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

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 03 004 52468 Office: VERMONT SERVICE CENTER Date: JUL 12 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:

[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 Director, Vermont 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 the sole owner of the U.S. entity and states that the U.S. company is engaged in the business of importing and selling Indian silk fabrics. The petitioner states that the U.S. company was established in 2001 and now seeks authorization to employ the beneficiary temporarily as the executive manager of its U.S. company. The petitioner claims that the beneficiary would be employed in an executive position. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. On appeal, counsel disputes the director's findings and submits additional documentation.

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.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within 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 services in the United States.

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

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 provided the following description of the beneficiary's job duties:

Her duties are primarily concerned with all of [the petitioner's] and [the U.S. entity's] purchasing, [sic] marketing. This included, but is not limited to[,] directing and managing the marketing and purchase function, negotiating prices and quality with suppliers of raw materials, and any new purchase and supervising that the main purchaser of [the foreign entity] is always sufficiently stocked. [The beneficiary] is responsible for hiring, training and supervising of the employees of [the petitioner]. [The beneficiary] is further also supervising the Research and Development of new custom made ladies dresses. It is within this position, where the beneficiary gained extensive general business experience and knowledge within the area of management and control of an expanding business operation.

On October 15, 2002, CIS issued a request for additional evidence. The petitioner was asked to provide a specific description of the beneficiary's past and proposed duties with the U.S. subsidiary. The petitioner was also instructed to provide a description of duties of the U.S. company's only other employee.

The petitioner stated in the response that the beneficiary's subordinate is an assistant sales manager. The petitioner provided the following description of the beneficiary's duties:

> [The beneficiary] has been involved in the soliciting and acquiring the buisines [sic]. The appellant has authority to hire or fire any staff member. The appellant directs the whole staff about the systems and the style and conditions necessary for the work. The appellant makes arrangements for the finalization as a liaison arranging client meetings, suggesting the way of work and making arrangements for the work to be done.

The petitioner also provided the following additional list of the beneficiary's duties for the prior year:

1. Set up the company in the U.S.

2. The beneficiary hired one employee and is authorized to hire more employees and if require [sic] to fire any employee.

3. The beneficiary negotiates with the customers for import and export of yarn and fabrics, which are highly in demand in the US and prepares contracts and is authorized to execute these contracts.

4. The beneficiary is [sic] only person in [sic] US entity, coordinating among Indian parent organization.

5. The beneficiary is the only person responsible for setting up goals and drawing future plans for the US entity and was also responsible for achieving those targets.

6. The appellant directs the staff about the systems and the style and conditions necessary for executing the work.

The petitioner added the following statement:

> [The beneficiary] has discretion with regard to day to day functioning of US entity. The beneficiary has control over financial/banking matters and [sic] authorized to make and receive payments. The beneficiary also has authority over all sales/purchase matters and marketing of the US entity.

In regard to the duties of the U.S. subsidiary's other employee, the petitioner stated that she "only handles the office work, [sic] [she] has to keep in touch with customers, Attend telephone calls, collect payments, book-keeping, manage account receivable, payable [sic] etc."

The director denied the petition noting that having discretionary authority, in and of itself, is not a sufficient indicator that a beneficiary is employed in a managerial or executive capacity. The director determined that the petitioner failed to establish that the beneficiary is employed in a managerial or executive capacity.

On appeal, counsel claims that the beneficiary performs duties that "only a person with managerial capacity can perform." He also paraphrases the list of duties provided in response to the request for additional evidence, and adds that the beneficiary arranges for the final execution of contracts and maintains communication with clients by setting up meetings. While the descriptions of the beneficiary's duties suggest that the beneficiary has and continues to assume a significant role in expanding the U.S. company's business operation, the record is also replete with statements indicating that the beneficiary spends a majority of her time marketing for the U.S. company and soliciting clients. However, 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). As accurately determined by the director, the fact that the beneficiary has been vested with a high degree of discretionary authority does not outweigh the fact that she also performs most of the essential duties of the U.S. company. Although the petitioner claims that the beneficiary is now supervising three additional employees, the petitioner indicated in response to the request for additional evidence that the U.S. company had a total of two employees, including the beneficiary, at the time the petition was filed. 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). As such, the additional employees hired after the petition was filed are irrelevant in this instance and will not be considered in determining the beneficiary's eligibility for managerial or executive capacity.

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. At the time the petition was filed, the beneficiary was one of two employees. The U.S. company's only employee, other than the beneficiary, was performing primarily office clerical duties. The remaining duties, including marketing and sales, were performed by the beneficiary. Thus, the record indicates that a preponderance of the beneficiary's time is spent directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that the beneficiary has been relieved from performing non-qualifying duties. Although the petitioner indicates that the beneficiary has assumed an executive role within the U.S. company, the petitioner has not demonstrated that the U.S. company 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, it is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. Although the statute refers to an alien that seeks to enter the United States temporarily in order to render his or her services to "the same employer or a subsidiary or affiliate thereof," the phrase "same employer" refers to a "branch office" of a foreign entity that is authorized to do business in United States. The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office

of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed petitioner is a foreign entity with no branch office in the United States and no ownership interest in a U.S. entity, as in the present matter, there is no U.S. entity to employ the petitioner and accordingly no qualifying organization. *See* 8 C.F.R. 214.2(l)(1)(ii)(G)*(2)*.

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.