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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 01 137 53033 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

MAR 28 2003

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]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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, [redacted] Inc. claims to be a subsidiary of an Indian company. The petitioner imports and sells Indian handmade woolen carpets and rugs. The U.S. entity was incorporated in the State of New York on March 13, 2000. The petitioner now seeks to hire the beneficiary as a new employee. The U.S. entity, therefore, is petitioning the Bureau to classify the beneficiary as a nonimmigrant intracompany transferee (L-1) for one year. The petitioner seeks to employ the beneficiary as the U.S. entity's president and chief executive officer at a salary of $28,000 per year. The director determined, however, that the beneficiary did not qualify as an executive or a manager. On December 20, 2001 the petitioner submitted a motion to reopen and reconsider. In accordance with 8 C.F.R. § 103.3(a)(2)(iv), the director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On January 15, 2002 the petitioner submitted a brief. On appeal, the petitioner's counsel asserts that the beneficiary works in an executive or managerial capacity.

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 meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

Under 8 C.F.R. § 214.2(l)(3), 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 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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii), a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied by:

(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.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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.

When examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner submitted several documents describing the beneficiary's proposed U.S. duties. Letters dated February 28, 2001 and March 20, 2001 summarized the proposed duties while two later letters - dated June 28, 2001 and August 22, 2001 - described the duties in greater detail. Furthermore, the two later letters estimated the amount of time the beneficiary would spend per week on each of his duties. The June 28, 2001 letter, submitted in response to the Bureau's request for evidence, listed the duties and weekly time spent on each task as:

- Formulating the company's long- and short-term business goals (5 hours);
- Researching the international handmade carpet market in order to develop marketing and sales strategies on a short[-] and long-term basis (10 hours);
- Meeting with Marketing/Sales Representative in order to communicate the findings of market research and instruct Representative regarding preferred course of action (5 hours);
- Setting and controlling budgets and related fiscal matters, including meeting with the company's Chartered Accountant to discuss financial planning for the company (5 hours);
- Exercising discretion over the daily operations of the company (2 hours);

- Organizing and establishing office systems and procedures (1 hour);

- Negotiating contracts and conducting follow-up with clients through the Marketing/Sales Representative who serves as a liaison between CEO and clients (4 hours);

- Hiring, firing, and determining compensation levels and leave of employees (as needed);

- Determining customer requirements as per feedback from [M]arketing/Sales Representative (1 hour);

- Interfacing with Marketing/Sales Representative regarding inventory issues (1 hour);

- Communicating with suppliers/distributors to negotiate contract arrangements and communicating with banks regarding necessary transfers of money (2 hours);

- Engaging in customer and public relations (2 hours);

- Supervising and participating in trade shows of consumer products[] (1 hour);

- Communicating with Subsidiaries Company [*sic*] with regard to current status of market, supply [and] demand issues, financial status of the subsidiary, and implementation of short/long term goals (2 hours);

- Preparing periodic reports concerning the quantity and value of the inventory (1 hour)

- Supervising Administrative Assistant in the collection of all accounts receivable from [the petitioner's] customers and assisting CPA in the preparation of taxes and related financial matters (1 hour);

- Interviewing, Hiring, Supervising and Terminating Staff members (1 hour).

In addition, the June 28 letter stated that the beneficiary would be supervising two employees: (1) a product manager, Sukesh Baranwal; and (2) an administrative clerk, Akhilesh Mishra.

The August 22 letter, submitted in response to the Bureau's notice of intent to deny, listed the beneficiary's proposed duties and weekly time spent on each task as:

- Establishing and executing the company's short-term and long-term business goals. (6 hours)

- Becoming knowledgeable of the market for carpets in the US by US and foreign purchasers. (4 hours)

- Developing a marketing plan for the subsidiary in the US.

- Meeting with Marketing representatives to inform the representatives on the current market for carpets and to instruct the representatives on the preferred course of action to be carried out on behalf of the company. (5 hours)

- Conferring with marketing representatives to determine the current demand for carpets, and accordingly, inventory needs. (3 hours)

- Negotiating contracts with suppliers and distributors of carpets. (3 hours)

- Negotiating contracts with clients. (3 hours)

- Engaging in public relations for the company[.] (4 hours)

- Communicating with the other subsidiaries of the company to discuss the current status of the market and the implementation of long term company goals. (3 hours)

- Establishing and monitoring a budget for the company. (1 hour)
- Monitoring the daily operations of the company with wide discretion. (2 hours)
- Supervising the staffing needs of the company. (1 hour)
- Maintaining communication with the parent company. (1 hour)

Also, the August 22 letter listed the beneficiary's proposed subordinates as well as their required educational requirements:

- A manager with a BS in business and marketing;
- An assistant manager with a BS in marketing;
- An unspecified number of distribution specialists with a BS in marketing;
- A finance controller with a BS in accounting and finance; and
- An administrative assistant with an associate degree in office management.

An organizational chart accompanied the August 22 letter. Neither the organizational chart nor the letter provided specific names for any of the proposed subordinate positions.

Initially, the AAO notes that the June 28 and August 22 letters provide inconsistent information. In particular, the letters present somewhat differing descriptions of the beneficiary's duties. For example, in the June 28 letter, the petitioner states that the beneficiary will devote five hours per week to formulating long and short term business goals. In contrast, the August 22 letter indicates that the beneficiary will spend six hours per week on setting short and long business goals. Other similar hourly discrepancies exist between the two letters. Moreover, although the June 28 letter lists the

beneficiary as supervising two employees, the August 22 letter states that the beneficiary will be supervising five or more employees. The subordinates' job titles also differ between the two letters. The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho,* 19 I&N Dec. 582, 591-2 (BIA 1988). The inconsistent listings of duties and subordinates, therefore, raise doubts about the petitioner's evidence.

Apart from these inconsistencies, the petitioner failed to submit any evidence demonstrating that the listed employees work for the U.S. entity. Specifically, the record lacks quarterly wage tax filings, yearly income tax documents, or pay records. Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS,* 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS,* 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, counsel's assertions do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980).

Even if the AAO accepted the lists of duties and subordinates as consistent, the petitioner described the beneficiary's duties in extremely broad terms, largely paraphrasing the statutory and regulatory executive and managerial requirements. Four examples of the vague, paraphrased statements include:

- Organizing and establishing office systems and procedures; and

- Formulating the company's long- and short-term business goals;

- Monitoring the daily operations of the company with wide discretion; and

- Supervising the staffing needs of the company.

The petitioner's vague descriptions provide insufficient detail to allow the Bureau to determine what the beneficiary's daily responsibilities are. As explained previously, going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra; see generally Republic of Transkei v. INS, supra; Matter of Treasure Craft of California, supra.*

The AAO further observes that the beneficiary's duties primarily appear to comprise marketing tasks. Marketing duties, by definition, qualify as performing a task necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or 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).

Additionally, to qualify as a manager, the beneficiary must supervise a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing nonqualifying duties. In this instance, the petitioner asserts that the beneficiary will be supervising personnel with college degrees. The petitioner failed, as noted above, to demonstrate that it has filled any of the positions listed in either the June 28 or August 22 letters. Further, the petitioner provided no evidence demonstrating that the persons claimed to hold the subordinate positions have advanced degrees. The lack of supporting documentary evidence precludes the petitioner from meeting its burden of burden of proof. *Ikea US, Inc. v. INS, supra; see generally Republic of Transkei v. INS, supra; Matter of Treasure Craft of California, supra.*

The petitioner asserts that, at some future time, it may hire additional professional employees for the beneficiary to supervise. The Bureau may not, however, approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire,* 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The Bureau will adjudicate the appeal based only on the record proceedings before the director. *See Matter of Soriano,* 19 I&N Dec. 764 (BIA 1988). When the petitioner filed Form I-129, the beneficiary did not supervise any employees. Therefore, based on the record before the director, the beneficiary does not serve in a primarily executive or managerial capacity.

On appeal, counsel maintains that the beneficiary's responsibilities are those of a functional manager. Counsel further asserts that a functional manager who supervises no employees may serve in an executive or managerial capacity. Counsel cites an unpublished AAO case to support this argument. While 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. The AAO acknowledges that a person can qualify as a functional manager without directly supervising other employees. However, as explained above, the evidence demonstrates that, at most, the beneficiary performs tasks necessary to provide a service or produce a product. Consequently, the beneficiary does not qualify as a functional manager.

Also, on appeal, the petitioner asserts that the U.S. entity's small size should not preclude the beneficiary from functioning in a managerial or an executive capacity. The AAO recognizes that an entity's size does not necessarily decide the question of managerial or executive capacity. As established previously, however, the beneficiary is not only performing tasks required to provide a service or produce a product, but has no staff to relieve him of those duties. Thus, regardless of the U.S. entity's size, the petitioner has not established that the beneficiary is primarily functioning as an executive or a manager.

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; *Transkei*, 923 F.2d at 178 (holding burden is on the petitioner to provide documentation); *Ikea*, 48 F.Supp at 24-5 (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.