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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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

[REDACTED]

FILE: SRC 02 089 51300 Office: TEXAS SERVICE CENTER Date:

APR 08 2003

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]

PUBLIC COPY

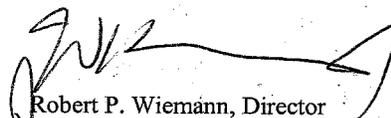
INSTRUCTIONS:

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 believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

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, Texas 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] claims to be a subsidiary of a Brazilian company, [REDACTED]

[REDACTED] imports and exports products with an emphasis on selling Brazilian food products at a small grocery store in Florida. The U.S. entity was incorporated in the State of Florida on April 1, 2000. In February 1999, the petitioner petitioned the Bureau to classify the beneficiary as a nonimmigrant intracompany transferee (L-1). The Bureau approved a petition and extension of stay as valid from February 25, 1999 to February 25, 2002. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for three years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's executive manager at an annual salary of \$35,000.¹ The director determined, however, that the beneficiary did not qualify as an executive or a manager. Consequently, the director denied the petition. 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

¹ In one instance, the petitioner listed the beneficiary's title as head manager.

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.

Pursuant to 8 C.F.R. § 214.2(1)(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 (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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 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). On Form I-129, the petitioner described the beneficiary's U.S. duties as:

- 1) Oversee the overall function of the current corporation and the expansion of the Import and Export market.
- 2) Continue to manage the company and the employee's staff[.]
- 3) Identify new markets for penetration for Import/Export business.
- 4) [Be i]n charge of doing business with the wholesaler[.]
- 5) Oversee distribution of the products imported from Brazil into the U.S.

The petitioner appended a nontechnical description of the beneficiary's duties to the Form I-129:

Will oversee the overall marketing plan for the company, promote the local consumer's name to be synonymous with [a] quality exporting company, identify new markets for penetration and act as liaison with distributors to assure that these markets

are accessed, create marketing strategies to reach both retailers and consumers, educate wholesaler[s'] sales people regarding the characteristics of the product line, oversee distribution and inventory control of the products from Brazil into the U.S., and maintain communication with local consumers in South America regarding the expansion of production by means of constant growth.

Letters dated January 2, 2001, and October 25, 2001, used identical wording to describe the beneficiary's job duties in the United States:

[The beneficiary] has been responsible for the overall marketing plan and philosophies of our company, he has promoted customer service, identified new markets for penetration, [provided] liaison with distributors to ensure import-export trade, communicated and negotiated with the wholesalers with respect to prices and terms of business agreements, [overseen] distribution, inventory, and control of the products from Brazil into the U.S. that are being sold by retail grocery business, [been] responsible for the economic and financial growth of the subsidiary, and exercised authority to supervise and manage employees as well as to hire and fire.

A March 11, 2002 fax from petitioner reiterated the duties listed in the two letters and Form I-129. Additionally, the fax stated that the beneficiary supervises one store attendant, [REDACTED]. The fax listed the percentages of time the beneficiary spends on each of his duties:

- A) 5%: [The beneficiary is r]esponsible for the overall marketing plan of the company,
- B) 70%: He promotes customer service,
- C) 15%: [He provides l]iaison for the company with respect to distributors and wholesalers for the distribution of inventory and purchasing products and sale,

D) 5%: He exercises authority to supervise and manage the Subsidiary company together with the authority to hire and fire any employees, and

E) 5%: He has total authority with respect to the decision-making for the Subsidiary.

The petitioner described the beneficiary's duties in general terms, largely paraphrasing the statutory and regulatory executive and managerial requirements. 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 petitioner had described the job duties in more detail, 70 percent of the beneficiary's responsibilities comprise customer service which, by definition, qualifies 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).

Petitioner maintains that, because the beneficiary supervises employees, the beneficiary functions as a manager or executive. The record reveals that the beneficiary supervises only one employee, namely, [REDACTED]. The petitioner did not describe [REDACTED] job duties. As previously noted, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, *supra*.

The petitioner's failure to identify [REDACTED] duties or qualifications makes it impossible for the Bureau to determine whether the beneficiary primarily supervises a subordinate staff

of professional, managerial, or supervisory personnel who can relieve him from performing his nonqualifying duties. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[T]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). In sum, the beneficiary's duties - rather than being executive or managerial - demonstrate that the beneficiary functions, at most, as a first-line supervisor of one employee who appears to be performing non-professional duties. See 8 U.S.C. § 1101(a)(44)(a)(ii).

On appeal, petitioner's counsel suggests another reason why the beneficiary qualifies as a manager or an executive: the Bureau previously granted the beneficiary L-1A status for the period February 25, 1999, through February 25, 2002. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. The record of proceeding does not contain a copy of the visa petition that counsel claims the director previously approved. If the director approved the previous nonimmigrant petition on the same unsupported assertions contained in the current record, the approval would constitute clear and gross error on the Bureau's part. The Bureau is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of potentially erroneous prior approvals. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that the Bureau or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); cert. denied, 485 U.S. 1008 (1988). Furthermore, the AAO is not bound to follow service center's contradictory decision. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

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.