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FILE: SRC 02 164 54936 Office: TEXAS SERVICE CENTER Date: MAR 31 2006

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

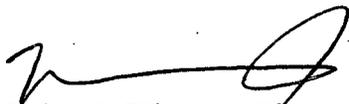
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.

The petitioner is described as engaged in the import, marketing and wholesale of loose diamonds and finished diamond jewelry. It seeks authorization to employ the beneficiary temporarily in the United States as its Quality Control Manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the job responsibilities of the position are those of management of an essential function of a component and/or department of the organization.

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)(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 (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 United States petitioner was incorporated in 1994 and is located in Texas and states that it is an affiliate of [REDACTED] located in Mumbai, India. The U.S. company, [REDACTED], is doing business as [REDACTED]. The petitioner indicated 14 to 17 employees on the Form I-129 and listed approximately \$10 million in gross revenues. The petitioner seeks to employ the beneficiary for three years at an annual salary of \$24,000.

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.

The petitioner stated in its initial letter that the beneficiary:

will manage the inspection of diamonds and finished jewelry for defects and deviations from specifications. The inspection is accomplished by examining the jewelry and gem surfaces and internal structure using a polariscope, refractometer, microscope and other optical instruments. The strength of the settings and bonding of the gemstones is also tested. As Quality Control Manager, [the beneficiary] is the final authority regarding the acceptability of the final product. He will also handle customer suggestions and complaints and work with the customers to insure their satisfaction.

On May 15, 2002, the director issued a request for additional evidence which requested the following:

1. Submit a new organizational chart for the U.S. entity. This must include the names, positions, whether they are full-time or part-time employees, and the date-started employment with the U.S. entity.
2. Submit a copy of all stock certificates (front and back) for the U.S. entity.
3. Submit a copy of the stock registry for the U.S. entity.
4. Submit evidence that the beneficiary has at least one continuous year of full time employment as a manager or executive abroad with a qualifying organization within the last three years prior to filing this petition.
5. Submit evidence that the beneficiary will be employed as a managerial or as an executive position within the U.S. entity.

On or about August 2, 2002, counsel for the petitioner responded to the director's request for additional evidence. The petitioner provided a new organizational chart for the U.S. company which listed the beneficiary as the quality control manager. The position listed directly under the supervision of quality control manager is a vacant assistant manager position. The petitioner also provided an affidavit from the president of the U.S. company which provided description of the beneficiary's position in the foreign company. In response to the director's request, the petitioner also provide the requested stock certificates and stock transfer ledger.

In response to the director's request that the petitioner submit evidence that the beneficiary will be employed as a managerial or as an executive position within the U.S. entity, the petitioner stated "[the beneficiary's] expertise is needed to manage the quality function due to the expansion of our business resulting from contract negotiations with Walmart and Zales Jewelers. In his position he will exercise absolute discretion in matters concerning the quality of diamonds and the matters affecting his department."

In her decision, the director stated the record does not convincingly demonstrate that the petitioner has any qualifying employees: "The beneficiary will purportedly serve the petitioner under the title of quality control manager, but there is not proof that there are any subordinate manager employees, it is concluded that the quality control manager will be carrying out the day to day operations of the quality control department and not

supervising them.” In her decision, the director also stated that “the record must demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function.” The director determined that the petitioner has not demonstrated that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel states that the director did not take into account that quality control is an essential function and did not take all of the facts and circumstances into account. Counsel asserts that the law was not applied correctly and that additional evidence will be submitted with the brief. Additionally, counsel cites CIS non-precedent and precedent decisions.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

On appeal, counsel states that the job responsibilities of the position are “those of management of an essential function of a component and/or department of the organization.” On appeal, the petitioner submits an augmented job description of the beneficiary’s position:

1. Manage the inspection of diamonds and finished jewelry for defects and deviations from specifications;
2. Examine the jewelry and gem surfaces and internal structure using a polariscope, refractometer, microscope and other optical instruments;
3. Test the strength of the settings and bonding of the gemstones;
4. Liaise with the President and Production Manager regarding observations noted in the diamond purchased and final jewelry product;
5. Review customer complaints and suggestions and, where appropriate, implement changes in materials, procedures and products;
6. Utilize his extensive knowledge in exercising wide latitude and discretionary decision-making in determining quality issues;
7. Hire and staff the Quality Control Department with Professional Gemologists to insure production of quality products.

Additionally, counsel cites several CIS precedent decisions in support of his assertion that the beneficiary’s position is managerial and qualifies for L-1A classification. However, counsel misconstrued the following cases, since these cases determined other issues and did not define a management position. *Matter of Vaillancourt*, 13 I&N Dec. 654 (Reg. Comm. 1970) determined whether the beneficiary could be in a specialized knowledge position abroad and then transfer to the United States as a manager. Also, counsel cites *Matter of Bocris* 13 I&N Dec. 601 (Reg. Comm. 1970) as holding that a manager of marketing was a qualifying L-1 position. However

Bocris discussed the 1970 law and the fact that the petitioner used the term "permanent" with reference to the petition. *Bocris* did not define the type of position qualifies as a managerial position. Counsel also cites *Matter of Pozzoli*, 14 I&N Dec. 569 (Reg. Comm. 1970) as holding that an operations research manager for a sales office is a qualifying L-1 position without a discussion of duties. Counsel is again misconstruing the decision. The *Pozzoli* decision held that the beneficiary could be paid by the foreign company and qualify for L classification. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to the cited decisions.

Counsel further refers to two unpublished AAO decisions. In one, 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 unpublished decision. The other decision involved a function manager. Counsel has not shown that the unpublished decision is analogous to this case. 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.

Counsel asserts that the beneficiary qualifies as a functional manager. Counsel insists that the beneficiary's position as a quality control manager "in essence, gives him authority over all functions and operations of the company. He is responsible for the quality of the raw materials purchased for the production department as well as the quality of the production and whether the jewelry is of sufficient quality to sell."

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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. 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. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

The petitioner has not demonstrated that the beneficiary will be primarily managing or directing a function. Based on the job descriptions provided by the petitioner, the beneficiary is performing the function. The beneficiary is performing quality control by physically examining the diamonds and jewelry. The description of the beneficiary's duties and responsibilities indicates that the beneficiary is providing the necessary services to the petitioner to allow its continued operation. Again, 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*, at 604.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner is a company engaged in the import, marketing and wholesale of loose diamonds and finished diamond jewelry. The petitioner has not established that a majority of the beneficiary's duties will be managing an essential function within the organization, or a department or subdivision. The record indicates that a preponderance of the beneficiary's duties will be directly performing the quality control function of the organization, which is, physically inspecting the diamonds and jewelry. The description of the beneficiary's primary duties indicates that they are not 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.