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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D7

[redacted]

FILE WAC 02 191 54435 Office: CALIFORNIA SERVICE CENTER Date: APR 0 4 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)

IN 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

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.

The petitioner is described as an import company trading in Japanese antiques and art. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager and president. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner contends that the beneficiary is employed in the United States as a general manager and president and meets all the criteria of Title 8 C.F.R. § 214.2 (l)(ii)(C) and 8 C.F.R. § 214(l)(ii)(B).

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)(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 (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.

Furthermore, 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

> (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
>
> (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
>
> (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
>
> (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
>
> (E) Evidence of the financial status of the United States operation.

The United States petitioner was incorporated in 1999 and states that it is a wholly owned subsidiary of Izushige Co. Ltd., a Japanese corporation. In the instant petition, the petitioner declares two employees working at the

U.S. corporation and as explained in the response to the request for evidence and on appeal, two employees working out of the parent company in Japan. The petitioner submitted its U.S. Corporate Income Tax return for 2001 which indicates gross receipts or sales of $33,419. The initial petition was approved and was valid until June 10, 2002, in order to open a new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for two years at an annual salary of $50,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a 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.

The letter from the petitioner states that the beneficiary's "responsibilities will continue to consist of overall day-to-day management of all aspects of the new company." He will continue to "delegate various duties to the administrative personnel, purchase/sales personnel and computer specialists. Control work schedules and assign subordinate supervisors to specific duties."

The director requested additional information, specifically:

> The U.S. entity's organization chart indicating the beneficiary's position and other named employees in the chart.
>
> Clearly indicate other supervisory, professional, or managerial employees under the beneficiary's direct supervision in the U.S. including name, job title and duties, entry date of employment, education level, and evidence of salaries/wages paid.
>
> Other employees under the beneficiary's direct supervision in the U.S. including name, job title and duties, entry date of employment, education level, and evidence of salaries/wages paid.
>
> The Form 1120 U.S. Corporate Income Tax Return shows gross sales for the past year was only $33,419. It appears there is insufficient evidence to demonstrate that the U.S. entity is doing business. Please clarify and submit copies of legible sales invoices in chronological order from 1/1/2002 to the present.

In the response to the request for evidence, the petitioner provided the organization chart for the petitioner and the foreign parent company. The petitioner states that it has one full-time employee, the beneficiary, one part-time employee whose title is Director/Vice President and two employees in Japan. The response also indicated that the petitioner submitted wage information for all employees, however, the record does not contain any wage information.

The director determined that the evidence fails to establish that the beneficiary directs the management of the organization or establishes the goals and policies of the organization. The director found that there is insufficient evidence to establish that the beneficiary will be managing or directing the management of a department, subdivision or function of the U.S. entity. The director determined that the beneficiary has not been and will not be employed in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the position of the beneficiary as general manager and president meets all the criteria of Title 8 C.F.R. § 214.2 (l)(ii)(C) and 8 C.F.R. 214(l)(ii)(B). Counsel asserts that the beneficiary is employed in an executive capacity and restates the job duties and current responsibilities of the beneficiary. The description of the duties employed words such as "establishing the goals and policies of the organization," "authority to enter into agreements," and "involved in giving input and advice as well as executing decisions made." These words and phrases are generalities. For example, they do not identify what "goal and policies" the beneficiary will establish. In sum, the petitioner described the beneficiary's duties in general terms, largely paraphrasing the statutory definitions of managerial and executive capacity. 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). Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991)

(discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner asserts that the beneficiary is employed in a managerial capacity and restates his job duties as "managing the overall day-to-day operations of all aspects of the U.S. company, including in-house personnel operation." The petitioner insists that the beneficiary supervises and controls the work of other professional employees. However, evidence submitted by the petitioner states that the only other employee in the United States, the Director/Vice President, only works part-time and that there are two employees located in Japan. To qualify as a manager, the beneficiary must supervise a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing nonqualifying duties. The petitioner has not submitted evidence that would demonstrate that the part-time Director/Vice President and the two employees located in Japan would relieve the beneficiary from performing nonqualifying duties. Based on the record, the beneficiary performs the tasks 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Although the petitioner is a company that imports and sells Japanese art and antiques, the petitioner has not established who, if not the beneficiary, actually performs the day-to-day tasks of receiving the products and selling the products. The record does not establish that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

While not directly addressed in the decision of the director, the AAO notes that the petitioner failed to provide all of the requested documentation. Specifically, the petitioner did not provide information to demonstrate that the U.S. entity is doing business and did not submit copies of legible sales invoices in chronological order from January 1, 2002 to May 28, 2002. In general, the petitioner's statements about its business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) in that it is engaged in the regular, systematic, and continuous provision of goods and/or services by a qualifying organization. The petitioner stated "we were unable to receive any merchandise from Japan for nearly two months due to events of September 11." As the appeal will be dismissed, this issue will not be examined further.

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.

ORDER: The appeal is dismissed.