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U.S. Citizenship
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Services

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[REDACTED]

FILE: WAC 02 272 53182 Office: CALIFORNIA SERVICE CENTER Date: **AUG 11 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:

[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.


6 Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is described as a marketing consultancy business. According to the documentary evidence contained in the record, the petitioner was incorporated in 1999 and claims to be a subsidiary of [REDACTED] located in Verona, Italy. It seeks to extend its authority to employ the beneficiary temporarily in the United States as its company director for a period of one year, and at a monthly salary of \$2,000.00.

The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary will be employed primarily in a managerial or executive capacity with the U.S. entity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary will be employed primarily in a 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 (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 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.

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.

The petitioner stated in the petition that the beneficiary's proposed job duties would consist of overseeing all of the company business, including the marketing and new business aspects of the business.

In response to the director's request for additional evidence, the petitioner stated that it had no employees other than the beneficiary at the time of filing the petition due to the lack of business development to the level initially projected and the nature of the business as a consultancy. The petitioner further stated that the beneficiary's duties consisted of: planning and developing policies five percent of the time; directing legal affairs one percent of the time; planning and supervising marketing ten percent of the time; and supervising financial matters five percent of the time. The petitioner also stated that the remainder of the beneficiary's time is devoted to providing consultancy services and promotional activities pursuant to contractual agreements.

The petitioner submitted a copy of its IRS Form 1120, Corporate Income Tax Return for 2001. The petitioner also submitted a copy of an independent contractor agreement dated October 15, 2002, and a contractual agreement between [REDACTED] and [REDACTED] dated November 7, 2002.

The director stated that since the evidence shows that the U.S. office employs only the beneficiary, he was not persuaded that the beneficiary's duties in that position would be primarily those of an executive or manager. The director further stated that it appeared from the record that the beneficiary would be engaged primarily in the day-to-day operations of the business itself. The director noted that the U.S. entity's IRS Form 1120 did not show that there was any compensation given to officers in 2001.

On appeal, counsel argues that the company has recently hired a sales representative. Counsel also argues that there is no evidence in the IRS Form 1120 of compensation to officers for 2001 because the U.S. entity is subsidized by the foreign entity. Counsel further argues that the beneficiary has the power and authority to open business accounts, sign business documents, establish goals, and direct all of the components of the U.S. company.

On appeal the petitioner submits a letter dated February 3, 2003, in which the foreign entity's representative paraphrases the definitions of managerial and executive capacity in describing the duties of the beneficiary. In a letter of employment dated December 23, 2002, the petitioner describes the beneficiary's proposed duties to include the promotion of major distributor's and general contractor's products. The letter also states that the beneficiary will be involved in promoting the products of architects and specified major projects.

The petitioner submitted an affidavit of support and recognition dated February 3, 2003. The petitioner also submitted copies of its invoices dated November 29, 2002 through January 27, 2003, and a resume depicting the newly hired sales representative's work history.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive position. 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). Two elements generally characterize an executive or managerial position; first, the position must involve significant authority by the beneficiary over generalized policy of the organization or a major division thereof, and second, there must be a showing that most of the beneficiary's duties are managerial or executive in capacity. 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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial.

The petitioner has not provided a comprehensive description of the beneficiary's purported job duties. The beneficiary's position description is too general and broad to establish that the preponderance of her duties will be managerial or executive in nature. The following duties are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive: planning and developing policies, directing legal affairs, planning and supervising marketing, and supervising financial matters. Further, there is insufficient detail regarding the actual duties of the assignment to overcome the objectives of the director. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. V. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In intracompany transferee matters the actual duties, themselves, reveal the true nature of the employment. *Id. at 1108.*

The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing non-qualifying duties. The record establishes that the U.S. entity employed only the beneficiary at the time the petition was filed. In addition, the petitioner admits that the U.S. company had only one employee at the time the petition was filed. Although counsel states on appeal that a sales representative has recently been hired by the U.S. entity, the regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

The record does not establish that a majority of the beneficiary's duties will be primarily directing the management of the organization. The record indicates that primarily the beneficiary's duties have consisted and will consist of maintaining the business operations, including marketing and sales. However, the petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring and firing of personnel, discretionary decision making, and setting company goals and policies constitute significant components of the duties performed by the beneficiary on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. The record reflects that 5 percent of the beneficiary's time will be devoted to planning and developing policies; 1 percent to directing legal affairs; 10 percent to planning and supervising marketing; 5 percent to supervising financial matters; and the remainder of the time to be devoted to servicing the company contracts.

Although the petitioner stated that the beneficiary would primarily have discretionary decision-making authority over the business affairs of the corporation, the record does not specifically detail

how the beneficiary is to perform these duties. Based upon evidence submitted on the record, it appears that the beneficiary will be performing the functions of the U.S. entity rather than managing a function or major division of the organization. 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 record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the organization. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.