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

U.S. Citizenship and Immigration Services

D7

[redacted]

FILE: SRC 02 268 52064 Office: TEXAS SERVICE CENTER Date: AUG 16 2004

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: 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner claims to be engaged in the business of importing and distributing footwear to wholesalers, retailers, and to trading and distribution companies. It states that the beneficiary would be employed in an executive capacity and seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. On appeal, the petitioner disputes the director's conclusion and submits an appellate brief in support of its assertions.

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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) 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.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner stated that the beneficiary's primary responsibility would be to "establish the company" to ensure its success. The beneficiary would be required to travel back and forth from the United States, where the petitioner is located, to Colombia, where the foreign entity is located, "to keep command of the central operations of the parent company and the new U.S. subsidiary." The petitioner also provided an organizational chart listing a total of five employees, including the beneficiary. The chart indicated that the beneficiary's immediate subordinates include an accountant and the vice-president, and that the vice-president's subordinate would be a warehouse supervisor. The chart is unclear as to who supervises the sales representative.

In additional to the chart, the petitioner provided the following description of the beneficiary's duties:

> Directs and manages all aspects of both companies. He supervises the Vice-President, the Warehouse Supervisor, Sale[s] representative and the Accountant. In addition, he coordinates the imports of Footwear and supervises the distribution and coordinates sales

> distribution by establishing sales territories. He approves and maintains the budget and coordinates with the Accountant every aspect of the company to keep it up to date.

After reviewing the petitioner's record, the director issued two requests for additional evidence, one dated September 25, 2002, and another dated October 10, 2002. Both requests instructed the petitioner to further discuss the beneficiary's proposed duties under the extended petition and to indicate how the beneficiary would fit the definition of a manager or executive. The second request specifically instructed the petitioner to submit its W-2 forms, a tax return for 2001, as well as a list of the beneficiary's proposed duties accompanied by a percentage breakdown of time spent performing each duty.

In response to the initial request for evidence, the petitioner submitted a statement explaining that it is still in the start-up stage of development and therefore hired independent contractors instead of employees who would work directly for the company. The petitioner issued the following statement regarding the beneficiary's proposed duties:

> [The beneficiary] has executive control of the entire subsidiary, which consists of two essential functions: imports and sales. He will supervise and control the work of the warehouse supervisor who manages the warehouse and organizes the imports within the warehouse. The warehouse supervisor, Sheril Fraisier is planned to become a salaried employee next quarter. [The beneficiary] will also oversee the sales department. Although we only have one sales representative in this department, we will need to employ more sales representatives in the next phase of business now that we have our export center established and will need to move our imports to the market.

The petitioner added that the beneficiary has been in Colombia since July 2002 running the foreign entity while the vice-president oversees the setting up of business operations of the petitioning entity. In response to the second request for evidence, the petitioner indicated that the beneficiary works a total of 30 hours per week, which is broken up as follows: sixty percent of that time is spent supervising the vice-president and the secretary/sales coordinator; twenty-five percent of his time is spent overseeing imports from the foreign entity; and fifteen percent of his time is spent working with an accountant to approve and maintain the petitioner's budget. The petitioner also added the following explanation of the beneficiary's duties:

> Currently, [the beneficiary] supervises two employees but oversees all five workers of the U.S. subsidiary. This includes the delegation of duties that perpetuate business, spot-checking the work of subordinates, and making executive decisions in situations that are brought forth by the Vice-President and Secretary/Sales Coordinator. Due to his intimate connection with the parent company, [redacted] he also oversees the importation of imports from Colombia. Based on production levels of [the foreign entity] and sales analyses from the Vice-President, he decides how much to import to the U.S. and when to import. Also, [the beneficiary] makes decisions regarding the budget of the U.S. subsidiary. Based on the production levels and budgets of the parent company, along with information from the Vice-President and accountant for the U.S. subsidiary, [he] must make crucial decisions for the fledgling subsidiary . . . . [H]is duties are primarily concerned with the supervision of management employees and oversight and decision-making of the major functions of the company, such as importation and budgets; whereas other management, the Vice-President and Sales Coordinator, are concerned with the day to day functions of running the company.

On February 19, 2003 the director denied the petition noting that with a staff of only two employees the beneficiary would not be relieved from having to perform day-to-day business activities. The director also stated that the beneficiary would not be managing professional or managerial employees, and concluded that the petitioner failed to submit evidence that the beneficiary would be primarily performing qualifying duties.

On appeal, the petitioner asserts that the beneficiary fits the definition of a manager because the vice-president and secretary/sales coordinator, whom the beneficiary manages, are managerial and supervisory employees, respectively. While the organizational chart initially submitted indicates that the vice-president oversees a subordinate employee, the same is not true of the secretary/sales coordinator who has no subordinates. Therefore, it is unclear how this individual can be classified as a managerial or supervisory employee. Furthermore, in the initial description of the beneficiary's duties, the petitioner stated that in addition to the vice-president and sales representative, the beneficiary also supervises the warehouse supervisor. This claim is in direct conflict with the subsequent descriptions of the beneficiary's duties. 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 addition, despite the supervisory title of the warehouse supervisor, there is no indication that he either manages or supervises anyone. As such he cannot be deemed a managerial or supervisory employee. Nor is there any indication that this individual possesses the educational requirement to be deemed a professional employee. If, as claimed by the petitioner in the response to the second request for evidence, the beneficiary spends sixty percent of his time overseeing employees, the record indicates that a majority of the beneficiary's time is spent overseeing non-professional, non-managerial, and non-supervisory employees. Of the beneficiary's subordinates, only the vice-president can potentially be deemed as a supervisory employee. However, the petitioner has failed to provide specific details about the actual tasks the beneficiary would perform in managing that individual. 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 claims that the beneficiary does not need to engage in non-qualifying, day-to-day duties because there are other employees available to relieve him of such tasks. However, despite the petitioner's claim regarding the size of its staff, the record indicates that for the third quarter of 2002, during which the petition was filed, the only individual employed by the petitioner on a full-time basis was the vice-president. The secretary/sales coordinator, who was the only other employee named on the petitioner's quarterly report, worked only 20 hours per week. In addition, the petitioner's original organizational chart indicated that Sheril Fraisier was the petitioner's warehouse supervisor. In the second response to the request for evidence the petitioner referred to the same individual as a secretary/sales coordinator. These inconsistencies contribute to the overall confusion regarding the petitioner's staff and the tasks they perform. It is noted that 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. at 591.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The petitioner repeatedly states that it is in its initial stage of operation and predicts that it will progress beyond this stage. However, 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. As such, the director's suggestion, in the second request for additional evidence, that CIS may consider "granting [the petitioner] another year as a 'start-up company'" was erroneous and will hereby be withdrawn. In the instant matter, the petitioner failed to submit evidence to show that it has the sales and support staff to realistically allow the beneficiary to primarily focus on qualifying duties. 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).

Furthermore, 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). 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). In the instant case, even though the petitioner provided a number of descriptions of the beneficiary's job duties, none conveyed a clear understanding of what the beneficiary would be doing on a daily basis. Additionally, the petitioner consistently confuses the terms "manager" and "executive" by using those two terms interchangeably. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

While CIS does not dispute the degree of discretionary authority with which the beneficiary has been vested, the record does not establish that the beneficiary's duties have been and will be primarily of a managerial or executive nature. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he will be relieved from performing non-qualifying duties. As indicated above, the petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record lacks sufficient evidence to establish that the petitioner has a qualifying relationship with the claimed foreign entity as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). Specifically, in the initial petition, the petitioner claimed that it is a subsidiary of the foreign entity by virtue of the foreign entity's ownership of sixty percent of the petitioner's stock. However, stock certificate no. 1 indicates that the beneficiary, not the foreign entity, owns sixty percent of the petitioner's stock. The petitioner has neither reconciled, nor even acknowledged this considerable inconsistency. For this additional reason, this petition cannot 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.

ORDER: The appeal is dismissed.