

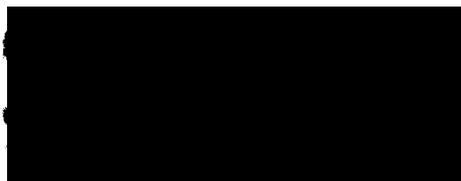
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U.S. Citizenship
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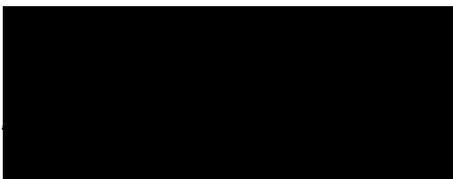


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FILE: EAC 02 033 55060 Office: VERMONT SERVICE CENTER Date: **AUG 15 2005**

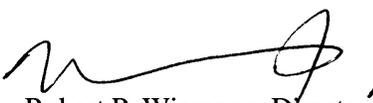
IN RE: Petitioner: 
Beneficiary:

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:


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, Vermont 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 1997 and claims to be an import, export, and travel business. The petitioner claims that the U.S. entity is an affiliate of Ilga, located in The Congo. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for a period of two years, at a monthly salary of \$4,700.00. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been or would be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will continue to 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.

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.

In a letter dated October 26, 2001, the petitioner described the beneficiary’s duties as:

[The beneficiary] will continue to be needed in the U.S. on a temporary basis. As president, he will continue to be responsible for [the petitioner’s] operations including coordinating activities

of the U.S. company with the foreign parent corporation and ensuring the profitability and overall success of the U.S. operations.

[The beneficiary] has broad discretionary power to establish policy and delegate authority and duties as necessary in the course of business. He hires, fires, and promotes employees and establishes personnel policy, such as health, safety, and pay scales. He supervises the sale/travel manager in preparing her to direct key marketing initiatives. [The beneficiary] reviews the work of subcontractors and employees to ensure compliance with company policies and government regulations. He develops company goals and policies, including marketing strategies. He also analyzes business and financial reports and explores industry resources and contacts to assess opportunities for new business and marketing trends. [The beneficiary] reviews operations in New Congo and directs management staff to ensure continued profitability of overseas operations. He contacts vendors to negotiate contract prices and arrange[s] for participation in trade shows.

[The beneficiary] will be dividing his time between the United States and New Congo.

The petitioner submitted as evidence a copy of its IRS Form 1120S, Corporate Income Tax Return for the year 1999, and two IRS Forms W-4, Employee's Withholding Allowance Certificate for the year 2000.

In response to the director's request for evidence on the subject, the petitioner submitted a position description that described the beneficiary's duties as:

The president of [the U.S. entity] oversees the entire business. [The beneficiary] promotes the company as the business spokesman, in both Africa and the U.S.. Based on the reports provided by his manager, he makes decisions regarding the nature of the business, its merchandise, target market, and pricing schedules. Since the company sells African artifacts and tours, [the beneficiary] must approve any changes to the product line, ensuring all products and representations conform to the ethnic aspect of the company. He also identifies new business opportunities and directs the company employees to target these areas. He allocates resources and provides the budget. [The beneficiary] delegates authority for the day-to-day decisions and employee supervision to his manager.

[The beneficiary] spends 10% of his time reviewing sales and profit records of the 3 subcontracted employees. He spends 20% of his time developing pricing and marketing policy plans based on those records. He spends approximately 20% of his time budgeting/allocating resources and overseeing the finances. [The beneficiary] spends 15% of his time investigating and pursuing new marketing niches. He spends 20% of his time networking with potential clients, speaking on behalf of the company, and promoting the business. Finally, the president spends 15% of his time supervising the work of the manager and employees, keeping them abreast of changes in policy.

The petitioner stated that the beneficiary had developed experience in making policy and budgeting decisions, reviewing sales and profit sheets, forecasting international markets and trends, representing the company as the spokesperson, overseeing managers, and knowing the African products and the import and export process. The petitioner also submitted position descriptions that described the duties of the company's merchandise salesperson, tour salesperson, custom's broker, shows and travel manager, and administrative assistant. The

petitioner submitted a copy of the U.S. entity's organizational chart that depicted the beneficiary as president, with the shows and travel manager, the customs broker (subcontractor), bookkeeper, tour salesperson, merchandise salesperson, and administrative assistant under his direction.

The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary had been and would be employed primarily in a managerial or executive capacity. The director noted that of the three full-time positions, two part-time positions, and subcontractor position none appeared to be supervisory, professional, or managerial in nature. The director also noted inconsistencies in the number of employees employed by the petitioner. The director stated that he was not compelled to deem the beneficiary to be a manager or executive based solely on his title as president. The director noted that in an office the size of the petitioner's, it was very unlikely that the beneficiary would be primarily engaged in managerial or executive duties. The director stated that in all likelihood, the beneficiary has been and would continue to be engaged in the non-managerial, day-to-day operations of the organization.

On appeal, counsel argues that due to the beneficiary's absence from the United States a majority of the time, it has been necessary to have a manager to manage the U.S. entity's operations. Counsel asserts that the beneficiary's duties had clearly been defined as managing the U.S. entity, including the supervision of its sales and marketing managers. Counsel also asserts that the beneficiary has the authority to hire and fire employees as well as retain or dismiss independent contractors. Counsel reiterates the statutory definition of an "executive" in describing how the beneficiary's duties meet statutory requirements. Counsel concludes by noting that the beneficiary oversees employees' work, manages a productive output, and directs the operation of the company.

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 in nature. The petitioner asserts that the beneficiary has been and will be employed as the U.S. entity's president. Counsel described the beneficiary's job duties as both managerial and executive in nature. However, there has been insufficient evidence submitted to demonstrate which of his duties will be in fact managerial and which will be executive. Further, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions, and *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). There has been insufficient evidence and/or explanation given to establish that the beneficiary has performed and will perform high-level responsibilities conducive to a managerial or executive position. To the contrary, it appears that the beneficiary has been and will continue to primarily perform the day-to-day sales and marketing functions of the organization.

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 stated that the beneficiary's duties include: develops company goals and policies, and explores industry resources. The petitioner did not, however, clearly define the beneficiary's goals, policies, or clarify the nature of the industry resources. 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 described the beneficiary as being involved in the negotiating process and marketing of the petitioner's product. Since the beneficiary is directly involved in selling and marketing 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).

Further, rather than providing a specific description of the beneficiary's duties, on appeal the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For instance, the petitioner depicted the beneficiary as "directing the entire operation of the organization, establishing goals and policies of the organization, and exercising sole discretionary decision making." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd.* at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The record contains inconsistencies in the number of employees employed by the U.S. entity. The petitioner noted in the petition that it employed two employees "plus subcontractors." In response to the director's request for additional evidence, the petitioner listed six company employees. The petitioner submitted a copy of the U.S. entity's organizational chart that showed seven employees employed by the organization. In addition, the petitioner submitted copies of two IRS Form W-4s that demonstrated two individuals had filled out employee's Withholding Allowance Certificates for 2000. A financial report submitted by the petitioner indicated that the U.S. entity employed only two salaried employees for the period covering May 2001 to October 2001. 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).

Although the petitioner asserts that the beneficiary is 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. The petitioner contends that the manager reports directly to the beneficiary and therefore, the beneficiary should be considered a manager or executive rather than a first-line supervisor. However, the petitioner has not established that these employees possess or require a baccalaureate degree, such that they could be classified as professionals. 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 subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner stated that the beneficiary only "spends 15% of his time supervising the work of the manager and employees"

It does not appear that the petitioner has reached the point that it can employ the beneficiary in a predominantly managerial or executive position. The U.S. entity was established as an import, export, and travel business. Counsel stated that the beneficiary is out of the country in the Congo a majority of the time each year taking care of his corporate responsibilities there. It is also noted in the record that the company employs half of its employees on a part-time basis. The petitioner stated that the beneficiary spends only 15 percent of his time supervising subordinates. Based upon evidence of record, it appears that the petitioner is not yet able to support a managerial or executive position. 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.