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U.S. Citizenship
and Immigration
Services

[redacted]

FILE: EAC 02 222 52841 Office: VERMONT SERVICE CENTER Date: JUN 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:

[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 is engaged in the transport of forestry and timber products for logging and sawmill industries. It seeks to employ the beneficiary as its secretary/treasurer, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary would not be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary's proposed position in the U.S. entity "primarily involves the management of several essential functions," and the beneficiary, therefore, qualifies for the classification sought. Counsel submits a brief and additional evidence in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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.
>
> (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; however, the work in the United States need not be the same work which the alien performed abroad.

The issue is whether the beneficiary has been employed abroad and would be employed in the United States 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-

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) 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;

(3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), if another employee or employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(4) 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-

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the petition for a nonimmigrant visa, dated June 20, 2002, the petitioner stated that the beneficiary's proposed job duties in the U.S. entity would be identical to those she has performed in the foreign company: managing all financial, accounting, personnel, and administrative functions, and overseeing all day-to-day affairs. The petitioner explained that the beneficiary would also plan and manage the company's capital investments, specifically with regard to replacing and purchasing new equipment. As the secretary/treasurer, the beneficiary would receive an annual salary of $10,000.

In a letter accompanying the petition, the president of the U.S. corporation stated that, similar to the position held in the foreign company, the beneficiary "will be the operational manager of all financial and administrative functions for the U.S. entity." The president also noted that the beneficiary's job duties would be "identical" to those performed in the parent company, and provided the following description of the beneficiary's job duties abroad:

> [The beneficiary] has been in charge of all financial, administrative, and personnel functions in the Corporation, and as such oversees the accounting and payroll of the Corporation, manages every aspect of the Corporation's daily operations, and selects and oversees capital investments and improvements. Her role with the Corporation is to function as the decisionmaker [sic] and supervisor for all administrative, personnel, and financial issues, from payroll through taxes, including the management of the complex permit and operational requirements for the trans-national shipment of forestry products throughout northeastern Canada and the U.S. [The beneficiary] is one of two directing agents . . . empowered under the By-laws of the Corporation to lend corporate funds and arrange loans, issue bonds and securities, pledge corporate asserts as securities, enter into mortgages, and delegate corporate authority. It is her responsibility under the By-laws . . . to manage and administer all of the Corporation's property, to maintain the Corporation's credit, enter into leases, purchase capital goods and manage capital expenditures, manage insurance and risk, administer debts and taxes, conform with governmental reporting requirements, manage corporate finances and accounts, supervise capital assets and real estate, appoint agents, interface with vendors and professional service providers, purchase equipment, and manage corporate records and reports.

The petitioner also submitted the beneficiary's resume, which outlined the same job responsibilities as those previously listed.

In a request for evidence, dated June 28, 2002, the director requested: (1) organizational charts for the foreign and U.S. entities; and (2) a breakdown of the beneficiary's and other foreign employees' job duties, including an allocation of time spent on each duty.

In response, the petitioner provided a job description for the beneficiary's duties abroad and her proposed U.S. duties, which is similar to that already stated above. The petitioner noted that the beneficiary would continue employment with the foreign company twenty hours per week, and would work in the U.S. entity for the remaining twenty hours per week. An organizational chart for the U.S. company identified the beneficiary as vice-president, subordinate to the president of the corporation. In addition, the chart reflected one direct subordinate of the beneficiary, a "chief driver," and two additional drivers, who report to the chief driver. The petitioner also provided a brief description of the responsibilities of each of the employees.

In a decision dated July 26, 2002, the director noted that because the beneficiary would be responsible for managing every aspect of the corporation's daily operation, the beneficiary would not be directing others in the company. The director also concluded that the beneficiary would not be supervising the drivers subordinate to her on a daily basis, as the drivers would likely be outside the office for the majority of the day. Additionally, the director stated that even if the beneficiary would be supervising the drivers, the petitioner did not establish that they are managerial or professional employees. The director consequently concluded that the beneficiary would not be employed in the United States in a primarily managerial or executive capacity. As these same job responsibilities relate to the beneficiary's position in the foreign company, the director also determined that the beneficiary was not employed in the foreign entity as a manager or executive.

On appeal, counsel asserts that the beneficiary's position in the United States "primarily involves the management of an essential function of the Petitioner company." Counsel contends that the record supports a finding that the beneficiary "directs" the activities of the truck drivers employed in the U.S. and foreign

companies, and "arranges" the transportation of forest products. Counsel states "[a]t first glance[,] this job would appear to be one of the [beneficiary] performing as opposed to managing various essential company functions; such functions being the financial, accounting, personnel and administrative functions." Counsel refers to an unpublished AAO decision, in which the sole employee of a scrap metal company was found to be a functional manager, and contends that the present matter "can be successfully analogized" to the unpublished matter. Additionally, counsel asserts that case law "dictates that small companies that plan to expand, such as [the petitioning company], must be given some leeway as to a manager's duties." Counsel cites a second unpublished decision as stating "in light of [the] petitioner's reasonable needs and stage of development at time of petition filing, the beneficiary operated at a senior level with respect to the function managed." Counsel also submits the previously provided job descriptions of the beneficiary.

On review, the record does not support a finding that the beneficiary has been employed in the foreign company or will be employed in the U.S. entity in a primarily managerial or executive capacity.

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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

While the petitioner provided a detailed outline of the duties performed by the beneficiary in the foreign company, the description fails to establish the beneficiary's position as "managing" an essential function of the company, rather than performing the function. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial.

In the present matter, the petitioner has not specifically identified how the beneficiary's job duties amount to "managing" an essential function. Rather, it appears that the beneficiary is actually performing many functions that contribute to the daily operation of the business, and may be deemed non-managerial and non-executive functions. The petitioner asserted that the beneficiary manages the financial, administrative, and personnel functions of the foreign company, including overseeing accounting, payroll, corporate taxes, and purchasing. The petitioner also stated that the beneficiary, in her role as decision-maker and supervisor, manages the corporation's daily operations. It is reasonable, however, to conclude that the beneficiary has been and will be "performing" the foreign and U.S. companies' day-to-day financial, administrative, and personnel functions. Specifically, the petitioner has not accounted for the performance of these functions by any individuals employed by the petitioner, or by any outside sources or agencies, which the beneficiary would manage and oversee. Without additional evidence, the AAO may assume that the beneficiary performs the payroll, bookkeeping, scheduling, and administrative functions of both organizations. 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).

Additionally, as referenced above, whether the beneficiary is an "activity" or "function" manager depends in part on whether the petitioner has sustained its burden of proving the beneficiary's duties are "primarily" managerial. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner identifies the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them, even though requested by the director. This failure of documentation is important because several of the beneficiary's daily tasks, such as purchasing equipment, monitoring customer orders, arranging loans, and entering into mortgages do not fall directly under traditional managerial duties as defined in the statute. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel also asserts on appeal that this matter "can be successfully analogized" to an unpublished AAO decision in which the AAO concluded that the president and sole employee of a scrap metal company was employed in a primarily managerial or executive capacity. However, counsel has furnished no explanation or evidence to establish that the facts of the instant petition are analogous to those in the AAO decision. More importantly, counsel has failed to recognize that in the unpublished decision the AAO concluded that the beneficiary did not perform any non-managerial tasks, whereas here, the beneficiary is performing non-managerial job duties. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all Citizenship and Immigration Services (CIS) employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel refers to an additional unpublished AAO decision on appeal, and notes that administrative case law dictates that in the case of a small company, "some leeway" must be given to a manager's duties. Counsel further provides that in this unpublished matter, the AAO, considering the petitioner's reasonable needs and stage of development at the time of filing the petition, concluded that the beneficiary operated at a senior level with respect to the function managed. Counsel's claim is not supported by the record as counsel has not provided a copy of the AAO's decision. Again, the assertions of counsel do not constitute evidence. *Id.* Also, as noted above, unpublished AAO decisions are not binding on CIS employees in the administration of the Act.

Based on the evidence provided, the beneficiary may not be deemed to be functioning in a primarily managerial or executive capacity, and specifically as a functional manager, in the foreign or U.S. companies.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.