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U.S. Citizenship and Immigration Services

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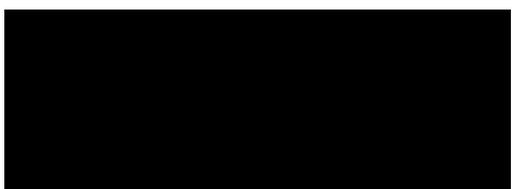
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FILE: EAC 02 247 54828 Office: VERMONT SERVICE CENTER Date: JUL 26 2005

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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the evidence contained in the record, the petitioner was established in 2000 and claims to be a gem and jewel import and marketing firm. It claims to be a branch office of Bary & Company, located in [REDACTED] Sri Lanka. The petitioner claims one employee and gross annual income in the amount of \$237,561.00. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its managing partner at a weekly salary of \$800.00. The director determined that the petitioner failed to submit sufficient evidence to establish that the beneficiary has been or will be employed primarily in an executive or managerial capacity.

On appeal, counsel disagrees with the director's determination and asserts that the evidence establishes that the beneficiary's duties have been and will continue to be primarily executive or managerial 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) further 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 issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary has been and will be employed primarily in an executive or managerial 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 initially described the beneficiary's duties in the petition as: "Look[s] for wholesale and retail stone and gem merchants in the United States and boost [sic] the sales operation of gems and stones."

In response to the director's request for additional evidence on the issue, counsel described the beneficiary's duties as:

The beneficiary gets shipment [sic] from Sri Lanka. He orders and supervises the manufacturing of some custom made gems and jewels material and markets the gems and jewels commodities in different shows and business exposition [sic] in the United States.

The director denied the petition after determining that the evidence was insufficient to establish that the beneficiary had been or would be employed primarily in a managerial or executive capacity. The director noted that, although specifically requested, the petitioner failed to submit a complete position description for all employees in the United States; a breakdown of the number of hours devoted to each of the employees' job duties; and financial evidence relating to the number of persons employed by the U.S. entity. The director further stated that it appeared from the record that the beneficiary alone was primarily engaged in providing sales services to the company's clients at various trade shows and out of his home, rather than directing the management of the organization. The director concluded that the beneficiary had been and would be performing the day-to-day duties of the organization and that any managerial or executive duties were only incidental to such tasks.

On appeal, counsel disagrees with the director's decision and asserts that sufficient evidence has been submitted to establish that the beneficiary has been and will continue to be employed primarily in a managerial or executive capacity. Counsel asserts that the beneficiary manages and supervises the U.S. entity and exercises discretion over the day-to-day operations of the organization. Counsel also asserts that the beneficiary, from time to time, during various trade shows and exhibitions, hires and supervises independent contractors. Counsel refers to an unpublished AAO decision in support of his claim on appeal.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or will be employed in a managerial or executive capacity. 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). 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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *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). In the instant matter, the petitioner's description of the beneficiary's job duties is vague and fails to clarify the percentage of time spent performing managerial versus executive duties. There has been no evidence submitted that demonstrates which duties the beneficiary will be primarily performing for the U.S. entity.

Counsel refers to an unpublished decision on appeal, 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 where it was shown that the organization hired and supervised independent contractors. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished case. The petitioner has failed to submit evidence to substantiate its claim that the U.S. entity hires and supervises independent contractors for various trade shows and exhibitions. 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.

On review, 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 managing the import, marketing, sales, and manufacturing of gems and jewels. The petitioner did not, however, define how the beneficiary manages the functions of the organization or how he supervises employees. 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, supra*. 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 addition, the petitioner describes the beneficiary as manufacturing, marketing, and selling the gems and jewels. Since the beneficiary actually manufactures, markets, and sells the gems and jewels he is performing a task necessary to provide a service. 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).

In the request for evidence, the director requested that the petitioner submit a U.S. business organizational chart; a complete position description for all employees in the United States; a breakdown of the number of hours devoted to each of the employees' job duties; and financial evidence including IRS Form 941 and payroll summaries relating to the number of persons employed by the U.S. entity. The petitioner failed to submit these documents in response, stating that the beneficiary was the only employee who, from time to time, hired and supervised independent contractors. Contrary to the petitioner's belief, this evidence is critical as it would have established whether the beneficiary has been and would be performing primarily in a managerial or executive capacity. 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 failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The evidence and explanations submitted by the petitioner are insufficient to establish that the beneficiary has been or will be employed primarily in a managerial or executive capacity. It appears from the record that the beneficiary has been performing and will continue to perform the day-to-day

services of the U.S. entity, rather than manage or supervise the business operation as a whole, a function within the organization, or personnel staff. Accordingly, the appeal will be dismissed.

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.