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20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529

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U.S. Citizenship  
and Immigration  
Services



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FILE: SRC 03 151 51295 Office: TEXAS SERVICE CENTER Date: JUL 26 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 May 2000 and claims to be an exporter of electronics and electronic parts. The petitioner claims that it is a subsidiary of [REDACTED] located in Venezuela. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as president and director of operations for two years, at a yearly salary of \$20,000.00. The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed by the U.S. entity primarily in a qualifying managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and asserts that the evidence is sufficient to establish that the beneficiary will be employed primarily as a function manager.

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)(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.

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:

Managing an essential function in the company: Direction of all computer-related and technological aspects of the company's activities; supervising performance of subordinate managerial personnel; hiring and firing employees; planning and developing technology-related policies.

Present duties with the U.S. company include overseeing all of the company's activities; establishing the company's business policies and goals; conducting business negotiations; hiring and firing personnel; managing an essential function in the company: the product selection process.

The petitioner submitted a letter dated April 30, 2001, in which the beneficiary's duties are described in part as:

As the highest administrative authority of the company, [the beneficiary] has been performing, and will continue to perform, the following duties:

1. Overseeing all of the company's activities including purchasing, shipping, marketing, financial, customer service and other activities;
2. Establishing the company's business policies and goals;
3. Assuring that the product selection process is conducted in accordance with business practices, rulers, and philosophy of the parent company;
4. Conducting business negotiations with suppliers in the United States and customers in Venezuela; [and]
5. Conducting negotiations with banks and/or other financial institutions;

#### MANAGERIAL DUTIES

1. Hiring and firing personnel.
2. Managing an essential function within the company. The essential function to be managed by [the beneficiary] is the product selection process. The Latin American market in general and Venezuelan market in particular have their

own specific requirements and demands as to computer and auto electric/electronic products. These requirements differ from those common to the United States market and are determined by economic and cultural realities of Latin America. [The beneficiary] has profound knowledge of and first-hand familiarity with specifics of the Latin American customer preferences and market requirements. She will assure that the products purchased by [the U.S. entity] meet requirements of the Venezuelan market. [The beneficiary] will also monitor trends and price fluctuations in the international computer and electric industries. [The beneficiary] spends 90-95% of her work time performing the executive and managerial duties. All routine clerical responsibilities are performed by support personnel.

The petitioner submitted copies of the U.S. entity's IRS Form 1120, Corporate Income Tax Return for 2001; IRS Form 941, Employer's Quarterly Federal Tax Return for 2002; and IRS Forms W-3 and W-2 for 2002.

In response to the director's request for evidence on the subject, counsel stated that the beneficiary manages an essential function in the U.S. entity, namely development of the product selection process. Counsel further asserted that the function was essential to the petitioner's business in that Venezuelan consumers were not familiar with U.S. computers and auto electric/electronic products. Counsel also asserted that the function was essential based upon such objective factors as consumer preferences, local testing and certification standards, local tariff burdens, and the compatibility of U.S. products with Latin American usage requirements.

Counsel further stated that due to the economic turmoil in Venezuela, the petitioner had laid off two of its three employees. Counsel asserted that as a result of the negative effects, during the past two quarters, the petitioner did not pay out any wages or employer quarterly taxes. Counsel notes that the petitioner expects to reactivate the two employees in the future.

The petitioner submitted as evidence a Standard & Poor's publication highlighting Venezuela's economic crisis dated September 24, 2002; IRS Form 940 for 2002, and Employer's Annual Federal Unemployment Tax Return for 2002.

The director determined that the beneficiary would not be performing in a managerial or executive capacity in that he will not be managing other professionals or managers. The director noted that based upon the number of employees employed by the petitioner, the beneficiary would have to engage in day-to-day business activities. The director also noted that the evidence of record demonstrated that the beneficiary would be performing the functions of the organization rather than managing them. The director stated that there was no evidence to show that the beneficiary would function at a senior level within the organizational hierarchy.

On appeal, counsel argues that the evidence submitted is sufficient to demonstrate that the beneficiary is managing or directing an essential function of the organization. Counsel cites an unpublished decision in support of his contention that the beneficiary operates as a functional manager. Counsel further asserts that as long as it has been established that the product selection process constitutes an essential function within the organization, that acknowledgement is sufficient to establish that the beneficiary performs such a function.

Counsel's argument is not persuasive. The evidence does not establish that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity. Counsel contends the beneficiary will be performing the product selection function of the organization. Counsel further contends that performing the function rather than managing the function is sufficient to demonstrate the beneficiary's capacity as a function manager. Contrary to counsel's contentions, the beneficiary's proposed duties such as: ensuring product compliance, monitoring trends, and monitoring price fluctuations are not characteristic of duties performed by a manager or executive. Since the beneficiary actually performs the administrative work and markets the petitioner's product, he is performing tasks necessary to provide a service or product and such 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).

Counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. There has been no evidence submitted to demonstrate that the U.S. entity utilizes outside independent contractors in performing the functions of the organization. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The record does not demonstrate that the beneficiary will primarily manage an essential function of the organization. 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. In this matter, the beneficiary's proposed job description depicts an individual who will perform the day-to-day services of the organization, not that of a functional manager. Although the petitioner stated that the beneficiary would be primarily responsible for managing the product selection process within the organization, the record reflects that the beneficiary will perform managerial as well as non-qualifying duties necessary to establish the business, namely: marketing, purchasing, sales, contract negotiations, and banking. In addition, the record demonstrates that former employees have been laid off. When managing or directing a function, the petitioner is required to establish that the function is essential and that the manager is in a high-level position within the organizational hierarchy, or with respect to the function performed.

The record does not demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the product selection function. Counsel asserted that the two other company

employees had been laid off and would possibly be reactivated “soon.” Therefore, the beneficiary as sole employee would have to perform the duties of the organization in addition to the routine clerical responsibilities that were once performed by the support personnel. Furthermore, the petitioner has failed to provide a detailed position description specifying exactly what the management of the corporate functions associated with the product selection process will entail. The petitioner has not established that the beneficiary has been, or will be, employed in a primarily managerial or executive capacity. 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.