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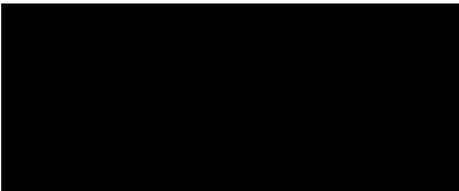
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FILE: WAC 03 234 52436 Office: CALIFORNIA SERVICE CENTER Date: **AUG 01 2005**

IN RE: Petitioner: [Redacted]
Beneficiary [Redacted]

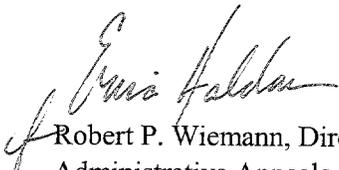
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Texas 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 2002 and claims to be an importer and exporter of goods from and to Sri Lanka. The petitioner claims to be a branch office of Aranga, located in Kandy, Sri Lanka. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for a period of three years, at an annual salary of \$30,000.00. The beneficiary was initially granted a one-year period of stay to open a new office in the United States. The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and asserts that the petitioner has submitted sufficient evidence to demonstrate 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)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary 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 (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) states that a visa petition under section 101(a)(15)(L) of the Act 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 (1)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- (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.

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.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The petitioner initially described the beneficiary's duties as: "President of USA company, Marketing Manager, coordinate customer service, expedite shipments between Sri Lanka, Mexico and USA. Accounting Manager, hire employees, maintain [sic] office, etc."

In response to the director's request for evidence, the petitioner described the beneficiary's duties as:

1. Research and purchase raw materials, artistic articles, and agricultural supplies to be marketed to the United States and Canadian markets, and eventually to Sri Lanka and throughout Asia This activity represents about 20% of [the beneficiary's] duties.
2. Marketing of Araga products, manufactured in Sri Lanka, to various markets with the United States and Canada. This activity represents about 25% of [the beneficiary's] duties.
3. Prepare contracts with suppliers and customers. This activity represents about 10% of [the beneficiary's] duties.

4. Hire competent, multi-lingual staff for customer service. Initially one additional United States employee will be hired to staff the new company. This activity represents about 5% of [the beneficiary's] duties.
5. Set up an efficient and cost effective operation, including leasing and maintaining adequate office space, selection and installation of a computerized business system, network connections to other companies and a meeting facility for customers and suppliers. This activity represents about 20% of [the beneficiary's] duties.
6. Manage all aspects of the North American operation, including sales and marketing, accounting, communications, customer service, delivery and receiving, warehousing, customer returns, government compliance, and employee safety. This activity represents about 10% of [the beneficiary's] duties.
7. Serve as initial Chief Financial Officer to control costs and manage revenues. This activity represents about 5% of [the beneficiary's] duties.
8. Serve as ultimate Customer and Supplier Liaison. This activity represents about 5% of [the beneficiary's] duties.

The petitioner submitted as evidence company payroll records for the U.S. entity covering the period from February 2003 through June 2003. The petitioner also submitted as evidence a copy of the U.S. entity's IRS Form 941, Employer's Quarterly Federal Tax Return, for the quarters ending March 31, 2003, and June 30, 2003.

The director determined that the petitioner's claim that the beneficiary manages a business does not necessarily establish eligibility for the classification sought. The director noted that it appeared from the record that only one other person besides the beneficiary was employed by the U.S. entity and that person's duties were not clear. The director also noted that it appeared from the record that the beneficiary would be primarily performing the day-to-day duties associated with the operation of the business. The director determined that based upon evidence in the record, the beneficiary's responsibilities primarily entailed market research, sales, and other non-qualifying duties. The director further noted that the U.S. entity did not possess the organizational complexity to warrant having an executive officer.

On appeal, counsel argues that since there has been significant effort and some success in developing the newly established business, the beneficiary should be given the opportunity to continue in his efforts to grow and expand the U.S. entity and to employ additional workers. Counsel also argues that the beneficiary performs the managerial and executive functions described in the regulations as well as meeting with existing and future business contacts, suppliers, and customers. Counsel contends that although the beneficiary has been able to hire an additional employee, the original business plan remains intact, including plans to hire more employees, add a warehouse, and expand office space. Counsel further contends that 60 percent of the beneficiary's time is spent on managerial and executive tasks and 40 percent of the time is spent building the business, developing business partners, and building financial relationships.

Counsel's argument is not persuasive. In evaluating whether the beneficiary has been or will be employed in a primarily managerial or executive capacity, the AAO will look first to the petitioner's description of the beneficiary's 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 matter, the record demonstrates that the beneficiary has performed and will continue to perform various non-qualifying job duties for the U.S. entity.

The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary is responsible for managing all aspects of the "North American" operation. The petitioner did not, however, detail the organization's business activities, nor clarify the beneficiary's duties in managing the organization. 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. 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner describes the beneficiary as conducting industry research, purchasing raw materials, marketing the petitioner's product, preparing company contracts, and serving as a customer service representative. Since the beneficiary actually performs clerical work, sells the product, negotiates the contracts, and markets the petitioner's product, 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).

Even though the petitioner claims that the beneficiary directs and manages the petitioner's overall operational activities, it does not claim to have anyone on its staff to actually perform the functions of the business. The petitioner failed to submit an organizational chart of the U.S. entity as requested by the director. Although the petitioner did submit copies of the entity's payroll records and Form 941 for the quarters ending March 31, 2002, and June 30, 2003, these records show that only one person was employed by the U.S. organization for the first half of 2003.

The petitioner indicates that it plans to hire additional managers and employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. The petitioner has failed to establish that the U.S. entity has reached a stage of organizational complexity sufficient to support a managerial or executive position. Accordingly, 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.