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U.S. Citizenship and Immigration Services

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[redacted]

NOV 23 2004

FILE: WAC 02 142 50116 Office: CALIFORNIA SERVICE CENTER Date:

IN 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)

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 Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its general manager as a nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that is operating as an import company. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Jalandhar, India. The petitioner now seeks to employ the beneficiary for three years.

The director determined that the evidence submitted with the petition is insufficient to demonstrate that the beneficiary will function in a managerial or executive capacity. Therefore, the director determined that the beneficiary will not be employed primarily in a qualifying executive or managerial capacity.

On appeal, counsel states that the petitioner has submitted "very persuasive" documents pertaining to the parent company and the U.S. company. Counsel asserts that the beneficiary is employed in a managerial and executive capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act 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.

The only issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties.

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.

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). In this instance, in a letter attached to the petition, the petitioner stated that the beneficiary is the general manager of the U.S. company. The petitioner stated that the beneficiary is:

[a]ctively involved in the planning, organizing, controlling, and coordinating the operations of U.S operations. He negotiates the sales contracts for imports, in addition to arranging the appropriate import/export license and L/C's (letter of Credits). He is responsible for all financial aspects for the US Company, funding for the new operation to maximize returns on investments, and to increase productivity.

On June 3, 2002, the director requested additional evidence including the following:

- U.S. Business Organizational Chart: Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current names of all executives, managers, supervisors, and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, annual salaries/wages (in U.S. Dollar equivalents) and immigration

> status . . . . for all employees under the beneficiary's supervision. Finally, explain the source of remuneration for all employees and explain if the employees are on salary, wage or paid commission.

The director also requested a list of all employees as well as copies of major sales invoices.

On August 23, 2002, the petitioner responded to the director's request for evidence. The petitioner did not provide an organizational chart or a list of employees. In response, counsel for the petitioner explained

> due to the adverse market conditions and the ensuing recession and the beneficiary has not been in a position to hire staff pertaining to the United States Business as earlier represented. The beneficiary is currently conducting a solo business and is waiting for an upturn in the market. Currently this is the phenomenon in the most [sic] of the businesses in the United States and the industry feels optimistic for economic recovery.

On October 23, 2002, the director issued a decision denying the petition. The director noted that CIS requested the petitioner to submit additional information to establish eligibility of the benefit sought. Though the petitioner responded to the requested information, the director noted that the petitioner failed to submit the U.S. organizational chart and rendered a decision according to the record. The director also reviewed the submitted evidence to determine if the beneficiary was employed in an executive capacity, though the petitioner only asserted that the beneficiary was employed in a managerial capacity. The director stated that the petitioner had provided no comprehensive description of the beneficiary's activities that show that the beneficiary will be primarily engaged in managing or directing the management of a function, department, subdivision or component of the company. The director notes that the petitioner has one employee. Furthermore, the director determined there is no indication that the beneficiary will exercise significant authority over generalized policy or that the beneficiary's duties will be primarily managerial or executive in nature.

On appeal, counsel for the petitioner states that the beneficiary "does work as a [m]anager and in [e]xecutive capacity." Counsel explains "[I]t is well known in commercial and business circles that there has been a massive commercial downturn through out [sic] US [sic] and is more so prominent especially on the East and West Coast." Counsel further explains "the [b]eneficiary has not been able to hire personnel for different functions as had been envisaged [sic] earlier when filing the instant petition. . . . It has become necessary that the beneficiary take care of the entire portfolio all by himself." Furthermore, counsel confuses the issue by stating in the closing paragraph "[t]he petitioner has sufficiently established, in view of the totality of the position of Marketing Analyst qualifies as a specialty occupation . . ."

Because counsel asserts that the beneficiary will be employed in both a managerial and executive capacity, the 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. Counsel asserts "[i]n so far as, the definition of [m]anagerial capacity pursuant to 8 C.F.R. §214.2(1) (ii)(B) is concerned, the [b]eneficiary does exercise this discretion for day-to-day operations and overall manages the entire enterprise." Counsel also asserts that the beneficiary is working in an executive

capacity and does exercise wide latitude in decision-making and does establish the goals of the targets and policies for the U.S. entity and is accountable for decisions only to the board of the parent company.

In reviewing the record, the petitioner has not sufficiently described the day-to-day responsibilities of the beneficiary in order for the AAO determine whether the beneficiary's position is primarily executive and managerial. The petitioner did not provide an organizational chart or a list of employees. 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). Counsel explained that the beneficiary is the single employee and therefore the petitioner did not have an organizational chart to submit. Counsel asserts that the beneficiary is working in a managerial and executive capacity. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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. The petitioner indicates that it plans to hire additional employees when the business is able to support them. 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Counsel admits the beneficiary is the single employee therefore the beneficiary does not supervise and control the work of other supervisory, professional or managerial employees pursuant to Section 101(a)(44)(A)((2)) of the Act. Based on the record of the proceeding, the beneficiary is primarily engaged in producing the product or providing the services of the petitioner. The beneficiary is the one managing the orders and deliveries. 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).

Based on the record of proceeding, the petitioner provided insufficient evidence to determine whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy. Further, the petitioner's evidence is not persuasive in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or

supervisory personnel who relieve him from performing non-qualifying duties. Based on the evidence submitted, it cannot be found that the beneficiary will be employed in a primarily executive or managerial capacity.

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.