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U.S. Citizenship
and Immigration
Services

DA



FILE: LIN 04 046 52241

Office: NEBRASKA SERVICE CENTER

Date: MAY 11 2005

IN RE: Petitioner:
Beneficiary:



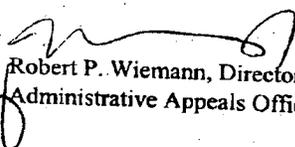
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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

According to the documentary evidence contained in the record, the petitioner was established in 2001 and claims to be in the business of importing and exporting software and electronic goods. The petitioner claims to be a subsidiary of Softnet [REDACTED] located in New Delhi, India. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as the chief executive officer of its Indiana office for three years, at an annual salary of \$43,900.00. The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The beneficiary was initially granted a one-year period of its stay to open a new office in the United States and was subsequently granted a one-year extension of status and the petitioner now seeks to extend the beneficiary's stay for an additional three year period.

On appeal, counsel disagrees with the director's decision and asserts that the evidence is sufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

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 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 (1)(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 with 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 this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity 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—

- (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 a November 25, 2003 letter submitted with the initial petition, the petitioner described the beneficiary's duties as:

Serves as Chief Executive Officer. ...[The beneficiary] continues to perform many of the duties he held during his service with the parent company in India. More specifically, in addition to overall direction of the company, he will be responsible for leading the provision of:

1. Marketing: Advertising in magazines, the Internet and at exhibitions; location of prospective customers; arrangement of demonstrations for customers; finalizing product specifications; submitting quotations to customers; negotiating prices with customers; pursuing customers until an order is placed; tracking the design team for timely execution of the job as per specifications.
2. Product Development and Engineering: Preparation of the system design chart at the subsystem level; deciding which Sub-modules are to be developed in India by Softnet, by the in-house team in the U.S. at [the petitioner], or by subcontractors; assigning each subsystem to a team with clear specifications and protocol for integration; preparation of PERT chart and monitoring of progress as per the time schedule; keeping the entire organization current with the latest in technological developments.
3. Interaction with subcontractors: Minimize costs by selecting competitive and appropriate Sub-contractors; negotiation with Sub-contractors for the best prices; monitoring the progress for timely execution of projects.
4. Finance Management: Preparation of the budget; negotiation with customers for advance payment or stage-wise payment; maintenance of sufficient reserves for smooth business operation; collection of payments from customers on completion of projects; monitoring of expenses; monitoring of the cash flow.
5. Overall Management: Supervise the day-to-day activities of the company; arrange basic infrastructure and facilities for smooth operation of the company; recruit personnel as per requirements; supervise the management of the company; arrange the requisite insurance coverage to ensure there are no legal liabilities; ensure proper documentation as required by law; interact with appropriate government officials.
6. Personnel Management: In addition to the Executive duties held by [the beneficiary], he is also expected to directly supervise the activities of Dr. [REDACTED] who handles Pharmaceutical matters for [the petitioner]. This professional position is crucial to the organization, as a major client is a pharmaceutical developer and manufacturer, requiring computer validation of various pharmaceutical functions. Due to the nature of the types of business engaged in, [the beneficiary] also spends a great deal of time supervising and coordinating the activities of [the petitioner's] Sub-contractors.

In a letter, dated April 1, 2003, the petitioner described Dr. [REDACTED] job duties as: "Your primary responsibility will be to ascertain requirement of computer validation in Pharmaceutical industry and develop appropriate Implementation plans for customers. The main thrust is to be given on project management of pharmaceutical computer validation."

The petitioner submitted as evidence a copy of the U.S. entity's Quarterly Wage and Withholding Report for the quarters ending December 31, 2002, and March 31, 2003. The petitioner also submitted copies of the U.S. entity's IRS Form 941, Employer's Quarterly Federal Tax Return for the quarter ending March 31, 2003, and pay stub detail evidencing the beneficiary's employment for the months of January, February, and March of 2003. The petitioner submitted copies of a purchase order, dated July 9, 2003, for consultation services for a

two-year period in the amount of \$200,000, and a purchase order, dated October 2, 2003, for the purchase of computer supplies in the amount of \$1,772,800. The petitioner also submitted a copy of a degree certificate in engineering issued to the beneficiary, and company bank statements.

The director stated in the request for evidence, dated December 11, 2003, that the documentation submitted by the petitioner was not sufficient to warrant a favorable consideration of the petition, and subsequently requested the petitioner submit evidence demonstrating the beneficiary's managerial or executive capacity as dictated by the regulations. The director further requested that the petitioner:

Submit evidence to establish that the beneficiary qualifies under all four criteria stated above for either a Manager or Executive. Submit a statement signed by an authorized official of the prospective employer describing the alien's employment for one continuous year abroad within the three years immediately preceding the filing of this petition, or if the alien is already in the U.S., immediately preceding his/her entry as a nonimmigrant, and describing the intended employment in the U.S. (Emphasis in original.) The statement should include information concerning the dates of employment, job titles, specific job duties, [and] types of employees supervised, if any, level of authority, and title and level of authority of the alien's immediate supervisor....

Also submit an organizational chart showing the alien's current and proposed positions in relation to others in the company.

In response to the director's request for evidence on the subject, counsel for the petitioner stated that the beneficiary's position with the U.S. entity would be that of executive. Counsel also stated that the beneficiary met all requirements as an executive in that he directs the overall operation of the company and has final say over matters including the "provision of computer validation of various pharmaceutical functions for a major international pharmaceutical company," and "the importation of parts plastic, sheet metal and casting to the USA and Canada." Counsel asserted that the subordinate, Dr. [REDACTED] conducts and directs the functions of the organization and reports directly to the beneficiary. Counsel also asserted that the beneficiary was responsible for negotiating agreements for company services and provides overall guidance to Dr. [REDACTED] in carrying them out. Counsel noted that the U.S. entity received three major consulting contracts for which the beneficiary possesses the authority to negotiate, secure, and monitor the progress of. Counsel stated, "[the beneficiary] has responsibility for negotiation with...subcontractors, cost minimization in agreements and production, and responsibility for timely execution of projects and deliveries." Counsel noted that as the majority of the petitioner's business consists of the importation of subcontract parts and materials and the provision of verification and information solutions, it has no need for large production facilities or a large staff.

Counsel asserted that the beneficiary established the goals and policies of the U.S. entity in that he has authority over contract negotiations and major business decisions of the company. Counsel also asserted that the beneficiary exercises wide latitude in discretionary decision-making regarding the negotiation and execution of contracts, production choices, use of subcontractors, assignment or use of personnel, and business service choices. Counsel further asserted that the beneficiary receives only general supervision or direction from the president of the U.S. entity and holds direct responsibility for directing interactions with customers and suppliers, including negotiations and leading the provision of services.

The petitioner submitted as evidence a copy of the U.S. entity organizational chart, which depicted Jawahar Gidvani as president, the beneficiary as CEO, and Dr. [REDACTED] as Pharmacologist. It was demonstrated in the chart that the beneficiary was responsible for the "identification of new customers, preparation of project reports, negotiation with customers, supervision of installation of software, interaction with Indian/Chinese customers, management of finances, and all administrative responsibilities." The petitioner also submitted a copy of an invoice, dated December 1, 2003, for the development of custom software in the amount of \$50,000; a copy of the U.S. entity's IRS Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 2002; and bank statements from the National City Bank of Indiana.

The director subsequently denied the petition. The director determined that the evidence submitted was not sufficient to establish that the beneficiary would be employed in a managerial or executive capacity. The director stated that the petitioner had failed to demonstrate that the beneficiary would be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties. The director further stated that the petitioner indicated the beneficiary would supervise the only other employee of the company, Dr. [REDACTED] and that his duties would consist of the provision of computer validation of various pharmaceutical functions for a major international pharmaceutical company. The director also stated that there had been no evidence submitted to establish that Dr. [REDACTED] was a professional or that he was currently employed by the U.S. entity. The director noted that the record did not establish that the majority of the beneficiary's duties would be directing the management of the organization. The director also noted that the record indicated that a preponderance of the beneficiary's duties would be directly performing the operations of the organization. Finally, the director stated that the petitioner's claim to utilize contracted support services did not demonstrate managerial capacity.

On appeal, counsel disagrees with the director's decision and asserts that the decision was incorrectly based on the petitioner's failure to submit requested evidence when no such evidence was requested concerning Dr. [REDACTED] position, professional status, payroll records, or educational certification. The petitioner submits as evidence on appeal, copies of Dr. [REDACTED] resume, University of Delhi Doctor of Philosophy degree, University of Delhi Master of Pharmacy degree, University of Delhi Bachelor of Pharmacy degree, University of Delhi statement of marks, and University of Delhi College of Pharmacy Certificate of Merit. The petitioner also submitted copies of U.S. entity payroll detail indicating that Dr. [REDACTED] was employed by the entity in November and December of 2003, and in January of 2004.

Counsel contends that the beneficiary will be managing the direction of the pharmaceutical services component or function of the organization and in so doing will be responsible for supervising Dr. [REDACTED] who is characterized as a professional employee. Counsel further contends the beneficiary also directs other components of the business namely the importation of plastic parts, sheet metal, and casting. Counsel argues that due to the nature of the U.S. business there is no need for large production facilities or a large staff. Counsel further argues that the beneficiary negotiates sales contracts and "leads provision of...marketing, product development and engineering, finance management, personnel management and overall management." Counsel contends the beneficiary has authority over interactions with subcontractors. Counsel further contends the beneficiary negotiates with and maintains relations with customers and suppliers at the executive level. Counsel surmises that the evidence submitted also demonstrates that the beneficiary functions at a senior level within the organizational hierarchy and with respect to the function managed, exercises discretion over the day-to-day operations, and supervises a professional employee.

Counsel argues that the beneficiary receives only general supervision or direction from higher level executives or the board of directors. Counsel further argues that the beneficiary directs the management of the organization, establishes the goals of the organization, component or function, and exercises wide latitude in discretionary decision-making. Counsel contends that the day-to-day duties the beneficiary is performing include:

Preparation of the budget, supervising Dr. [REDACTED] maintenance of sufficient reserves, negotiation, supervision, and coordination of subcontractors, keeping the entire organization current in the latest technological developments, arrange basic infrastructure and facilities for smooth operation of the company, recruit personnel as per requirements, supervise the management of the company, negotiating prices with customers, interact with appropriate government officials, and others.

Counsel claims the duties described are clearly executive, or in the alternative, managerial in nature. Counsel quotes the *Occupation Outlook Handbook's* description of "top executive" and claims the definition is similar to the beneficiary's duties as described. Counsel reiterates the beneficiary's duty descriptions given by the petitioner in response to the director's request for evidence, which will be made a part of this record. Counsel notes that the beneficiary has been granted L-1A status by CIS twice previously.

Counsel's assertions are not persuasive. Upon review of the petition and the evidence, the petitioner has not established that the beneficiary has been or will be employed in a 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). 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.* On appeal, counsel for the petitioner contends that the beneficiary's duties are executive, or in the alternative, managerial in nature. The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. 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 that the beneficiary is both an executive and a manager. In the instant matter, the petitioner claims that the beneficiary will perform both managerial and executive duties but fails to provide a break down of each.

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). In the instant matter, counsel stated that the beneficiary would be responsible for managing staff, negotiating contracts, client relations, and establishing goals. However, there has been insufficient evidence submitted and/or explanation given to establish that the beneficiary has and will primarily perform high-level responsibilities characteristic of a managerial or executive position. In review of the record it appears that the beneficiary has been and will be primarily performing the day-to-day services of the business.

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as directing the entire operation of the organization, establishing goals and policies of the organization, and exercising sole

discretionary decision-making authority. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. 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.).

In addition, the petitioner describes the beneficiary as developing the petitioner's product, marketing the petitioner's product, and negotiating contracts with potential customers. Since the beneficiary actually performs those tasks, he is performing tasks necessary to provide a service or product and this duty 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).

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 lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as developing the product, marketing the product, and negotiating the contracts do not fall directly 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 function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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. The petitioner has established that the beneficiary's sole subordinate, Dr. [REDACTED] is a professional. However, the petitioner has failed to establish that supervising his one professional subordinate is the beneficiary's primary responsibility. Dr. [REDACTED] role is limited to providing technology-consulting services within the scope of the petitioner's pharmaceutical sector. However, the beneficiary is also charged with "leading" the petitioner's marketing, product development and engineering, and finance functions. As the petitioner does not employ any staff to relieve the beneficiary from performing the day-to-day operations duties, it is assumed, and has not been proven otherwise, the preponderance of the beneficiary's time is allocated to non-qualifying duties, rather than to supervision of his one subordinate. The fact that the beneficiary devotes some portion of his time to supervising one professional employee is insufficient to overcome the director's finding that the beneficiary is primarily engaged in duties that cannot be considered managerial or executive in nature.

The petitioner has failed to overcome the objections of the director. Even though the petitioner claims that the beneficiary directs and manages the petitioner's importation of plastic parts, sheet metal, and casting activities, it does not claim to have anyone on its staff to actually perform the importation function. In this matter, counsel claims that due to the nature of the U.S. entity's business there is no need for large production facilities or a large staff. However, 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, there has been no evidence submitted to demonstrate the activities of the subcontractors or that they have entered into an employment agreement with the U.S. entity. Thus, either the beneficiary himself is performing the importation function or he does not actually manage the importation function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties.

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. 582, 591 (BIA 1988). If the beneficiary is performing the importation function, the AAO notes that 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 of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, the petitioner's evidence is not sufficient to substantiate its claim that the beneficiary will be directing the management of the organization or a major component or function of the organization, establishing the goals and policies of the organization, exercising wide latitude in discretionary decision-making, and receiving only general supervision or direction from higher level executives. Rather, it appears from the evidence that the beneficiary has been and will continue to primarily perform the day-to-day duties of the organization and limited managerial or executive duties. There has been no evidence presented to demonstrate that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Accordingly, the appeal will be dismissed.

Counsel noted on appeal that CIS approved two other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Accordingly, the appeal will be dismissed.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.