beneficiary." However, in the absence of such evidence as pay stubs and payroll records and employee names and job descriptions, the petitioner has not established that it employs a subordinate staff that would relieve the beneficiary from performing non-qualifying duties.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

After careful consideration of the evidence, the AAO concludes that the petitioner has failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. For this reason, the 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.