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

U.S. Citizenship and Immigration Services

[redacted]

File: SRC 02 273 53777 Office: TEXAS SERVICE CENTER Date:

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)

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, 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 filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 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 Texas that is engaged in the import of specialty foodstuff. The U.S. petitioner claims that it is the affiliate of Unique Exports, located in Mumbai, India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary, as president of the U.S. entity, manages and directs the U.S. entity, and therefore performs executive and managerial duties. In support of this assertion, the counsel submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 management or executive capacity; and

(e) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the beneficiary has been and will continue to be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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

Consequently, the director concluded that the beneficiary was not acting primarily in a managerial or executive capacity as contemplated by the regulations.

On appeal, counsel for the petitioner asserts that the beneficiary, as president of the U.S. entity, was in fact "direct[ing] the activities and management of the entire organization and was supervis[ing] the other supervisory, professional, and managerial employees." Additionally, counsel focuses on the financial success of the U.S. entity during its first year of business, and asserts that such success is directly attributable to the beneficiary's capable leadership and his executive capabilities. Finally, counsel alleges that the beneficiary manages and directs the entire operations of the U.S. entity and is responsible for developing its market base, thereby establishing the beneficiary's eligibility under the regulatory definitions.

Upon review, counsel's assertions are not persuasive. 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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Prior to adjudication, the petitioner failed to clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Specifically, counsel for the petitioner repeatedly alleged that the beneficiary was functioning "in an executive *and* managerial capacity." (Emphasis added). A beneficiary, however, 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. Although counsel for the petitioner claims for the first time on appeal that the beneficiary has been and will continue to be employed in a primarily *executive* capacity, the AAO will examine the beneficiary's qualifications under both sections of the Act.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity for several reasons. First, 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). In the initial petition, counsel provided a detailed description of the beneficiary's duties, which included "studying the local markets," "sourcing and purchasing the products," and "supply of products and all issues relating to pricing and terms of payment." On appeal, counsel alleges that the beneficiary "directly controls the banking, finance, and product purchase and supply operations," and that it is the beneficiary's responsibility to "negotiate distributorship arrangements." Additionally, in a letter dated February 6, 2003 from the U.S. entity's newly-appointed general manager, it is alleged that the beneficiary also "ensur[es] that all US government approvals (FDS, Custom's [sic]) are obtained and all laws and regulations are strictly

observed." Furthermore, he reiterates that the beneficiary is responsible for the sourcing and purchasing of products as well as for studying the market conditions.

Finally, the general manager also provides a breakdown of the percentage of time that the beneficiary spends performing each identified duty. The breakdown provided is as follows:

Duties	Hours/Week
Analysis of the US market and building the company's market base. Developing mutually beneficial business relationships	10
Development of policies and strategies, including budgeting, finance, allocation of funds, authorization of expenditure, banking etc.	5
Sales and marketing activities, including entering into contracts and distributorship agreements, overseeing orders and their timely delivery, building business relationships with new and existing customers, setting sales targets, implementing marketing strategies, for the company etc.	15
Introduction of new products and developing new sources of supply	2
Supervising and directing the activities of all the employees	5
Liaising and coordinating with the affiliate office in India	3

A review of the beneficiary's duties indicates that he is not performing primarily managerial or executive tasks. The majority of the identified duties appear to be essential to the provision of the services of the U.S. entity, and not primarily managerial or executive in nature. The breakdown of time the beneficiary spends performing each task indicates that the majority of his time each week is devoted to sales and marketing functions (15 hours) and market analysis (10 hours). Only 5 hours per week are devoted to supervising employees. The beneficiary's duties, therefore, establish that he is actively participating in various day-to-day activities of the company as opposed to acting primarily in a managerial or executive capacity. The actual duties themselves reveal the true nature of the employment. *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).

Second, in further support of the assertion that the beneficiary is acting primarily as a manager or executive, counsel alleges in his appellate brief that the beneficiary supervised and will continue to supervise employees that are supervisory, professional, and managerial. In support of this contention, counsel provided an updated organizational chart for the U.S. entity on appeal, demonstrating that it employed a total of six persons, including the beneficiary. The employees' positions are described as follows:

1. Manager and Sales Coordinator
2. Sales and Warehouse Supervisor
3. Office Assistant
4. FDA, Customs, and AQI Documentation (in charge of obtaining necessary government permissions and completion of import and export documentation)
5. Accountant (on retainer)

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

There are several problems with counsel's assertion that the beneficiary supervises "supervisory, professional, or managerial employees." First, it is unclear how the identified employees are "supervisory, professional, or managerial" as set forth in the regulatory definitions. According to the organizational chart, there are no other subordinate employees working below those employees identified above. There is no evidence, therefore, that these employees are supervising or managing other employees within the company. In addition, the petitioner has not established that an advanced degree is actually necessary, for example, to perform the secretarial and administrative functions of the office assistant or the general work of the sales and warehouse supervisor, who are among the beneficiary's subordinates.[1]

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[1] Although counsel states that the petitioner has contractual employees in the area of accounting, the petitioner has neither presented evidence to document the existence of this employee nor identified the services this individual provides. Additionally, the petitioner has not explained how the services of the contracted employee obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Second, the record indicates that the beneficiary only spends five hours per week supervising and directing the activities of all employees. While counsel alleges on appeal that the beneficiary qualifies as a manager or executive due to his supervisory functions, he is not devoting a significant portion of his time to such activities. In fact, although the organizational chart confirms that there are two other employees working in sales, the record indicates that the majority of the beneficiary's time is devoted to sales and marketing activities. The record does not establish, therefore, that the beneficiary will be primarily supervising professional employees.

The payroll records submitted by the petitioner indicate that the only other employee working for the U.S. entity when the beneficiary began his assignment as President in October of 2001 was the Office Assistant. The payroll records for this employee, however, end abruptly in April of 2002, which leads to questions with regard to the current status of his employment. Aside from counsel's assertions, the record contains no evidence whatsoever that the U.S. entity has employed an Accountant or a Manager and Sales Consultant. 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).

Consequently, the sporadic payroll records raise additional issues that are not resolved by the evidence contained in the record of proceeding. If the payroll records are accurate, the beneficiary had only one subordinate employee for two-thirds of his first year of employment with the U.S. entity. This documentation, therefore, further devalues counsel's allegation that the beneficiary has satisfied the regulatory requirement of executive or manager because he supervises professional employees.[2] The lack of subordinate employees at the conclusion of the first year of operations necessitates a finding that the beneficiary will be performing the majority of the day-to-day tasks, such as the sales functions, of the organization himself. Consequently, it is impossible to conclude that the beneficiary was acting primarily in a managerial or executive capacity during the past year.

The regulation at 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 Citizenship and Immigration Services (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.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the appeal will be dismissed.

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[2] 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).

Beyond the decision of the director, the minimal documentation of the parent company's and the petitioner's ownership composition raises the issue of whether there is a qualifying relationship between and U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). First, the only evidence in the record pertaining to the ownership of the U.S. entity is a copy of the entity's By-Laws and an undated share certificate indicating that the beneficiary owns 100% of the U.S. entity. There is no supporting documentation to confirm the number of shares authorized by the U.S. entity, such as a copy of the Articles of Incorporation, nor is there documentation to validate the share certificate, such as a stock ledger. 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 additional reason, the appeal will be dismissed.

A remaining issue not examined by the director is whether the petitioner has established that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this matter, the record indicates that the beneficiary is the majority shareholder of the parent organization, and the sole owner of the U.S. entity. On the petition, the petitioner indicated that the beneficiary's services would be required for two years. No evidence of the claim was provided. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of the position in the United States. Therefore, the petition may not be approved on this basis as well.

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.