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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 07 2005

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]

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 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 president 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 is a corporation organized in the State of California and claims to be a "business owner/operator" and international trader. The petitioner states that it is a subsidiary of ~~Data Complex, Inc.~~, located in the Philippines. 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 for an additional two years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes the director's findings in the form of an appellate brief, which will be addressed in the discussion below.

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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) 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.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed 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.

In support of the petition, the petitioner provided the following description of the beneficiary's job duties:

[The beneficiary] will continue to fill the position of President for the U.S. entity. In this executive capacity he will be in control of the overall operations of the business and arrange for the strategy and conduct of the business. [He] will be responsible to hire and train managers and workers in the business. [The beneficiary] will coordinate and direct the activities of the supervisors/managers. He will be in control of the mission statement of the business and in the operational efficiency and effectiveness of the initial restaurant and with

the other planned [sic]. [The beneficiary] will continue to ensure that his directions and instructions are properly carried out. [His] experience and knowledge as one of the Directors of the Philippine holding entity, Datu Complex Inc[.], will be crucial to the success of the U.S. business as his guidance and direction are essential.

On July 17, 2003, CIS issued a request for additional evidence. The petitioner was asked to provide a copy of its organizational chart naming all of its employees and pointing out those employees that are directly under the beneficiary's supervision. The petitioner was also asked to provide a more detailed description of the beneficiary's proposed duties and to assign a percentage of time that would be spent performing each listed duty.

The petitioner responded with the following three lists of the beneficiary's proposed duties:

Responsibilities within Edokko Restaurant:

- Assign tasks to [the general manager]. Ensure that all tasks are completed in a timely fashion by the management team and staff. (5% of time)
- Weekly management meeting; [c]reate and discuss corporate policy, financial status and sales projections, promotional plans, customer satisfaction level, and other operational concerns. (15% of time)
- Review weekly sales audits as prepared by [the general manager]. (10% of time)
- Review summary of company purchases with manager via tradebills, purchase orders, and inventories. (5% of time)
- Review the cost analysis on weekly purchases as prepared by [the general manager]. Order [c]hanges and expenditures as needed. (10% of time)
- Establishing rapport with executives of suppliers and conduct warehouse visitation and sales meetings. Negotiating and [e]ntering contracts with suppliers. (25% of time)
- Discuss and [m]onitor quality control of products and facilities with the respective managers. (5% of time)
- Bi-[m]onthly [a]udit of payroll for all employees with [the] general manager. (5% of time)
- Supervise payments of taxes and other financial obligations. (5% of time)
- Supervise monthly audits of deposits and payments made. (10% of time)
- Attend the monthly employee meeting as presided by [the] [g]eneral [m]anager (5% of time)

General responsibilities within the petitioning company:

- Constantly required on the road to meet, negotiate and enter into contracts with vendors (25%)
- Establishing contact database and following up with new prospects. [sic] Via telephone, internet, letters, flyers. (20%)
- Provide weekly update information to webmaster of the site maintenance. (10%)
- Testing and evaluation of old and new hardware for sales consideration (25%)
- Schedule exhibitor for the upcoming; [sic] Internet Telephony [sic] Conference & Expo (20%)

Other duties:

- Continue to act as entrepreneurial executive constantly researching US investments for short and long term profits.
- Report to foreign board of directors on the progress of the US business.

On September 22, 2003, the director denied the petition concluding that the record lacks evidence to establish that the beneficiary would be employed in a managerial or executive capacity. The director noted that based on the description of the beneficiary's duties, the beneficiary would actually perform the petitioner's daily operational tasks.

On appeal, counsel asserts that the beneficiary will delegate duties to his staff through the general manager, who is claimed to be the beneficiary's direct subordinate. Counsel restates the beneficiary's daily duties with the restaurant and explains how each duty falls under the definition of "executive capacity." While counsel provides an adequate explanation, the AAO cannot conclude that negotiating and entering into contracts with suppliers is an inherently executive or managerial tasks. Rather, it is an operational task and regardless of its essential nature it cannot be deemed a qualifying duty. Nevertheless, the petitioner has clearly stated that its overall business operation consists of two components only one of which is the restaurant business. The petitioner has indicated that the other component of its business is computer building and sales. However, based on its organizational chart, which was submitted in support of the petition, only the restaurant portion of the business was staffed. The marketing manager's position and the two staff positions were all unfilled at the time the petition was filed. It is noted that 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). Therefore, the additional employees indicated in the updated organizational chart, which was submitted in response to the request for evidence, cannot be considered in determining the petitioner's eligibility for the benefit sought. As such, the AAO must assume that at the time the petition was filed the beneficiary himself was performing all of the daily operational tasks that are directly associated with running the computer-building portion of the petitioner's business. As noted by counsel, 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). Thus, while counsel claims that the beneficiary is relieved from having to perform non-qualifying duties, a portion of that relief came when the petitioner hired a marketing manager to head its computer hardware operation. Furthermore, despite counsel's indication that the beneficiary would spend a majority of his time with the restaurant, he failed to specify exactly how much of the beneficiary's forty-hour work schedule has been and would be spent on the computer hardware portion of the business operation. This information is crucial in light of the fact that the petitioner did not have a manager or support staff in place to help operate the computer hardware business at the time the petition was filed. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel further asserts that the director place too much emphasis on the size of the petitioner's support staff and cites a number of prior AAO decisions in support of his assertions. However, most of the cases cited by counsel are unpublished and 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. To further support his assertions, counsel cites the published case of *Mars Jewelers Inc. v. INS*, 702 F.Supp. 1570 (N.D. Ga. December 6, 1988). However, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, however the analysis does not have to be followed as a matter of law. *Id.* at 719.

On review, the record as presently constituted is not persuasive in demonstrating that at the time the petition was filed the beneficiary was employed in a primarily managerial or executive capacity. The record indicates that at the time of the filing of the petition the petitioner was set up as two businesses—the restaurant business and the computer hardware business. While the evidence of record indicates that the beneficiary primarily performed qualifying duties in regard to the restaurant portion of its operation, the same is not indicated in regard to the computer hardware portion of its operation, which had no manager or staff at the time the petition was filed. Contrary to counsel's assertions, the record does not establish that at the time the petition was filed the beneficiary was primarily performing duties of a managerial or executive capacity. 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.