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U.S. Citizenship
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Services

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FILE: WAC 03 132 52200 Office: CALIFORNIA SERVICE CENTER Date: JUN 07 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 Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its branch manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the Territory of Guam and claims to be a retailer and wholesaler of [REDACTED] heaters, parts, and accessories. The petitioner states that it is an affiliate [REDACTED] located in the Philippines. The petitioner seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits a brief in support of his assertions.

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 regulations at 8 C.F.R. § 214.2(l)(3) state 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.

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

In support of the petition, the petitioner provided the following description of the beneficiary's job duties.

1. As [b]ranch [m]anager, [the beneficiary] supervises the work of his four (4) employees, especially on technical aspects where his expertise is required. He has full authority to hire and, if necessary, fire and schedule leave for all employees in the [REDACTED] Division.
2. At this time of the government's save energy program, [the beneficiary] has to train his sales people and customers on the technical functions of the solar heaters.

3. [The beneficiary's] presence is necessary at installation and commissioning of units.
4. Since [the beneficiary] became the [b]ranch [m]anager of [REDACTED], he has sold 56 units up to December, [sic] 2002. In January 2003 alone he has sold 14 units, and he is optimistic that the business would continue to improve because of his technical skills and know-how ably explained to his sales people and customers.
5. As the organizational chart shows, [the beneficiary], in his managerial capacity, supervises and controls the work of his employees, or otherwise manages and directs the essential function of the [petitioner].
6. It cannot be emphasized enough that the expertise of [the beneficiary] gained in his years of employment with [the foreign entity] is needed in his supervision of his employees, especially as to technical aspects and proper installation of solar heater units.

On May 6, 2003, CIS issued a request for additional evidence. A significant portion of the request focused on the beneficiary's position in the United States. In that regard, the petitioner was asked to provide a copy of its organizational chart to illustrate the petitioner's managerial hierarchy and staffing levels. The chart was also to include the names of all of the petitioner's employees and point out those employees that are directly under the beneficiary's supervision. The petitioner was further asked to provide a detailed position description for the beneficiary, assigning a percentage of time that the beneficiary spends performing each of his listed duties, as well as brief position descriptions for all of the beneficiary's direct subordinates.

The petitioner responded with a letter from counsel, dated July 25, 2003. Along with the letter, the petitioner submitted its organizational chart showing the beneficiary as the head of the [REDACTED] division. The chart indicates that the beneficiary has four subordinates including a coordinator, a salesman, a warehouseman, and an installer. The petitioner indicated that the coordinator performs secretarial duties; the salesman deals with customers in an effort to sell the petitioner's products; the installer installs purchased units in the customers' homes; and the warehouseman ensures proper conditions of the warehouse and keeps track of the number of units sold. Although requested to submit a more detailed description of duties of the beneficiary, the petitioner provided the exact same description that it previously submitted in support of the petition and failed to assign a percentage of time the beneficiary would spend performing his daily duties.

On September 15, 2003, the director issued a decision, which listed the beneficiary's duties and concluded that the record does not contain sufficient evidence to establish that the beneficiary would primarily perform qualifying duties.

On appeal, counsel asserts that the petitioner's organizational chart is a clear indicator of the beneficiary's authority over his subordinate personnel. However, the AAO does not dispute the beneficiary's apparent discretionary authority. In any case, this factor is only one of several that must be considered in determining the petitioner's eligibility for the benefit sought. 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). In the instant matter, the petitioner submitted a job description that is entirely too general to convey a clear understanding of what the beneficiary has been and would be doing on a daily basis. 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 broad description of duties provided by the petitioner suggests that the beneficiary's time will primarily be consumed with managing a staff of individuals who, based on their job descriptions, cannot be deemed managerial, supervisory, or professional. Based on the beneficiary's description of duties, the beneficiary continues to engage in customer service functions in an effort to train the customers and the petitioner's sales staff on how to use the petitioner's product. The petitioner also indicated that the beneficiary has been directly involved in selling the petitioner's product and is present during product installations. While the AAO does not dispute the beneficiary's professional knowledge and his discretionary authority over the sales of the petitioner's product, the fact remains 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, 604 (Comm. 1988). Counsel further refers to an unpublished decision involving an employee of the Irish Dairy Board. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification 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 Irish Dairy Board matter. Rather, the record strongly suggests that the beneficiary has been and will continue to be directly involved in carrying the petitioner's daily operational tasks. It is noted that the statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). 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.

Although counsel properly implied that the beneficiary need not be a personnel manager in order to qualify as a manager or executive, the record lacks evidence that the beneficiary manages a function. 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. However, as previously indicated, while the director specifically asked the petitioner to submit a detailed description of the beneficiary's job duties, including the percentage of time spent on each duty, the petitioner failed to respond to this request. 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). Due to this failure, the record does not contain the necessary detailed description of duties or other evidence that would suggest that the beneficiary manages an essential function.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity as the record fails to establish that a majority of the beneficiary's duties have been and will be of a qualifying capacity. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he will otherwise be relieved from performing non-qualifying duties. Based on the evidence furnished, it cannot be found that the beneficiary

has been or will be employed primarily in a qualifying 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.