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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, DC 20536

[redacted]

JAN 27 2004

File: LIN 01 088 53134 Office: NEBRASKA SERVICE CENTER Date:

ON RE: Petitioner:
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:

[redacted]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is engaged in exporting timber products and importing and exporting paneled "doorskins." It seeks to employ the beneficiary temporarily in the United States as its sales manager. The director determined that the petitioner had not established a qualifying relationship with the foreign entity. The director also determined that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity.

On appeal, counsel states that the director committed errors of law and abused his discretion in finding both the foreign entity and the United States entity were not within a qualifying relationship when the two companies are clearly affiliates under current law. Counsel further states that the director committed errors of law and abused his discretion in finding the petitioner's proposed job duties were of a sales position, rather than managing or directing the management of a function, department, subdivision, or component of the petitioning organization. Counsel argues that the director committed errors of law and abused his discretion in finding the beneficiary's duties abroad were not of a managerial nature, when sufficient evidence was submitted to the contrary.

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 regulations at 8 C.F.R. § 214.2(l)(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 first issue to be discussed in this proceeding is whether the petitioner and the foreign entities are qualifying organizations. The petition indicates that a subsidiary relationship exists between the U.S. and foreign entities as the foreign company, AMA Timbers Pty Ltd, owns 100 percent of the petitioning organization, AMA Timber Products Ltd. The petition also indicates that AMA Timbers Pty Ltd and Hume Doors & Timber (Aust) Pty Ltd (where the beneficiary is employed) are both owned by Clinker Holdings No. 22 Pty Ltd (Australia). Counsel states that Mr. [redacted] owns 100% of Clinker Holdings No. 22 Pty. Ltd and therefore has direct control of all of the above companies. Counsel further states that this direct control and ownership by Mr. [redacted] of both companies makes the two companies affiliates.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

> *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
>
> (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
>
> (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(I) state:

> *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(J) state:

> *Branch* means an operation division or office of the same organization housed in a different location.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(K) state:

> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns,

directly or indirectly, less than half of the entity, but in fact controls the entity.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, in pertinent part:

> *Affiliate* means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
>
> (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The record contains sufficient evidence to show that the outstanding shares of stock of AMA Timber Products Ltd. and Hume Doors & Timber (Aust) Pty Ltd are held by Clinker Holdings No. 22 Pty. Ltd.

The petitioner states that AMA Timbers Pty Ltd, owns 100 percent of the petitioning organization, AMA Timber Products Ltd. However, the petitioner has not submitted sufficient evidence such as stock certificates and stock ledgers to support this assertion. Therefore, a qualifying relationship between the U.S. entity and the AMA Timbers Pty Ltd has not been shown to exist. 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). For this reason, the petition may not be approved.

The next issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed in a primarily 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 petitioner describes the beneficiary's job duties as follows:

Mr. [redacted] current capacity and title in Hume Doors & Timber (Aust) Pty Ltd is **Manager (Major Projects Division)** for the last two years (and prior to that, he was Chief Estimator (Major Projects Division)). In this position he reports directly to me being the Manager/Director of Hume Doors & Timber (Aust) Pty Ltd.

The function of our Major Project Division is to handle all our Contract Business, Large Builders/Developers, Major Corporate Accounts in the State of New South Wales and recently Doorskin Manufacturers in Asia & New Zealand. Stocking distributors, retail yards, joinery shops, stores, small contractors using our products are served by other divisions.

> In the Contract business, we make lump sum bids to Contractors for doors and millwork on big size jobs. We are responsible for proper take off from architectural drawings, ensuring products meet specifications, submit bid proposal, negotiating with contractor, providing detail shop drawings, establishing job delivery schedule and do required follow up.
>
> In addition, the Major Project Division, is because of their special experience and knowledge, responsible for Detailing, Lay Out and Costing of all Special Architectural Doors for all departments.
>
> Mr. [redacted] has **direct managerial control** over 2 other Major Projects coordinators in his Division whose functions are to assist him in carrying out his duties outlined above. He is held responsible for the performance of his division and to meet a certain sales budget. He has the authority to select the appropriate coordinators to support and carry out his functions. (Emphasis in original)

The record indicates that the beneficiary supervised two subordinate employees abroad, an estimator and a chief estimator.

It is determined that record contains insufficient evidence to demonstrate that the beneficiary has been acting in a managerial or executive capacity abroad. The AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. Although counsel indicates that the beneficiary manages an essential function in his position abroad, insufficient evidence is submitted to support that contention. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner describes the beneficiary's prospective job duties in the United States as:

> Mr. [redacted] intended employment in the United States will initially be as Sales and Marketing Manager - Lumber Products & Moulded Doorskins for AMA Timber Products, Ltd (AMA) at Spanaway. WA, USA. His main tasks are to market and sell Australian moulded doorskins o United States and other overseas markets which is better serviced from a centralized location such as Spanaway, WA, USA.
>
> Some of Mr. [redacted] proposed duties and responsibilities include the supervision of marketing products to existing customers and also develop new

> market for moulded doorskins to door manufacturers in the United States and other overseas markets. He is required to make contact, quote and negotiate with existing and prospective customers by phone, fax, email or personal visits; to determine best shipping methods, routes and carriers; conduct follow up to ensure customer satisfaction and to handle claims and inspect material if so required. Mr [redacted] will be responsible for running and directing this department to achieve the sales and profitability objective. He has the authority to recruit additional staff and to make and recommend personnel changes as required for his department.
>
> Currently we have one person working for AMA US. He is Mr. [redacted] who is responsible for buying and exporting lumber products to Australia and Asian countries. The proposed organizational structure (a copy of the chart is attached) is to expand our business and marketing horizon to Australia, U.S. and Asia i.e., US & Canadian lumber products to Australia, Asia and other countries and Australian moulded doorskins to U.S. and overseas markets.

The organizational chart provided shows the president and CEO of the petitioner would be based in Australia while the beneficiary would work with Mr. [redacted] in a two person operation. Counsel's assertions concerning the managerial and executive nature of the beneficiary's future duties are not persuasive. The petitioner's description of the beneficiary's proposed job duties is not sufficient to warrant a finding of managerial or executive job duties. Even considering that the beneficiary would have authority to recruit additional staff and to make and recommend personnel changes, the petitioner has not shown that these actions would relieve him from performing non-qualifying duties. 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). The beneficiary would be an individual performing necessary tasks for the ongoing operation of the company, rather than primarily directing or managing those functions through the work of others. 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) (Emphasis in original). For this additional 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.

ORDER: The appeal is dismissed.