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APR 05 2008

FILE: EAC-02-268-51173 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its President and Chief Executive Officer (CEO) 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 York that is engaged in clothing sales and marketing. The petitioner claims that it is the subsidiary of [REDACTED], located in New Delhi, India.

On February 7, 2003, the director initially 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. On March 6, 2003, the petitioner filed a Motion to Reopen and Reconsider, accompanied by additional evidence. On June 5, 2003, the director granted the motion and reopened the matter for further consideration. The director ultimately denied the petition, again 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. On appeal, the petitioner asserts that the beneficiary will be employed in a primarily managerial or executive capacity, and that the director did not understand the beneficiary's position or the petitioner's outsourced labor. In support of these assertions, the petitioner submits a brief.

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 primary 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 filed on August 21, 2002, in an attached support letter the petitioner stated that "the beneficiary is responsible for managing U.S. marketing & Importing for ready to wear apparel manufactured in India."

On September 30, 2002, the director requested additional evidence. In part, the director requested a list of the petitioner's employees, including their names, job titles, Social Security numbers, immigration status, and compensation amount and source, with an indication of whether each employee is on salary, wage, or paid by commission. The director further requested an organizational chart for the petitioner that includes the current names of all executives, managers, and supervisors, and the number of employees in each department or subdivision. The director instructed the petitioner to clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. The director requested a brief description of the job duties and educational level for all employees under the beneficiary's supervision. The director requested a more detailed description of the beneficiary's duties, including the percentage of time he devotes to each task, and an explanation of how the beneficiary's duties differ from those of current managers or executives. The director finally instructed the petitioner to provide its Form 941, Quarterly Wage Report, for the first quarter of 2002, and copies of the petitioner's payroll summary and 2001 W-2s and W-3s.

In a response dated December 11, 2002, in part the petitioner submitted: (1) an organizational chart for the petitioner; (2) a statement describing the beneficiary's duties in the United States; (3) a statement discussing the duties of the petitioner's four employees; and (4) the petitioner's Form 941, Quarterly Wage Report, for the third quarter of 2002. In the statement discussing the beneficiary's duties, the petitioner provided the following:

[The beneficiary] is the Chairman of this corporation and is involved in the day to day affairs of the company. His basic duty is to grow business. He makes all the plans, takes all the important decisions and all the employees of this corporation report to him . . . . [The beneficiary] reports to the Board of its Holding company in India.

In the statement discussing the duties of all of the petitioner's employees, the petitioner provided that:

[The beneficiary] is heading the company and is responsible for the final results of the company. He plans and supervise [sic] the execution of the work and also look [sic] after banking personally. He travel [sic] overseas to make new contacts for supplies.

The petitioner described the duties of the beneficiary's subordinates as follows:

[REDACTED] leads the marketing division of the company. He is working with the company from last couple of years as salesperson. His major duties are to promote the sales of the company and to support the exiting customers . . . .

[REDACTED] outsources [sic] the products from overseas and is in charge of the timely supplies of the merchandises . . . .

[REDACTED] looks after the administration of the company and also is in charge of its accounts and finance[.] She reports to [the beneficiary] and works from time to time . . . .

On February 7, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated that three of the petitioner's claimed employees are not listed on the

petitioner's Form 941, Quarterly Wage Report, for the third quarter of 2002, calling into question the number of employees available to relieve the beneficiary from performing non-qualifying sales tasks. The director further noted that the petitioner failed to provide complete position descriptions for its employees, or a breakdown of the percentage of time the beneficiary devotes to each of his tasks. The director found that the description of the beneficiary's duties is vague, and that the petitioner failed to establish that he will function at a senior level within the organizational hierarchy other than in position title. The director stated that the petitioner failed to show that the beneficiary's subordinates will be supervisory, professional, or managerial.

On March 6, 2003, the petitioner filed a Motion to Reopen and Reconsider. In pertinent part, the petitioner explained that it relies on outside contract sales services, as well as independent shipping, receiving and warehousing through two separate companies. The petitioner asserted that using outside contractors would "allow the beneficiary to focus on exclusively managerial activities." The petitioner further indicated that it will provide consulting services to two different companies in developing call centers for telemarketing. In an attached letter, the petitioner's counsel provided the following description of the beneficiary's duties:

The beneficiary is responsible for setting business policy, retaining the services of companies and directing and reviewing the work of sales agent [sic] and the receiving, warehousing, shipping and fulfillment agents. He confers with the sales agents regarding customers demands and trends in ordering, to anticipate customer needs, and to plan and organize pricing, delivery schedules and the selection of products offered to best serve customers, and to attract new customers.

He also considers the prices, delivery schedules and reliability of contractors to make decisions on changing or negotiating different arrangements.

He budgets, plans fulfillment and negotiates financing. He decides to extend or refuse further credit to customers. His duties are strictly managerial, and of approximately a 40-hour week, about 10 to 12 hours are spent on developing sales and marketing policies including pricing and product selection in consultation with the sales agents, about 10 to 12 hours per week in reviewing financial and credit reports, consulting with the petitioner's CPA and making budgeting decisions, planning and negotiating financing for the business, and deciding on extensions and terminations of credit to [the petitioner's] customers. Another 8 hours are devoted to review of the receiving, importing and inventory control and all fulfillment work done by [the shipping, receiving, and warehousing contractor.]

A further 10 to 14 hours is [sic] spent in planning and guiding the staffs of the consulting clients in setting up, modifying and maintaining telemarketing systems, including reviewing hardware and software options and advising on the best choices for the business applications needed . . . . [The beneficiary] is now devoting his full time to the American enterprise.

In support of these assertions, the petitioner provided: (1) a statement discussing payments made to two companies for marketing, finishing, shipping, and warehousing services; (2) an agreement between the petitioner and a company titled [REDACTED], dated December 12, 2000, in which [REDACTED] agrees to provide shipping and warehousing services; (3) an agreement between the petitioner and a company titled [REDACTED] June 1, 2000, in which [REDACTED] to provide marketing services in

exchange for a commission; (4) a statement describing sources of income for the petitioner; (5) an agreement, dated October 25, 2002, in which the petitioner agrees to provide consulting services for a company titled ■■■■■■■■■■ (6) an agreement, dated June 25, 2002, in which the petitioner agrees to provide consulting services for a company titled ■■■■■■■■■■ NY; and (7) the petitioner's 2001 IRS Form 1120, U.S. Corporate Income Tax Return.

On June 5, 2003, the director granted the motion and reopened the matter for further consideration. The director ultimately denied the petition, again concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated that "the record does not currently demonstrate that the beneficiary functions at a senior level within an organizational hierarchy other than in position title, [or that] the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties." The director further noted that, "[w]hile a manager or executive may manage or direct a function within an organization, it must be clearly demonstrated the executive does not directly perform the function. The evidence of record in the instant petition does not appear to indicate that the executive is not directly performing the function he should be overseeing."

On appeal, the petitioner asserts that the beneficiary will be employed in a primarily managerial or executive capacity, and that the director did not understand the beneficiary's position or the petitioner's outsourced labor. The petitioner states that "there is no time frame for [a] CEO and no breakup of duties . . . . [I]t is very hard to give [a] breakup of the duties and numbers of hours of the CEO because the only . . . objective of any CEO is to maximize the wealth of the shareholders." In support of these assertions, the petitioner submits a brief.

Upon review, the petitioner'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 initial job description submitted by the petitioner was brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the statement that the beneficiary "makes all the plans, takes all the important decisions and all the employees of this corporation report to him" does not indicate what actual tasks the beneficiary will perform on a daily basis. 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). The actual duties themselves reveal the true nature of the employment. *Id*.

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 Motion to Reopen and Reconsider, the petitioner provided a breakdown of the percentage of time the beneficiary will devote to his various duties. This breakdown

suggests that the beneficiary will invest the majority of his time in non-managerial and non-executive tasks, as discussed below.

Counsel for the petitioner stated that, during a 40 hour week, the beneficiary will spend "10 to 14 hours . . . planning and guiding the staffs of the consulting clients." Thus, the beneficiary will spend this time directly providing the petitioner's consulting services to other companies. 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). Accordingly, this 10 to 14 hour portion of the beneficiary's time is invested in non-qualifying tasks.

Counsel for the petitioner stated that the beneficiary will take "8 hours . . . to review . . . the receiving, importing and inventory control and all fulfillment work done by [the shipping, receiving, and warehousing contractor.]" The agreement between the petitioner and the shipping, receiving, and warehousing contractor reflects that the contractor's services are approximately equivalent to two in-house employees that the petitioner would otherwise have to employ. The contractor will perform tasks such as receiving and storing shipments, preparing an inventory system, shipping merchandise, submitting records to the petitioner, sorting and counting merchandise, creating inventory records, and processing returns. Thus, the agreement reflects that the contract work will be largely clerical and manual labor. It is assumed that the employees to perform the contract work will not be professionals, managers, or supervisors. Accordingly, the beneficiary's review of the work of these employees is equivalent to acting as a first-line supervisor. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). If the contract workers were in fact in-house employees of the petitioner, the evidence of record reflects that the beneficiary would directly serve as their first-line supervisor. The fact that the workers are hired through a contractor does not render the beneficiary's supervision of their work to be a managerial task as contemplated by section 101(a)(44)(A) of the Act. Therefore, the eight hours the beneficiary spends reviewing the work of the shipping, receiving, and warehousing contractor are invested in non-qualifying tasks.

Counsel for the petitioner stated that the beneficiary will spend "10 to 12 hours per week in reviewing financial and credit reports, consulting with the petitioner's CPA and making budgeting decisions, planning and negotiating financing for the business, and deciding on extensions and terminations of credit to [the petitioner's] customers." The petitioner further provided that the beneficiary "look[s] after banking personally." Thus, within this category of tasks, it appears that the beneficiary will perform numerous non-qualifying duties such as reconciling a checking account, paying routine bills, and making bank deposits. The petitioner states that it employs an individual on a part-time basis, named [REDACTED] who "looks after the administration of the company and also is in charge of its accounts and finance." The description of this employee's duties suggests that she would perform routine banking functions. However, the petitioner has failed to document that she is in fact employed with the company, as she is not listed on the petitioner's Form 941, Quarterly Wage Report, for third quarter of 2002, and the record contains no further evidence to reflect her employment. 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). Though counsel referenced the petitioner's CPA, the petitioner has provided no documentation to support that it employs an accountant on an ongoing basis who would assist the beneficiary in preparing forms and performing non-qualifying duties. Again, 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. at 190 (Reg. Comm. 1972). Thus, the 10 to 12 hours the beneficiary commits to financial matters appears to include non-qualifying tasks.

Based on the foregoing, the evidence of record reflects that the majority of the beneficiary's time will be spent performing non-managerial and non-executive tasks. See section 101(a)(44)(A) and (B) of the Act.

Though the petitioner has not expressly asserted that the beneficiary is a "function manager," by raising the fact that the beneficiary manages independent contractors the petitioner suggests that the beneficiary may qualify as an intracompany transferee in accord with the relevant portion of section 101(a)(44)(A)(ii) of the Act. 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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Again, 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. at 604 (Comm. 1988). 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 above, in this matter the petitioner has not established that the majority of the beneficiary's time will be invested in managerial or executive tasks.

The petitioner's organizational chart represents that the beneficiary has three subordinate employees. The petitioner further provided a brief position description for each subordinate. However, the petitioner's Form 941, Quarterly Wage Report, for third quarter of 2002, which covers the date of filing the petition, indicates that the petitioner only employs the beneficiary and one other individual who is not named on the petitioner's organizational chart. 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). The petitioner has provided no additional evidence to reflect the number of staff members in its employ, or to clarify this inconsistency.

Further, 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. Despite the director's request, the petitioner failed to submit the educational level of each of these employees, thus the AAO cannot determine whether they are professionals as contemplated by section 101(a)(44)(A)(ii) of the Act. See also section 101(a)(32) of the Act; *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). Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Nor has the petitioner shown that any of the employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the

petitioner has not shown that the beneficiary's alleged subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Based on the foregoing, 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(1)(3). For this reason, 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 met this burden.

**ORDER:**       The appeal is dismissed.