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U.S. Citizenship and Immigration Services

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[redacted]

FEB 23 2005

File: EAC 03 198 53590 Office: VERMONT 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, 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 filed this nonimmigrant petition seeking to extend the employment of its executive manager 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 New Jersey that is engaged in the import and wholesale of coconut fiber products. The petitioner claims that it is the subsidiary of Shamini Fibre Industries (Pvt.) Ltd. located in Wennappuwa, Sri Lanka. The beneficiary has served as the petitioner's executive manager in L-1A status since December 2000 and the petitioner now seeks to extend the beneficiary's stay for an additional three years.

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

The petitioner subsequently filed an appeal in response to the denial. 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 disputes the director's findings and contends that the beneficiary performs only managerial and executive duties. In support of this assertion, 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 issue in the present matter is whether the beneficiary will 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 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), defines the term "executive capacity" as 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 the initial petition on Form I-129, the petitioner described the beneficiary's job duties as follows:

> The beneficiary is taking care of all kinds of marketing, sales, purchase of the company. The beneficiary is fetching business. The beneficiary has already arranged staff and hired staff. The beneficiary is hiring temporary workers also for expansion of the business.

In a June 17, 2003 letter appended to the petition, counsel for the petitioner described the beneficiary's responsibilities as follows:

> The beneficiary has hired three employees for sales, purchases and making arrangements for shipping of the products. . . . The beneficiary is managing as Executive Manager since the start of [the foreign entity] and is controlling the business. . . The beneficiary is supervising hiring of senior level personnel for the various departments to establish [the petitioner] as a working business entity. The beneficiary is spending time every week soliciting buyers by giving them presentation etc[.] along with sales and marketing officers and staff.
>
> US subsidiary has already hired following staff:
>
> 1) One Part time General Administration and Personal Manager:
> 2) One Marketing Manager:
> 3) Accounting and bookkeeping: The CPA is taking care of accounts and taxation matters and CPA and [sic] is paid $500 per month.
>
> * * *
>
> The [b]eneficiary will be required to run the day-to-day management, marketing, and administration as well as client negotiation for the wholly owned subsidiary. . . .

On July 8, 2003, the director requested additional evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director requested: (1) an organizational chart for the United States entity demonstrating that the beneficiary will function at a senior level within the organizational hierarchy; (2) evidence that he will supervise a subordinate staff of professional, managerial or supervisory personnel, including complete position descriptions and educational credentials of all of the beneficiary's subordinates in the United States; and (3) a breakdown of the number of hours devoted to the employees' job duties on a weekly basis.

In response, the petitioner submitted a description of the beneficiary's duties, a list of the beneficiary's proposed subordinates in the United States in which the petitioner briefly discussed their job duties and credentials, and an organizational chart depicting the structure of the U.S. entity. In a letter dated July 28, 2003, counsel for the petitioner provided the following description of the beneficiary's job duties:

> [T]he beneficiary has been involved in the soliciting and acquiring the buisiness [sic]. . . The beneficiary has, because of the growth of the company, been relieved from performing the non-managerial, day-to-day operations involved in running the enterprise. The duties of the beneficiary are primarily concerned with all of [the petitioner's] Marketing. It is within this

position, whether the beneficiary has experience his day to day functioning is in the area of expanding business operations. The position is an "Executive Position" with the Beneficiary keeping the other partners in [redacted] informed of the developments in the Beneficiary's area of operations. . . .

1. The beneficiary hired all employees and is authorized to hire more employees.
2. The beneficiary negotiates with the customers and prepares contracts and is authorized to execute these contracts.
3. The beneficiary is responsible for hiring sub-contractors in order to execute the contracts on time.
4. The beneficiary is the only person in [the] US entity, coordinating among Sri Lankan parent organization, customer companies from [redacted]
5. The beneficiary is the only person responsible for setting up goals and drawing future plans for the US entity and is also responsible for achieving those targets
6. 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 finishing the work.
7. The appellant makes arrangements for the finalization of contracts with the parties as well as working as a liaison arranging client meetings, suggesting the way of work and making arrangements for the work to be done.

With respect to the petitioner's staffing, counsel indicated that the petitioner employs the beneficiary as chief executive officer/general administration and personnel manager; an employee who serves as both secretary and inventory controller who performs secretarial and stock control duties; a marketing manager who is responsible for business development and promotional work; and a quality controller.

On August 1, 2003, the director denied the petition concluding that the beneficiary would not be employed in a primarily managerial or executive capacity under the extended petition. The director noted that the beneficiary's subordinate staff does not include managerial, supervisory or professional employees who would relieve him from performing the services of the corporation. Rather, the director concluded that it appeared that the beneficiary would be primarily engaged in the non-managerial day-to-day operations of the company.

On appeal, counsel for the petitioner asserts that the beneficiary is employed in a managerial and executive capacity and is relieved from performing the non-managerial duties by his subordinate staff, which includes a Secretary/Assistant Manager, Administrative Manager and a Marketing and Sales Agent. Counsel further contends that the number of employees supervised is not determinative when reviewing managerial and executive capacity.

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.* In this case the petitioner contends that the beneficiary is engaged in both managerial duties under section 101(a)(44)(A) of the Act, and executive duties under section 101(a)(44)(B) of the Act. A beneficiary 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 capacity and the statutory definition for managerial capacity if it is representing the beneficiary is both an executive and a manager. Although counsel states that the beneficiary qualifies for an extension of status as both an executive and a manager, the record contains no additional independent evidence or explanation establishing that the beneficiary is truly working in either qualifying capacity. Merely claiming that the beneficiary is a manager or an executive is insufficient to establish eligibility. Counsel's statements on appeal are likewise unsupported by independent evidence. 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).

Further, 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).

Upon review of the record, the petitioner has provided no comprehensive description of the beneficiary's duties that conveys what tasks he actually performs on a daily basis. For example, the petitioner states that the beneficiary is "taking care of all kinds of marketing, sales, purchase of the company," "fetching business," and is "primarily concerned with all of [the petitioner's] marketing." The petitioner has not, however, clarified who actually performs the company's marketing, sales and purchasing activities. The petitioner described the beneficiary as "directing the staff about systems and style and conditions necessary for finishing the work," "suggesting the way of work," "arranging for the work to be done," "setting up goals," and "hiring senior level personnel for various departments," but did not define the beneficiary's goals, describe the company's systems or methods, explain what duties are involved in "arranging" completion of work, or specify the departments overseen by the beneficiary. 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner describes the beneficiary as being responsible for personally arranging client meetings, being primarily concerned with marketing, coordinating fulfillment of orders with the parent company and "fetching business." The petitioner has not, however, explained how these duties can be considered managerial or executive. Since the beneficiary actually solicits sales, arranges order fulfillment with the parent company, negotiates contracts and markets the petitioner's products, he is performing tasks

necessary to provide a service or product and these duties will not be considered managerial or executive in nature. 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).

While the AAO recognizes that the beneficiary exercises discretionary authority over the U.S. operation and performs some qualifying duties, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of providing that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. 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's description of the beneficiary's duties includes both managerial and administrative or operational tasks, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because, as noted above, several of the beneficiary's daily tasks, such as negotiating contracts, arranging client meetings, and performing marketing duties, do not fall under traditional managerial duties as defined in the statute. For this reason the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101 (a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular or continuous manner. *See, e.g. Systronics Corp. v. INS,* 153, F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In this case, he petitioner has provided inconsistent statements regarding its employees and their job functions.

At the time of filing, the petitioner was an almost three-year-old import and wholesale company that claimed to have gross annual income in excess of $800,000. In a June 17, 2003 letter, the petitioner claimed to have three employees, the beneficiary as executive manager, a part-time general administration and "personal" manager, and a marketing manager, as well as a contracted part-time accountant. In a letter dated July 28, 2003, counsel claimed that the petitioner employed the beneficiary as both chief executive officer and general administration/personnel manager, a secretary/inventory controller, a marketing manager and a quality controller. In his appeal brief dated August 18, 2003, counsel claims that the petitioner employs the beneficiary, a secretary/assistant manager, an administrative manager and a marketing and sales agent. The record contains no documentary evidence to establish whom the petitioner actually employed at the time of filing, what their job titles and duties were, or whether they were employed on a full-time or part-time basis. 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). Although the petitioner provided an organizational chart in response to the director's request for evidence, there is no explanation for the inconsistent statements made regarding the number of employees

and their position titles. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Based on the above, it is impossible to conclude that the petitioner's needs are reasonably met by the services of the beneficiary as president and two to three additional employees whose roles have not been adequately or consistently described. Further, to establish that the reasonable needs of the organizational justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-qualifying sales and marketing duties as discussed above. 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). Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Finally, although counsel for the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) 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. Although the petitioner has submitted copies of educational qualifications for some of its claimed employees, none of them appear to hold the equivalent of a bachelor's degree. More importantly, the petitioner has not established that a bachelor's degree is actually necessary, for example, to perform the clerical work of the office secretary, who is among the beneficiary's subordinates. In addition, as noted above, the petitioner has also failed to provide a consistent account of the number of employees the beneficiary supervises or their roles within the organization. Without this information, the AAO cannot determine

whether any of the beneficiary's subordinates would be considered professionals, supervisors or managers as contemplated by section 101(a)(44)(A)(ii) of the Act.

The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. 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). The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach 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. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that he operates at a senior level within an organizational hierarchy. 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.

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.