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U.S. Citizenship
and Immigration
Services

D7

[redacted]

FILE: WAC 03 150 53744 Office: CALIFORNIA SERVICE CENTER Date: JUN 10 2005

IN RE: Petitioner: [redacted]

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:

[redacted]

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

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

According to the documentary evidence contained in the record, the petitioner was established in 1997 and claims to be an importer and exporter of Oriental and Persian rugs and carpets. The petitioner claims to be an affiliate of [redacted]m-Und Export Mit Teppichen, located in Hamburg, Germany. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for two years, at a weekly salary of $500.00. The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary had been or would be employed by the U.S. entity in a primarily managerial or executive capacity. The beneficiary was initially granted a one-year period of its stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay for a final two years.

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.

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.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

> If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The petitioner initially described the beneficiary's duties in the petition as: "President/Director of [the U.S. entity]: formulated corporate policy; set up and expanded into the U.S. market for sale of rugs and carpets; negotiated contracts with U.S. suppliers; set prices on merchandise and directed overall operations."

In a letter of support, dated April 4, 2003, the petitioner described the beneficiary's duties by stating:

> During the course of the past five (5) years, [the beneficiary] has been involved in the operation, management, maintenance, and overseeing of the business activities of the U.S. Company. The company has seen and experienced steady growth and has become a visible presence in the Oriental and Persian Rug market in the Southern California area.

As evidence, the petitioner submitted copies of the U.S. entity's IRS Form 1120, U.S. Corporate Income Tax Return for 2001; and copies of the foreign entity's payroll records for the year 2002.

The director, in turn, found the petition to be defective and requested that the petitioner submit additional evidence including: copies of the U.S. entity's organizational chart, Form DE-6, Quarterly Wage Report and Form 941, Quarterly Wage Report for the last three quarters preceding the filing of the petition, payroll summaries, Forms W-2 and W-3, a description of the beneficiary's job duties, and proof of NSEERS registration.

In response to the director's request for evidence, the petitioner stated that the beneficiary had been in the Oriental and Persian rug business for more than thirty years, and had served as an executive with the foreign entity since 1985. The petitioner described the beneficiary's duties as:

> [The beneficiary] directs [the U.S. entity], sets the goals for the organization and exercises wide discretion in the day to day [sic] management. [The beneficiary's] duties include hiring workers, including delivery personnel, office and sales staff. [The beneficiary] oversees the marketing of the business, approves new advertising campaigns, and sets the marketing goals for the company.

The petitioner submitted a copy of the U.S. entity's organizational chart that depicted the beneficiary as president of the company. The chart also listed a CPA position that was on a contract basis, a salesmen position that was to be filled on a temporary basis, a service and delivery position that was to be filled on a per-job basis, an office clerk's position that was to be filled "as needed," and a customer service representative position that was to be filled "as needed." The petitioner submitted copies of the U.S. entity's Form DE-6 and Form 941. The petitioner stated that the foreign entity pays most of the beneficiary's salary to allow the U.S. entity to maximize its liquid assets. The petitioner referred to the foreign entity's payroll record submitted with the initial petition to substantiate the beneficiary's salary.

The director subsequently denied the petition, determining that the petitioner had failed to submit sufficient evidence to establish that the beneficiary had been or would be employed in a primarily managerial or executive capacity. The director noted that the U.S. entity had been in business for five years and yet had no other employees besides the beneficiary. The director also noted that the IRS Form 1120 for the year 2001 showed that $3,600 was issued by the company as compensation for officers, and that the company's taxable income was in the amount of $662.00. The director further noted that when a company has no regular employees, it becomes questionable as to whether the operator of the business is engaged primarily in managerial or executive duties. The director stated that there was insufficient evidence to show that the beneficiary would supervise the work of other supervisory, professional, or managerial employees who would relieve the beneficiary from performing non-qualifying duties.

On appeal, counsel disagrees with the director's decision and asserts that Citizenship and Immigration Services (CIS) abused its discretion in denying the petition and that such actions displayed a complete lack of understanding of the petitioner's type of business. Counsel contends CIS mischaracterized the petitioner's financial status in that the petitioner's 2001 corporate tax return shows total company assets in the amount of $579,559.00, and total sales for 2001 in the amount of $77,245.00. Counsel further contends the beneficiary's salary is being paid by the foreign entity. Counsel also contends that the Oriental and Persian rug markets were adversely affected by recent trends in the economy and world politics. Counsel asserts that the 1986 U.S. trade embargo against importing rugs from Iran and the events of September 11, 2001, detrimentally affected the petitioner's business. Counsel also asserts that the petitioner sold mainly Oriental rugs until the 1986 trade embargo was lifted in 2000, and that the company is now experiencing an upward spiral. Counsel asserts CIS was incorrect in its characterization of the beneficiary, and reiterates the beneficiary's job duties.

Counsel asserts that the U.S. entity's organizational chart shows that the beneficiary directs the management of the company and makes the decisions involving company policy and goals. Counsel further asserts the beneficiary does not intend to perform any of the duties that he will supervise, and that as president he hires workers on an "as needed" basis to perform such tasks. Counsel also asserts the beneficiary will be hiring workers for permanent positions. Counsel concludes by stating: "The Service failed to make a reasonable review of petitioner's business in light of economic conditions, and failed to conclude that the current employee structure was necessary and justified in order to keep the company in operating [sic] while the economy recovers."

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.* The actual duties themselves reveal the true nature of the employment. *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). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In the instant matter, counsel asserts that the beneficiary is employed by the U.S. entity in a managerial or executive capacity in that he is responsible for overseeing the operation of the company, and hires and supervises lower level subordinates on a temporary or "as needed" basis. However, there is nothing in the record to substantiate this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of*

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 record demonstrates that the U.S. entity was established in 1997 and that the beneficiary is the sole employee. It appears from the evidence that the beneficiary primarily performs the day-to-day duties of the organization rather than high-level responsibilities as specified in CIS statutes and regulations. There is insufficient evidence to show that the beneficiary would supervise the work of other supervisory, professional, or managerial employees who would relieve him from performing non-qualifying duties.

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a five-year-old import and export Oriental and Persian rug and carpet company that claimed a gross annual income of $77, 245.00 in the year 2001. The organization employed the beneficiary as its president and claimed that the foreign entity was responsible for paying his salary. The petitioner submitted copies of the foreign entity's untranslated payroll records for 2002 to substantiate this claim. However, because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. The AAO notes that the petitioner also submitted copies of IRS Form DE-6 and IRS Form 941 that demonstrated the U.S. entity only paid $3,600 as compensation of officers for the year 2001. The AAO also notes that the evidence demonstrates that the beneficiary is to be paid $500.00 weekly. Although counsel argues on appeal that CIS mischaracterized the petitioner's financial status through its interpretation of the entity's 2001 income tax return, the evidence fails to demonstrate that the U.S. entity is able to remunerate the beneficiary for his services. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In this matter, the petitioner also failed to submit evidence that demonstrated it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operational duties of the U.S. entity. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act.

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 directing the organization, setting the goals and policies of the organization, overseeing the marketing of the business, and approving new advertising campaigns. The petitioner did not, however, define the beneficiary's goals, policies, or clarify who actually performs the marketing and advertising tasks of the U.S. entity. 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. at 190. 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, 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 and overseeing 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.* 724 F. Supp. at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner describes the beneficiary as marketing the petitioner's product. Since the beneficiary actually markets the petitioner's product, he is performing a task necessary to provide a service or product and this duty 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*, 19 I&N Dec. 593, 604 (Comm. 1988).

In the instant matter, 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)(l)(ii)(F) for purposes of evaluating the beneficiary's position in the U.S. entity. Counsel indicates that the petitioner plans to hire "as needed" and permanent 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.

Counsel contends that due to world politics, the economic embargo against the import of Persian rugs from Iran in 1986, and the tragic events of September 11, 2001, the U.S. Company suffered a loss and is just now beginning to reestablish its enterprise. Counsel also asserts that the U.S. business operations had to be streamlined during this period in order to guarantee the business's survival. Although counsel asserts that economic and political factors stagnated the U.S. entity's growth, there has been no direct evidence submitted to substantiate this claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, world politics and international economic conditions cannot be used as a substitute for the statutory and regulatory requirements to establish eligibility. 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. Accordingly, the appeal will 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.