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U.S. Citizenship and Immigration Services

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File: WAC 04 056 52002 Office: CALIFORNIA SERVICE CENTER Date: DEC 21 2007

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

**DISCUSSION**: The Director, California Service Center, denied the petition for a nonimmigrant visa and the Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is now before the AAO on a motion to reconsider. The AAO will grant the petitioner's motion and affirm its previous decision.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its marketing 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, a California corporation, states that it is engaged in the import and marketing of gold jewelry and raw diamonds. The petitioner claims to have a qualifying relationship with Gurpreet Exports, located in India. The beneficiary was initially granted a one-year period of stay in L-1A status in order to open a new office in the United States, and now the petitioner seeks to extend the beneficiary's status for two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The AAO dismissed the petitioner's subsequent appeal in a decision dated June 4, 2007. The AAO concurred with the director's finding and further determined that the petitioner had not established the existence of a qualifying relationship between the U.S. company and the beneficiary's previous foreign employer.

On motion, counsel for the petitioner asserts that the AAO's decision was based on errors of fact or law and requests that the matter be reconsidered. Counsel suggests that even if the beneficiary does not qualify as a manager or executive, he "will definitely qualify as a 'Functional Manager' and/or a person with specialized knowledge." Counsel also implies that the AAO overlooked evidence establishing that "the parent company" purchased a 60 percent interest in the petitioner, thereby establishing a parent-subsidiary relationship. Counsel submits a brief, but no additional evidence, in support of the motion.

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 managerial or executive capacity; and

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

Furthermore, 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The first issue to be addressed is whether the petitioner established that the beneficiary would be employed in a primarily managerial capacity. The petitioner does not claim that the beneficiary would be employed in an 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.

The petitioner filed the nonimmigrant petition on December 17, 2003. On the Form I-129 petition, the petitioner indicated the beneficiary's job title as "Import cum Marketing Manager" of the three-person company, and stated the non-technical description of his position as: "some clerical work." The petitioner did not submit an L Classification Supplement or supporting evidence in support of its claim that the beneficiary would be employed in a managerial capacity. Therefore, the director issued a detailed request for additional evidence related to the beneficiary's job duties and the staffing structure of the U.S. company.

In response to the director's request, the petitioner identified the beneficiary as "Marketing Manager and Chief Designer (Product)," and described his duties as follows:

1) Jewelry Designing and placement of orders.
2) Marketing and Sales including sales strategies.
3) Networking with the buyers and maintenance of customer data-base.
4) Delivery follow-up and customer satisfaction.
5) Maintaining record of Bills Receivable and Bills Payable.
6) Quality checking of all inventory.
7) Jewelry repairs if any.
8) Maintaining record of petty office expenses and travelling expenses.

9) Depositing checks and routine banking operations.

The petitioner submitted an organizational chart indicating that the beneficiary supervises a designer trainee/sales representative and a mail order/inventory employee. The chart shows that the beneficiary reports to the president and chief executive of the company, whose duties are described as "market studies/trends/selection of items to be imported." The petitioner submitted the requested state quarterly wage reports, quarterly federal tax returns, and Forms W-2 and W-3 for 2003, all of which show the beneficiary as the only employee of the company at the time of filing.

The director denied the petition on June 10, 2004, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the beneficiary was the petitioner's only employee at the end of the first year of operations, and questioned how he would devote the majority of his time to managerial or executive duties.

On appeal, counsel for the petitioner asserted that the director erred in concluding that the beneficiary is the sole employee of the petitioning company, and as such, is not performing primarily managerial duties. Counsel asserted that the petitioner's minority shareholder and his spouse had been working for the company, but had not received wages. The petitioner submitted an updated organizational chart and payroll records showing three employees in addition to the beneficiary, all of whom were hired during the second and third quarters of 2004.

In an appellate brief dated August 7, 2004, counsel asserted that the beneficiary now supervises a sales supervisor and two sales representatives, and will supervise a team of six to eight people, including an office manager, a design coordinator, and two sales agents, within the next year. The petitioner submitted an updated organizational chart indicating the petitioner's current and proposed staffing levels; a copy of the company's Form DE-6, Quarterly Wage and Withholding Report, for the second quarter of 2004 confirming the employment of the two employees previously identified as trainee designer/sales representative and mail order/inventory employee (both of whom were subsequently described as sales representatives); and job descriptions for the beneficiary, the sales supervisor hired on August 1, 2004, and the two sales employees. The petitioner also submitted an expanded description of the beneficiary's duties that differed significantly from the descriptions submitted previously.

The AAO dismissed the petitioner's appeal in a decision dated June 4, 2007. The AAO declined to consider the new position description offered for the first time on appeal, noting that the petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position.

The AAO noted that the earlier position description submitted for the role of "marketing manager and chief designer" did not include duties that were managerial or executive in nature. Rather, the AAO found that, at the time of filing, the beneficiary was personally responsible for virtually every routine duty inherent to operating a jewelry import and wholesale business, including sales, marketing, purchasing, bookkeeping, customer service, inventory, product design and quality control.

The AAO acknowledged that the petitioner hired two employees subsequent to the filing of the petition, and the petitioner's claim that it employed a total of eight employees as of November 2005, however, the AAO emphasized that a visa petition would not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The AAO found insufficient evidence to support counsel's claim that a claimed minority shareholder of the U.S. company and his spouse actually work for the petitioner under the beneficiary's supervision on an unpaid basis, and therefore concurred with the director's determination that the beneficiary was the sole employee at the time the petition was filed. The AAO concluded that any managerial duties performed by the beneficiary at the time of filing were incidental to his primary responsibility for performing the day-to-day services of the company. Therefore, the AAO dismissed the appeal.

On motion, counsel for the petitioner asserts that the beneficiary qualifies as a "functional manager" and/or "as a person with specialized knowledge." The AAO will address these claims separately.

Counsel contends that the beneficiary manages the essential function of "buying, importing and selling jewelry," because he has authority over the function, budgetary authority, contract authority, works at a senior level, has a significant effect on company profits, manages direct and/or indirect reports, and exercises discretion in managing the day-to-day operations of the function.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

As discussed at length in the AAO's previous decision, the petitioner did not establish that the beneficiary's actual duties at the time of filing the instant petition were primarily managerial in nature. Rather, the

petitioner stated that the beneficiary designs jewelry, repairs jewelry, places orders for jewelry, networks with buyers, maintains a customer database, follows up on delivery and customer satisfaction, maintains accounts payable and receivable, tracks routine expenses, checks all inventory for quality, performs marketing and sales tasks, and performs the company's routine banking operations. These duties do not fall under the high-level responsibilities contemplated by the statutory definition of managerial capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). Although the beneficiary has been given the title of marketing manager, the record does not establish that he performs managerial duties related to marketing or any other function of the petitioner's business. The fact that the beneficiary was the only employee responsible for the "essential function" of buying, importing and selling jewelry, does not elevate his position to that of a function manager. 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).

On motion, counsel does not acknowledge the AAO's lengthy discussion of the beneficiary's performance of non-qualifying job duties, or the AAO's finding that there was no evidence in the record that the U.S. company had any employees or contractors at the time the petition was filed. Counsel simply represents the beneficiary as a function manager and asserts that he is responsible for "establishing goals and policies and exercising wide latitude in discretionary decision-making." Counsel further asserts that the beneficiary "plans and directs the management function through its company employees as well as through outside contract employees who perform the marketing function, i.e., a large part of importing and selling the jewelry."

The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Further, these broad claims regarding the beneficiary's managerial duties and supervision of subordinate personnel, were already considered and rejected on appeal. The petitioner has not submitted evidence on motion to overcome the previous determinations of the director or the AAO.

Counsel further argues that the AAO should consider whether the beneficiary qualifies for classification as an employee with specialized knowledge. Specifically, counsel states:

> Even if the beneficiary does not qualify as a manager or executive because the office is small and that there no employees or the transferee must perform duties required to produce the company product or service, his placement in the new office is clearly based on the beneficiary's knowledge of its employer's products.
>
> Petitioner contends that the beneficiary's duties meet the definitions of both "the executive capacity and the managerial capacity," together with being a functional manager and with specialized knowledge.

It appears that counsel is requesting that the AAO reconsider the petition as a request for L-1B classification. Counsel's request to amend the petition on motion is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(l)(7)(i)(C) state:

> The petitioner shall file an amended petition, with fee, at the service center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The request to reconsider the original petition on motion as a petition for L-1B specialized knowledge classification is, therefore, rejected. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The second issue to be addressed is whether the petitioner established that the U.S. company and a foreign entity maintain a qualifying relationship as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

Although this issue was not addressed in the director's initial denial of the petition, the AAO determined that the record did not contain evidence of the ownership and control of either the petitioner or the foreign entity, nor had the petitioner explained the relationship between the U.S. and foreign entities. On appeal, counsel stated that [redacted], located in New Delhi, India, previously employed the beneficiary and the record contains an employment certificate from this company, dated March 5, 2002, confirming the beneficiary's role as general manager of the company beginning in April 1998. The letter is signed by "[redacted]" as proprietor, but there is no further evidence of the ownership of the company, nor any evidence that the company continues to do business in India. The record also contains a copy of the petitioner's articles of incorporation, but no copies of stock certificates, stock transfer ledgers, or other evidence of the ownership of the U.S. company. Although the petitioner has submitted copies of its 2003 and 2004 corporate tax returns, no information regarding the ownership of the company can be gleaned from these documents. Finally, on appeal, the petitioner stated that its chief executive officer [redacted], is a minority stockholder in the company, but there was no evidence submitted in support of this claim.

Therefore, based on the minimal evidence in the record of a qualifying relationship between the petitioner and Gurpreet Exports, the AAO denied the petition on this additional ground.

On motion, counsels states:

> When the petitioner filed a[n] L-1 petition, it submitted with that petition, the resolution of the parent company in buying a 60% interest in the US company, transferring money to the

> US Company, and exporting gold jewelry to the US subsidiary. The parent company is the main supplier of jewelry from India to the US Company, holds 60% of the US Company and that relation is a continuing one.

Upon review, the AAO affirms the denial of the petition based on the petitioner's failure to establish that it has a qualifying relationship with the foreign entity. The "resolution of the parent company" referenced by counsel on appeal is not part of the instant record of proceeding. As discussed in the AAO's decision, the current record contains no concrete evidence of the ownership and control of either the U.S. company or its claimed parent company. However, counsel offers no additional evidence in support of the claim that the petitioner is a majority-owned subsidiary of the beneficiary's foreign employer. Again, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO acknowledges that the referenced company resolution may have been submitted with the initial L-1 petition filed on behalf of the beneficiary. It is worth emphasizing that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If USCIS finds that it needs to review evidence that the petitioner may have submitted in conjunction with a separate nonimmigrant petition filing, the petitioner is, nevertheless, obligated to submit the evidence, as the records of separate, related nonimmigrant proceedings are not combined. Furthermore, the regulations governing the extensions of petitions that involved a "new office" specifically require the petitioner to submit evidence that the U.S. company and the foreign entity are still qualifying organizations. *See* 8 C.F.R. § 214.2(l)(14)(ii)(A). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not submitted evidence on motion to overcome the AAO's determination.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 AAO's decision dated June 4, 2007 is affirmed.