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FEB 02 2004

FILE: WAC 02 087 55048 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

[Redacted]

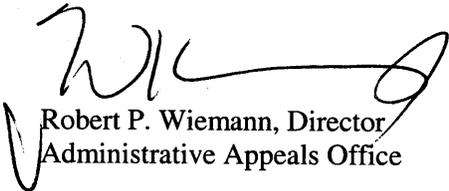
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, MACS Marketing Communication Services, Inc., claims to be a subsidiary of MACS GMBH Marketing Communication Services located in Germany. The petitioner is engaged in the business of advertising, marketing, and marketing related consulting services. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's executive vice president at a salary of \$63,472. The petitioner was incorporated in the State of California in August 2000 and claims to have two employees. On March 18, 2002, the director denied the petition and determined that the petitioner had not established that the beneficiary has been and will be primarily performing duties in an executive or managerial capacity.

On appeal, the petitioner stated that the beneficiary's primary duties are to direct the management of the U.S. entity, functioning at a senior level within the organization, and managing a staff of professional personnel.

Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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.

Pursuant to 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's prior year of employment abroad 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.
- (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.

In addition, if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) requires:

A visa petition under section 101(a)(15)(L) 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 this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties for the United States entity. 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 AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner 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.* Therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of either capacity.

On July 15, 2002, the petitioner filed Form I-129. The petitioner described the beneficiary's U.S. duties on Form I-129 and in a supporting letter as:

Directing U.S. operations and managing employees of our company, including the hiring and firing of employees. Further, [the beneficiary] will continue to analyze market trends and make strategic decisions about directing and developing the advertising, marketing, and marketing related consulting services.

In addition, in a letter, dated January 11, 2002, counsel described the beneficiary's duties as:

Provides on-site management, supervision, growth and continued development of its operations toward successful market penetration and expansion. . . . responsible for directing the entire U.S. operations and managing employees of the company.

Although the petitioner submitted a description of the beneficiary's duties, the director requested that the petitioner submit additional evidence to assist in determining whether the beneficiary has

been and will be primarily employed in a qualifying managerial or executive capacity. In particular, the director requested that the petitioner submit the U.S. business organizational chart describing its managerial hierarchy and staffing levels, number of employees, job duties, educational credentials of the U.S. entity's employees, wages paid to the employees, and immigration statuses.

In response to the request for additional evidence, the petitioner submitted a U.S. business organizational chart listing the name, title, duties, educational levels, annual salaries, and immigration statuses of all employees supervised by the beneficiary. The petitioner claims the U.S. entity is still in its start-up phase beginning its second full year of operation. The petitioner described the U.S. operation as having a three person staff comprised of the president, an executive vice president, and a director of new business development. The beneficiary's position as vice president is described as the following:

General management of the day-to-day business and activities of the U.S. entity, including entering into leases, entering into contracts with new clients, hiring and firing, interpreting policy and similar tasks. Besides her executive/managerial duties as Executive Vice President, [the beneficiary] supervises and oversees the work of the Administrative/New Business Development Director.

The petitioner also claimed that it plans to expand its staff in the near future to meet the needs of its current growth.

On March 18, 2002, the director denied the petition and determined that the petitioner had not established that the beneficiary has been and will be primarily performing duties in a managerial or executive capacity. The director found that it did not appear that the petitioning entity had the organizational complexity to warrant having an executive and that the beneficiary was performing the daily operations of the business. The director also found that since there were no other employees who performed the nonmanagerial or nonexecutive duties in the office, the record indicated that the preponderance of the beneficiary's duties were providing the services of he business.

On appeal, counsel, on behalf of the petitioner, stated that the beneficiary's primary duties are to direct the management of the U.S. entity, functioning at a senior level within the organization, and managing a staff of professional personnel. Counsel also stated that once a client has been retained by the petitioning entity, it will assemble a team comprised of employees and advertising professional independent contractors that the beneficiary supervises. Counsel claims that although the organizational chart "shows a staff of two," the beneficiary actually manages a staff of "roughly from four to twelve people on a per project basis." The petitioner submitted an updated organizational chart, Exhibit I, indicating the employees and independent contractors the beneficiary supervises. Counsel also described various projects that have been managed by the beneficiary involving these independent contractors. The beneficiary's duties were described as:

Develop advertising plans and campaigns to meet the needs of the U.S. clients based on her market analysis and client objectives. From these plans she will

direct the professional and administrative staff to produce end advertising and marketing products to meet the requirements of the plan. Review, edit, approve or reject work product. . . . exclusively responsible for managing and supervising every phase of these projects, including determining budget to be allocated to the project assessing and implementing MACS USA's staffing needs for the project, hiring and supervising all staff producing the project, and acting as liaison between the client and professional team . . . the beneficiary enjoys wide latitude of discretion over the provision of professional services and work product of the company.

As previously stated, in 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(l)(3)(ii). Upon review, counsel's assertions are not persuasive. The beneficiary's title and duties are described utilizing phrases as "interpreting policy and similar tasks," "analyze market trends," and "make strategic decisions" about "directing and developing" the advertising, marketing, and marketing related consulting services. However, these duties are generalities that fail to enumerate any concrete policies, strategies, or direction that the beneficiary will develop. In addition, the petitioner describes the beneficiary's U.S. duties as developing advertising plans and campaigns. These duties qualify as performing a task necessary to provide a service or product. 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).

Moreover, the record indicates that the preponderance of the beneficiary's duties will be directly performing the non-managerial day-to-day operations in an effort to provide marketing consulting services. The beneficiary is described as "entering into contracts with new clients" and "review, edit, approve or reject work product." However, it must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities are managerial or executive in nature. The majority of the beneficiary's duties appear to indicate that the beneficiary actually performs the day-to-day operations of the business.

In addition, the description of the beneficiary's duties does not persuasively demonstrate that the beneficiary has managerial control and authority over a function, department, subdivision, or component of the company. The petitioner claims that the beneficiary will be the "executive vice president," however; the AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner also stated that "[b]esides [the beneficiary's] executive/managerial duties as Executive Vice President, [the beneficiary] supervises and oversees the work of the Administrative/New Business Development Director." The petitioner must establish that the beneficiary is acting primarily in an executive capacity or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of either of the four elements of the two diverse statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive-manager" and rely on partial sections of the two statutory definitions.

Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing nonqualifying duties. The petitioner claims that the beneficiary “supervises and oversees the work of the Administrative/New Business Development Director” and “all staff producing the project.” Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary’s duties involve managing employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. However, it is apparent that the beneficiary’s subordinates are not managerial nor supervisory as they are not managing or supervising other employees.

In addition, section 101(a)(32) of the Act states that the term “profession” includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teachers of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. 204.5(k)(2), the term “profession” includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. The petitioner claimed that the beneficiary manages “a staff of professional personnel.” Even though educational levels were provided for the beneficiary’s subordinates, it is apparent that these types of positions are not ones that would normally require a college graduate. The petitioner has not established that the subordinates are professional employees within the statutory and regulatory definitions. Therefore, the description of the beneficiary’s job duties lead the AAO to conclude that the beneficiary is performing as a first-line supervisor of non-professional employees, rather than as a manager or executive. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As stated in the Act, “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)(A)(iv) of the Act.

Not explicitly addressed by the director, the AAO notes that the record states the U.S. entity has two workers as indicated on Form I-129 and by counsel on appeal. However, the U.S. organizational chart and a letter of support submitted with Form I-129 indicate the U.S. entity utilizes a three person staff. In addition, on appeal, the petitioner submitted a revised U.S. organizational chart indicating that the U.S. entity’s staff is comprised of eight employees, three contractors, and two unnamed employees. The petitioner claimed that the beneficiary manages a staff of “roughly four to twelve people” on various projects. The petitioner also stated that this is the second full year it has been operating and the beneficiary has supervised all staff producing the project. However, although the petitioner submitted what appears to be invoices for the staff, the petitioner did not submit evidence reflecting the wages were actually paid. The corporate tax returns for the fiscal year beginning August 31, 2000 and ending July 31, 2001 do not show these wages. As a result, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and 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, 591-92 (BIA 1988).

Moreover, although the petitioner claims “[I]t utilizes a three person staff and plans to expand its staff in the near future to meet the needs of its current growth,” 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). On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. In response to the request for additional evidence, the petitioner indicated that it plans to expand its staff in the near future and its still in a start-up stage beginning its second full year of operation. However, 8 C.F.R. § 214.2(1)(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 case, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

After careful consideration of the evidence, the AAO must conclude that the beneficiary has not been and will not 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.