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U.S. Citizenship
and Immigration
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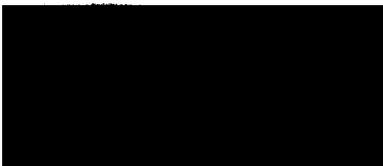
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FILE: SRC 02 257 50721 Office: TEXAS SERVICE CENTER Date: **AUG 11 2005**

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:



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 incorporated in 2001 and claims to be in the telecommunications sales business. The petitioner claims that the U.S. entity is an affiliate of [REDACTED]. The petitioner declares four employees and \$250,000.00 in gross annual income. The petitioner seeks to extend its authorization to temporarily employ the beneficiary in the United States as president for three additional years, at a yearly salary of \$18,000.00. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary would be employed primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties will be managerial or executive in nature.

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) 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) 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.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed 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.

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 described the beneficiary's proposed job duties as:

The beneficiary will continue to be employed as the president of the petitioner, and will continue to be responsible for performing the following duties; setting and establishing the company's goals and objectives; reviewing locations for the establishment of additional retail outlets; reviewing and analyzing market conditions; reviewing and approving budgets; directing and managing the company; reviewing and approving inventory orders prepared by subordinate staff; reviewing and approving marketing strategy; establishing sales and marketing goals and overseeing implementation of such goals; supervising and controlling work of subordinate managers and supervisors; hiring managers and supervisors; and reviewing financial records prepared by professional staff.

In response to the director's request for evidence, the petitioner reiterated the beneficiary's proposed responsibilities and listed the position descriptions of the subordinates as:

SHAKEEL ALI, MANAGER

Duties Include: bookkeeping; accounting; banking; handling customer complaints; supervising subordinate employees; writing checks; preparing employee work schedule;

preparing maintaining inventory report; prepare sales report; and assist in preparing budget and expense reports.

BADRUDDIN KAREZIA, SALES REPRESENTATIVE/ASSISTANT MANAGER

Duties Include: selling the products and assisting customers; ordering the products; stocking the shelves; maintaining the premises; operating the cash register and credit card machine; and reconciling daily cash with sales receipts.

ZAHIR MONIN, SALES REPRESENTATIVE/ASSISTANT MANAGER

Duties Include: selling the products; ordering the products; stocking the shelves; maintaining the premises; operating the cash register and credit card machine; and reconciling daily cash with sales receipts.

The petitioner submitted a copy of petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return for the quarter ending September 30, 2002.

The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be performing job duties in a primarily managerial or executive capacity. The director noted that there had been no evidence submitted to demonstrate that the beneficiary managed or directed the management of a department, subdivision, function or component of the organization. The director also noted that the petitioner had failed to show that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who would relieve the beneficiary from performing the non-qualifying duties of the organization. The director stated that it appeared that the majority of the beneficiary's work time would be spent performing non-managerial, day-to-day operations of the business. The director noted that it was unrealistic for a corporation to employ half of its workers in a strictly executive and/or managerial capacity.

On appeal, counsel argues that the evidence has established that the beneficiary is responsible for overseeing the management of the petitioner's retail location as well as managing the wholesale distribution of telephone cards. Counsel further argues that the beneficiary is responsible for establishing company goals and objectives, reviewing and analyzing the telecommunication card markets, establishing the marketing component of the petitioner's operations, and distributing on contracts executed by the petitioner. The petitioner submits as evidence on appeal a copy of a phone card distribution contract, dated November 1, 2002, its IRS Form 941 for the quarter ending December 31, 2002, and Cosmos Novelties & Comm. bank account statements.

The record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. When examining the managerial or executive capacity of the beneficiary, 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.* 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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. In this matter, the petitioner has failed to submit evidence sufficient to demonstrate that the beneficiary's duties are either primarily managerial or primarily executive in nature.

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's duties include: "setting and establishing company's goals and objectives; reviewing and analyzing market conditions; directing and managing the company" 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. *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 petitioner claims that the beneficiary oversees and manages the petitioner's retail location and the wholesale distribution of telephone cards. The petitioner also contends that the beneficiary is responsible for the marketing division of the operation. The petitioner listed a manager and two sales representatives/assistant managers as being under the direction of the beneficiary. There is no evidence to show that the three subordinates perform the non-managerial functions of the organization sufficiently to relieve the beneficiary from performing such duties. In addition, there is insufficient evidence contained in the record to show the percentage of time taken to perform each task. It appears from the record that the beneficiary is and will be primarily performing the functions of the organization rather than managing the same. 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 Scientology International*, 19 I&N Dec. 593, 597 (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 or executive, but it fails to quantify the time the beneficiary will spend on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as marketing the petitioner's product and negotiating 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 petitioner asserts that the beneficiary will be managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

The record also contains inconsistencies with regard to the number of employees employed by the U.S. entity. In the petition and the letter of support of the petition, the petitioner states that the U.S. entity employed four individuals. On appeal, the petitioner submits IRS Form 941 for the quarter ending December 31, 2002, and states that the U.S. entity employs seven individuals. The petitioner has failed to provide an explanation for the discrepancies in the number of employees employed by the U.S. entity. 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). The petitioner has failed to submit sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, with the minimal financial and business documentation submitted by the petitioner with respect to the foreign entity, it is questionable whether a qualifying relationship continues to exist between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(G). The petitioner indicated that the beneficiary was the sole proprietor of both the U.S. and foreign entities. In this matter, the petitioner has not persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. For this additional reason, the petition may not be approved.

The petitioner indicates that the beneficiary is the sole owner of both the U.S. and foreign entities. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(I)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States. For this additional 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.