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U.S. Citizenship
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Services

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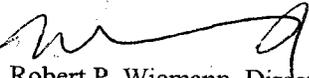
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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

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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 established in 2001 and claims to be an importer of furniture, handmade rugs, jewelry, and handicrafts. The petitioner claims to be a branch office of [REDACTED], located in Pakistan. The petitioner seeks to employ the beneficiary temporarily in the United States as a general manager for a period of one year, at an annual salary of \$40,000.00. The director determined that the petitioner had submitted insufficient evidence to establish that (1) the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity; (2) would be employed by the U.S. entity in a primarily managerial or executive capacity; or (3) that the petitioner would be able to support such a position within one year of operation.

On appeal, counsel disagrees with the director's decision and asserts the evidence submitted is sufficient to establish that the beneficiary has been employed by the foreign entity and will be employed by the U.S. entity in a primarily executive capacity, and that the U.S. entity will be able to support an executive position within one year of operation.

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 with 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 serves 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.

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.

In a letter of support, dated September 12, 2003, the petitioner described the beneficiary's job duties abroad as:

While working with the parent company as Import/Export Manager for Asian Gallery Exporters & Handi Crafts (Private) Limited, [the beneficiary] was in charge in the development of the product market inside Pakistan as well as in foreign countries for the business of exporting their products abroad. His duties included product enhancement, was oftentimes sent overseas to search and test new markets, helped set up the two branch office in Pakistan and assisted the individuals managing them in implementing their responsibilities upon start up of the new facilities. He also gave a hand at sales forecasting, budgeting, and managed a number of corporate accounts.

In response to the director's request for evidence, the petitioner described the beneficiary's job duties abroad as:

1. Coordinated activities for shipment of Asian Handicraft products to domestic and foreign buyers.
2. Supervised the activities of the staff engaged in receiving and shipping of Asian Handicrafts products.
3. Established standard operating procedures for receiving, handling, shipping Asian Handicraft products to the buyers.
4. Conferred with other managers in coordinating production, sales, quality control, and purchasing.
5. Reviewed invoices and purchase orders to estimate delivery periods and issue work assignments.
6. Examined invoices and shipping documentation for conformity to tariff and customs regulations.
7. Participated in the enhancement of product design.
8. Negotiated sales contracts and freight handling agreements to resolve problems between foreign and domestic shippers.
9. Assisted in setting up the two branch offices in Pakistan training the managers on the implementation of their duties.

The petitioner continued by stating that the beneficiary's job duties abroad had been managerial in nature in that he managed the sales department and exercised control and supervision over the staff engaged in freight, shipping, and receiving.

The director subsequently denied the petition. The director noted that although the petitioner claimed that the beneficiary had been performing managerial duties in that he managed the organization's sales department, it had failed to provide a comprehensive description of the beneficiary's duties to substantiate such a claim. The director stated that based upon the described duties, it appeared that the beneficiary had been primarily involved in the day-to-day operations of the business abroad. The director concluded by stating that although the petitioner stated that the beneficiary managed the foreign entity's freight, shipping, and receiving staff, the petitioner had failed to submit a job description of these subordinates.

On appeal, counsel argues that the beneficiary's duties clearly establish that he has been performing managerial or executive duties abroad in that he has coordinated shipping activities and has established operating procedures for receiving, handling, and shipping the foreign entity's products to buyers. Counsel also argues that the beneficiary supervises subordinate's activities in shipping and receiving as well as performs managerial duties by supervising the sales function of the organization. Counsel concludes by stating that the foreign entity's staff has been engaged in receiving and shipping freight, documentation, waybilling, invoicing, assessing charges, and collecting fees for shipping purposes while another group of employees has been responsible for the packing and shipment of the foreign entity's product.

In evaluating whether the beneficiary is employed by the foreign entity in a primarily managerial capacity, 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.

Further, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions, and 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 this matter, the record shows that the beneficiary primarily performs the marketing, sales, and shipping functions of the business rather than managing the function or managing professional, managerial, or supervisory personnel.

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 coordinating activities, supervising staff activities, establishing standard operating procedures, and participating in the enhancement of product design. The petitioner did not, however, define the petitioner's activities nor clarify the company's standard operating procedures. 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).

In addition, the petitioner describes the beneficiary as examining and reviewing company invoices and negotiating sales contract and freight handling agreements. Since the beneficiary actually negotiates the contracts, markets the petitioner's product, and performs clerical work, he is performing a task necessary to provide a service or product and this duty 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).

Although specifically requested by the director, the petitioner failed to document what proportion of the beneficiary's job duties abroad are managerial functions and what proportion are non-managerial. The petitioner lists the beneficiary's duties as managerial, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as performing clerical work, selling the product, negotiating contracts, and marketing the petitioner's product, are not 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).

The petitioner claims that the beneficiary supervises subordinate activities in the shipping and receiving departments, however, 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. Further, although specifically requested by the director, the petitioner failed to submit a detailed job description of the foreign entity's subordinates. It appears from the record that the beneficiary is supervising a staff of non-professionals engaged in the preparation, packaging, and shipping of the company's product. 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.

Even though the petitioner claims that the beneficiary directs and manages the petitioner's sales activities as an essential function of the foreign entity, it does not claim to have anyone on its staff to actually perform the sales function. Thus, either the beneficiary himself is performing the sales function or he does not actually manage the sales function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing the sales function, 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 of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). On review, the petitioner has failed to submit sufficient evidence to demonstrate that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

Neither has the petitioner submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity.

In a letter of support, dated September 12, 2003, the petitioner described the beneficiary's proposed duties as:

[The beneficiary] will fill the position of General Manager (USA) in the New York office of [REDACTED] (Private) Limited in charge of the development of the market and as administrative head of all the departments. The position requires that [the beneficiary] (1) Oversee the development of the company's marketing strategy and entry plan (2) Directs, plans, and implements policies and objectives of the business in accordance with

trade regulations (3) Appoint, hire, remove personnel and fix their salaries and wages. (4) Confers with key personnel from the parent company to establish policies and formulate plans. (5) Keep full and complete record of the operations of this office and render a report to the head office from time to time. (6) Directs, plans, and implements policies and objectives of the business in accordance with trade regulations (7) Reviews financial statements and sales and activity reports to ensure that the business's objectives are achieved. (8) Directs and coordinates activities of the department concerned with production, pricing, sales, and distribution of products.

The petitioner submitted a copy of the U.S. entity's proposed organizational chart. The chart depicted the beneficiary as general manager, with a proposed sales manager, purchasing manager, sales representative, and purchasing representative under his direction.

In response to the director's request for evidence, the petitioner described the beneficiary's proposed job duties in the United States as:

In the United States organization, [the beneficiary] is the General Manager and responsible for overseeing the entire staff as well as managing client relationships, representing the company at shows, providing firm direction, and reporting to the CEO of the parent company especially with the establishment of policies and formulating plans. He will keep a full and complete record of the operations of this office and will render report periodically. He will direct and coordinate activities of the company to obtain topmost efficiency and economy of operations. In this regard, he has the authority to hire, remove personnel, [and] fix their salaries and wages. He will develop the business concept and policies to realize the company's business goals then directs [sic] the implementation of the policies and objectives to see to it that the company's marketing strategy will yield maximum profits. Hence, he will review the financial statements and sales activity to make sure that the business's objectives will be achieved. He will direct and coordinate promotion and marketing of products through trade shows and relationships with existing clients. He will oversee the development of new markets, [and] find ways to obtain a competitive position in the market for Pakistani goods.

The director subsequently denied the petition noting that although the U.S. entity was established in October of 2001, the evidence did not establish that it had been doing business for at least one year as of the date of filing the petition, and therefore, it would be treated as a "new office." The director further noted that the job description given of the beneficiary's proposed duties was vague and abstract and did not clearly show how the beneficiary would be performing managerial duties. The director also noted that it appeared the beneficiary would be directly involved in the sales and marketing of the organization. The director further noted that the job duties of the proposed employees were described by the petitioner in an abstract form with no indication of the actual level of complexity of their duties within the U.S. entity. The director stated that based upon the evidence of record, it was not possible to determine that the beneficiary would be managing a professional staff or that the entity would be able to support a managerial or executive position within one year of operation.

On appeal, counsel claims that the U.S. entity has been engaged in the regular, systematic, and continuous provision of goods and services since March of 2001. The petitioner submitted copies of company invoices in an effort to substantiate counsel's claim. Counsel argues that the beneficiary will be responsible for managing the entire organization and that all other managers within the U.S. entity will be under his direction and

supervision. Counsel reiterates the beneficiary's proposed job duties. Counsel claims that the supervision will include supervising independent contractors. Counsel further claims, that the beneficiary, although the sole employee, will exercise discretionary authority over the day-to-day operations of the organization. Counsel cites to an unpublished AAO decision in support of his position. Counsel argues that the beneficiary's executive duties will consist of directing and coordinating activities of the U.S. entity, directing the implementation of the company's policies and objectives, directing and coordinating the promotion and marketing of the company's products, and developing the business concept and policies to realize the organization's business goals. Counsel claims that neither the nature of the organization nor its size is relevant in determining whether an individual qualifies for L-1 status. On appeal, the petitioner resubmits a copy of the U.S. entity's business plan and proposed organizational chart.

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 will include developing the business concept and policies to realize the company's business goals, directing the implementation of company policies and objectives, and direct and coordinate the activities of the organization. The petitioner did not, however, define the organization's goals, policies, or objectives, or clarify the activities of the organization. The record shows that the beneficiary will be primarily performing the sales and marketing functions of the organization rather than performing primarily managerial or executive duties.

Although counsel claims that the beneficiary will be responsible for managing the entire organization, including the supervision of managers and independent contractors, there has been no independent documentary evidence to substantiate this claim. The record shows that the beneficiary is the sole employee of the U.S. entity, although it began doing business in March of 2001. There is no evidence to show that the petitioner employed professional, managerial, or supervisory personnel who would relieve the beneficiary from performing non-qualifying duties. The petitioner has failed to demonstrate the extent to which the beneficiary will have control over the daily activities of the independent contractors, when they will be contracted, or how their responsibilities will interrelate with that of the beneficiary in relieving him from performing non-managerial duties.

Counsel refers to an unpublished decision in support of the appeal. However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. 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.

Rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). For instance, the petitioner stated that the beneficiary would be responsible for directing and coordinating the organization's business activities, directing and implementing the company's policies and objectives, and would exercise independent judgment in making business decisions. Merely paraphrasing the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he will direct the management of the organization or a major component or function of the organization, establish goals and policies, exercise a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals.

The petitioner indicates that it plans to hire additional managers and employees in the future as the company's client base expands. However, 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). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For these reasons, 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.