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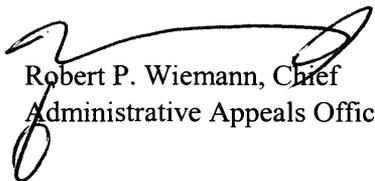
IN RE: Petitioner:
Beneficiary:

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)

IN 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, Chief
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, a foreign corporation registered to operate in the State of California, claims to be a branch of Bombay Export & Imports (India) Private, Ltd., located in Mumbai, India, and is engaged in the import and export of foodstuffs. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

Counsel for the petitioner filed an appeal in response to the denial. On appeal, the counsel contends that the petitioner demonstrated eligibility at the time of filing and that the director's decision was erroneous. In support of this contention, counsel for the petitioner submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(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.

The issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 the initial petition, counsel submitted a letter from the U.S. petitioner dated April 26, 2004 which outlined the beneficiary's duties while employed in the United States. The petitioner described his duties as follows:

[The beneficiary] prepares the necessary documents required for order execution and also coordinate[s] with the logistic departments and warehouses. [The beneficiary] is responsible for the overall coordination with the offshore office, local suppliers and customers in ensuring packaging requirements meet local Food and Drug Administration requirement[s] as well as ensuring the integrity of the product quality.

Also, he has been responsible for the negotiation and finalization with transportation companies, shipping companies and airlines. He has also been monitoring the progress with customers and taking corrective measures if any deviations are observed. He shall keep a report of all the marketing progress made to different customers by the US marketing team and prepare a progress report to submit to [the foreign entity].

Once the Food and Drug Administration obstacles have been overcome, [the beneficiary] will continue to expand the business. He will hire at least four employees. He will manage and direct the operation of the branch office, supervise professionals who will in turn supervise line employees. He will recruit the staff, over which he will have hiring and firing authority.

The petitioner also submitted copies of its quarterly tax returns for the quarters ending December 31, 2003 and March 31, 2004. Both documents indicated that the beneficiary was the petitioner's sole employee.

On June 9, 2004, the director requested additional evidence pertaining to the nature of the U.S. business, including a detailed overview of the beneficiary's duties, a list of all staff members and employees and their place in the petitioner's organizational hierarchy, as well as evidence of the employment and wages paid to the petitioner's claimed U.S. employees. The petitioner submitted a lengthy response dated August 31, 2004,

with the requested documentation. The documentation submitted included quarterly wage reports for the past three quarters, and an organizational chart for the petitioner. In a letter dated August 19, 2004, the petitioner provided the following updated description of the beneficiary's duties:

[The beneficiary] has been managing the overall operations of the U.S. branch office, located in Fremont, California. He was employed by the petitioner in the qualifying managerial/executive capacity. In his role as Branch Manager, [the beneficiary] directs and supervises professionals on a regular basis to achieve petitioner's business objectives, as set forth in the business plan. Moreover, [the beneficiary] supervises these professionals while performing essential functions with respect to the business enterprise. [The beneficiary] has great latitude in his decision making capacity, and in formulating U.S. branch office goals and strategies for the growth and development of the office.

[The beneficiary's] main responsibilities include human resources management function, sales and marketing management function, and operational management function. He has been performing all the above stated functions with the assistance of professionals in each area as will be discussed in detail below. Each of the professionals report directly to [the beneficiary] and are supervised directly by him. He has been given complete authority by the parent company abroad to act in a manner which is necessary and in the best interest of the branch office. [The beneficiary] has the authority to hire and fire [personnel] and take other personnel actions as required.

The letter indicated that the petitioner utilizes the services of a customs broker, a marketing firm, a distributor, and an accounting firm. The petitioner indicated that it currently employed a bookkeeper and had several vacancies for the positions of assistant manager of business development, assistant manager of operations and administration, warehouse supervisor, and sales representative. The petitioner emphasized that two promotional and marketing firms assist the beneficiary with sales and marketing on a commission basis.

On September 14, 2004, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, found that the beneficiary's stated duties had satisfied neither. The director noted that the nature and structure of the business as currently functioning did not appear to support the position of a bonafide manager or executive. In addition, the director noted that contrary to the petitioner's contentions, the petitioner had not established that the beneficiary would exercise authority over subordinate employees or manage an essential function or component of the organization.

On appeal, counsel for the petitioner asserts that eligibility had been proven and requests reconsideration.

Upon review, counsel's assertions are not persuasive. 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(1)(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 AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not demonstrated that the beneficiary will be employed in a primarily managerial or executive capacity. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, 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 are not considered to be managerial duties. For example, the petitioner states that the beneficiary is responsible for the "overall coordination with the offshore office, local suppliers and customers in ensuring packaging requirements meet local and Food and Drug Administration requirements." The record also indicates that he is responsible for negotiations with travel companies and airlines, and further states that the beneficiary maintains customer relationships, makes new contacts, "is under discussion with buyers," and has launched an advertising campaign and promotional activities. These duties do not fall directly under traditional 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).

Additionally, in response to the request for evidence, the petitioner claims that the beneficiary devotes the majority of his time to overseeing personnel, and that he currently supervises a staff of professionals. Specifically, the petitioner relies on the organizational chart, which claims that the beneficiary is responsible for overseeing several independent contractors; namely, an accounting firm, a customs broker, a commission agent, and a distributor. While the organizational chart identifies these contractors by name, the record contains no evidence that these contractors provided services to the petitioner. For example, the petitioner's Form 1120-F, U.S. Income Tax Return of a Foreign Corporation, indicates that it had no labor costs and paid no commissions during the tax year, which ended on March 31, 2004. This evidence, coupled with the petitioner's quarterly tax returns for the quarters ending December 31, 2003, March 31, 2004 and June 30, 2004, demonstrate that the beneficiary was the only person who was paid wages. The record, therefore, demonstrates that at the time of filing on May 6, 2004, the beneficiary was the petitioner's sole employee.

Clearly, this establishes that the beneficiary was the sole employee, and corroborates the claim in the initial letter of support that the beneficiary would soon hire four managers. While the petitioner claims in the response to the request for evidence that the beneficiary was currently supervising a subordinate staff of professionals, there is no evidence to support a finding that this staff was in place at the time the petition was filed. Merely claiming that the beneficiary is a manager or an executive by virtue of supervising a subordinate staff of employees or contractors, without documentation that such a staff existed at the time of filing, is insufficient to establish eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, 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).

It is noted that on appeal, counsel refers to several unpublished decisions in which 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 unpublished decision. 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.

Moreover, the AAO notes from the record that the beneficiary appears to be in charge of all tasks necessary to start and eventually expand the petitioner's business. The fact that the beneficiary engages in negotiations with transportation companies, deals with customers, and monitors the company's marketing practices suggests that he is directly involved in sales and tasks essential to the continued success of the business. If the beneficiary is engaged in client-related services, it must be noted that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed primarily in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. See 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitutes significant components of the duties performed on a day-to-day basis. The regulation at 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. 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.