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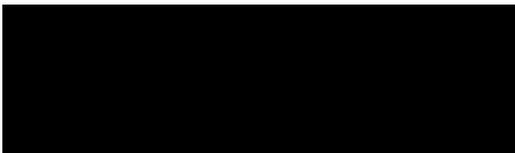
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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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Services

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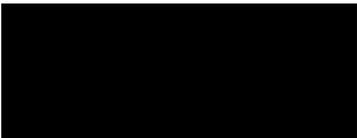


FILE: WAC 01 290 53845 Office: CALIFORNIA SERVICE CENTER Date: JUN 28 2005

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

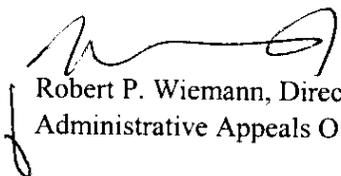
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 July of 1997 and claims to be in the import and export, and real estate investment business. The petitioner claims to be an affiliate of new [REDACTED] located in India. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and chief executive officer for three years, at an annual salary of \$48,000.00. The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary had been and would be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel disagrees with the director's decision, and asserts that the beneficiary has been and will continue to be employed in an executive capacity.

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.

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.

The petitioner initially described the beneficiary's job duties as:

[The beneficiary] has been leading, managing, and providing direction to the U.S. affiliate. His duties have included establishing corporate policies and long-term objectives. He has engaged in all executive decision making with regard to operations, marketing, sales, finance, and acquisitions. He has been the lead in negotiating all deals for the company and maintaining high-level contacts.

In response to the director's request for additional evidence, the petitioner described the beneficiary's duties as:

The beneficiary is the president and chief executive officer of the U.S. entity. As the senior most executive of the U.S. entity, he is ultimately responsible for the entity's activities, including business development, finances, marketing, personnel, and exploring new business opportunities.

...

The beneficiary spends about two hours each day (25%) conferring with the vice-president and providing guidance on issues that need resolution or resolving any problems that the entity may be facing. Since customer development and retention is a critical function, the beneficiary spends 2-3 hours (25%-35%) each day visiting existing customers and to develop

potential customers. [sic] The most important function, and one which the beneficiary has not delegated, is exploring new business opportunities so that the U.S. entity's growth can be accelerated and a large number of U.S. persons can be employed The efforts of exploring new opportunities has consumed about 35%-40% of the time, and going forward, it is imminent that the new venture will consume 55% - 60% of the beneficiary's time. The rest of the time, currently, is dedicated towards personnel issues, discussions with accountants and attorneys, and other matters.

...

The beneficiary directly supervises only the vice-president of the entity. The . . . vice-president . . . is entrusted with the day-to-day operations of the entity such as supervising other workers; dealing with "job work contractors" who manufacture and/or provide the finishing touches to the entity's products; and ensuring that the entity's operations are carried out smoothly and without interruption.

The petitioner submitted a copy of its organizational chart that depicted the beneficiary as president and CEO with the vice-president, advisors, job work contractors, a senior supervisor, and a machine operator serving under his direction. The petitioner submitted copies of its IRS Form 1120, Corporate Income Tax Return for 1999 and 2000 and IRS Form DE-6, Quarterly Wage and Withholding Report for 2001.

The director determined that the evidence submitted by the petitioner was insufficient to show that the beneficiary's duties have been or would be primarily managerial or executive in nature. The director stated that the petitioner had not established that the beneficiary would be involved in the supervision and control of the work of supervisory, professional or managerial employees who would relieve him from performing the services of the business. The director also noted that there was insufficient evidence to show that the beneficiary directs the management of the organization or establishes the goals and policies of the organization. The director noted that although the petitioner claimed that a significant portion of the company's activity was contracted out to other companies, the tax records demonstrated a minimum use of subcontractor's services in 2000.

On appeal, counsel argues that the beneficiary has been and will continue to be employed primarily in an executive capacity.

The petitioner has not established that the beneficiary has been or will be employed primarily in an executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he has been and will be responsible for directing the management of the organization or a major component or function of the organization, establishing goals and policies, exercising a wide latitude in discretionary decision-making, and receiving only general supervision or direction from higher-level individuals. The petitioner asserted that the beneficiary engaged in executive decision-making with regard to operations, marketing, sales, finance, and acquisitions. However, the petitioner has failed to submit independent documentary evidence to substantiate its claim. 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 petitioner also contends that the beneficiary spends 25 percent of his day conferring with the vice-president; 25 percent of his day visiting existing customers and developing potential customers; and 35 percent to 40 percent of his day exploring new business opportunities. The petitioner further asserts that the beneficiary will spend 55 percent

to 60 percent of his time developing the new business venture. It appears that the beneficiary has been and will be primarily involved in the day-to-day operations of the business and the acquisition and development of new businesses rather than primarily performing executive duties for the petitioning entity. There has been no evidence presented to demonstrate that the beneficiary directs the management of the organization or that he establishes goals and policies.

The petitioner contends that the beneficiary supervises the vice-president and that the vice-president supervises all other subordinates. Although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

The petitioner claims to employ subcontractors, but has not presented evidence of the subcontractors nor identified in detail the services these individuals provide. 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. 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. 190 (Reg. Comm. 1972).

The record does not demonstrate that the U.S. entity contains the organizational complexity to support an executive staff position. While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other pertinent factors such as the nature of the petitioner's business. Together, these facts can be used as indicators to help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant matter, the latter more accurately describes the beneficiary's role. There has been no evidence submitted to show that the petitioner employs full-time workers who carry out the day-to-day functions of the organization and who are in a position to relieve the beneficiary from performing non-executive duties.

The petitioner has failed to resolve inconsistencies that appear in the record. The petitioner submitted as evidence its Form 1120 for 1999 and 2000 that show no wages paid in 1999 and minimal wages paid in 2000. The U.S. entity's Form DE-6 quarterly tax reports for 2001 demonstrate that the petitioner employed a maximum of three employees. There is no evidence to show that the beneficiary as president, or the vice-president received any wages from the organization during this period. Furthermore, there is no evidence to show that the advisors were salaried. The evidence of record demonstrates that the contractors were paid only \$848.00 for subcontracting services in 2000. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.