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U.S. Citizenship
and Immigration
Services

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File: WAC 03 204 51227 Office: CALIFORNIA SERVICE CENTER Date:

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, 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 that is engaged in retail sale and distribution of glass, mirrors and related items. The petitioner claims that it is the subsidiary of Chung Wah Glass Company located in Hong Kong. The beneficiary has been employed as the petitioner's president in L-1A status since November 1999 and the petitioner now seeks to extend her stay for an additional three years.

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.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director failed to consider the beneficiary's actual job duties in rendering his decision and that the beneficiary qualifies as a manager or executive. In support of this assertion, the petitioner submits 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.

At 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 a June 24, 2003 letter submitted with the initial petition, the petitioner described the beneficiary's job duties as follows:

- (1) formulate company overall administrative and business operation policies and decisions in compliance with local corporate laws and regulations;
- (2) oversee and coordinate administrative, purchasing and export transactions with parent company, US suppliers and other business entities;
- (3) formulate the company business development plan and strategies and direct establishment of management systems, procedures, and policies;
- (4) direct company business promotion and public relations arrangements;
- (5) contact advertising businesses, suppliers and trade associations for business opportunities;
- (6) maintain sound financial conditions of company; and
- (7) organize board meetings and direct proper record keeping and administration of the company.

On September 14, 2003, the director requested additional evidence. Specifically, the director requested: (1) a copy of the U.S. company's organizational chart including names of all employees, a brief description of their job duties, educational level and annual salaries; (2) the U.S. company's payroll summary, W-2s and W-3s; (3) signed and certified copies of the U.S. company's Federal and State income taxes for the last tax year; (4) a detailed description of the beneficiary's duties, indicating what she does on an everyday basis; and (5) evidence that the petitioner is doing business in the United States.

In response, the petitioner submitted unsigned copies of its 2002 U.S. and California income tax returns, 2002 Forms W-2 and Form W-3, and its Forms DE-6, Employer's Quarterly Wage Reports for the first two quarters of 2003. In response to the director's request for a detailed description of the beneficiary's duties, the petitioner submitted a letter dated December 3, 2003 which included the same job description quoted above. In addition, the petitioner indicated that there are four employees working under the beneficiary's administration and control, including a "manager" responsible for purchasing and sales activities in the North America region and inventory control; a part-time secretary/administrative clerk responsible for record keeping and administrative matters; a bookkeeper responsible for bookkeeping, accounts payable/accounts receivable and inventory; and a warehouse person, responsible for warehouse control and shipping and receiving. As evidence that the company is doing business, the petitioner submitted three invoices written primarily in Chinese, and a receipt for a deposit received for installation of glass at a donut shop. The petitioner also stated that it was planning to open a second glass store in Oakland, California and submitted a copy of an agreement for the purchase of goodwill, inventories and equipment from the property's current tenant.

On December 18, 2003, the director denied the petition. The director determined the beneficiary has not been and will not be employed primarily in a managerial or executive capacity. The director noted that there is neither sufficient evidence to demonstrate that the beneficiary will supervise or control the work of other supervisory, professional or managerial employees who will relieve her from performing non-qualifying duties, nor evidence that the beneficiary would function at a senior level within an organizational hierarchy. The director concluded that the beneficiary was performing the non-qualifying duties necessary to run the office on a daily basis.

On appeal, counsel for the petitioner asserts that the petition was “erroneously denied because the actual job duties were never considered in its entirety before a decision was rendered.” In his brief, counsel for the petitioner reiterates the job description previously provided emphasizing that the beneficiary will spend the majority of her time “formulat[ing] company overall administrative and business operation policies” and further notes the beneficiary supervises a manager who will “conduct the business in accordance with company organization arrangement.” Counsel concludes that the beneficiary will have significant authority over the operation of the petitioner’s company and will perform an essential function at the managerial or executive level.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary had been or would be employed in primarily managerial or executive capacity. 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). 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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In this case, the petitioner has provided a vague and nonspecific description of the beneficiary’s duties that fails to demonstrate what the beneficiary actually does on a day-to-day basis. For example, the petitioner states that the beneficiary will “oversee and coordinate administrative, purchasing and export transactions with parent company” but does not describe any export activities or other interactions with the parent company, or any subordinate staff who would perform the actual purchasing or export activities. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, rather than providing a specific description of the beneficiary’s duties, the petitioner generally paraphrases the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as “directing the overall administrative and business operations of the organization,” “establishing policies and procedures,” and having overall responsibility for company decisions. However, conclusory assertions regarding the beneficiary’s employment capacity are not sufficient to meet the petitioner’s burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *Fedin Bros. Co. Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d Cir. 1990) *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 t *5 (S.D.N.Y.).

In the request for evidence, the director requested that the petitioner submit a detailed description of what duties the beneficiary performs on an everyday basis. The petitioner failed to submit the requested information in response, instead submitting the same vague job description submitted with the initial petition. This evidence is critical as it would have helped to establish whether the beneficiary’s duties are primarily managerial or executive. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit

the requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Without a comprehensive job description of the beneficiary's duties on which to base his determination, the director looked to the petitioner's staffing levels in order to determine whether the beneficiary could be deemed to be serving in a primarily managerial or executive capacity. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a five-year-old company that claimed to be engaged in retail sale and distribution of glass. In 2002, the petitioner achieved \$82,286 in gross receipts, reported taxable income of -\$69,474, and paid a total of \$20,200 in wages, not including the beneficiary's salary. At the time of filing in July 2003, the petitioner employed the beneficiary as president, a "manager," a bookkeeper, a warehouse person and a part-time secretary. The petitioner claims that the manager relieves the beneficiary from non-qualifying duties by supervising the other employees and the company's day-to-day business. Based on the Forms DE-6, Employer's Quarterly Wage Reports submitted, the "manager," who is described as being responsible for purchasing and sales activities rather than management or supervisory activities, appears to have worked for the petitioner for a single two-week pay period prior to the filing of the petition. Prior to June 2003, it appears that the beneficiary would have been solely responsible for all purchasing and sales activities of the company. 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). In addition, some of the other staff members appear to have been hired just a few months prior to filing of the petition, and the company had only two full-time employees in 2002, the beneficiary and the warehouse person. Further, the AAO notes that all of the invoices submitted appear to be for sale and installation of customized glass windows and mirrors, but the petitioner does not claim to have any staff responsible for custom glass cutting, delivery or installation, nor is there any evidence to suggest that the petitioner contracts outside labor to perform these services. The absence of personnel to perform these key tasks raises questions regarding the credibility of the claimed job duties of the petitioner's other employees. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Based on the above, it is not clear how the petitioner has been supporting or will support the beneficiary in a position that is *primarily* managerial or executive in nature.

Consequently, a critical analysis of the nature of the petitioner's business undermines counsel's assertion that it has a sufficient staff of subordinate employees who relieve the beneficiary from performing non-qualifying duties. Rather it appears that the beneficiary, who is described as "directing company business promotion and public relations arrangements" and "contacting advertising businesses, suppliers and trade associations for business opportunities" is the only individual performing any marketing functions, and that she had also been responsible for all sales and purchasing activities as recently as two weeks prior to filing the petition. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development.

In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties four to five years after the company commenced business operations in the U.S. Furthermore the reasonable needs of the petitioner will not supercede the requirement that the beneficiary be "primarily employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's job duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. Despite counsel's assertions on appeal that the beneficiary supervises a manager, the manager appears to be a non-professional salesperson who does not actually perform supervisory duties. Because the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

Finally, the petitioner's 2002 Federal and State Income tax returns clearly state the petitioner operates primarily as a Chinese restaurant known as "██████████" yet the petitioner has not claimed to be involved in any activities other than retail sale of glass products. The petitioner has provided only limited evidence that it had been selling and installing glass prior to the filing of the instant petition, and it did not provide any explanation as to why its tax returns indicate that it was operating as a restaurant only months prior to submitting the petition to extend the beneficiary's L-1A status. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence point to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 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. 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 the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that she operates at a senior level within an organizational hierarchy. 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.

The director's decision does not indicate whether he reviewed CIS's prior approvals of the petitioner's other nonimmigrant petitions submitted on behalf of this beneficiary. If the previous nonimmigrant petitions were

approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). The prior approvals do not exclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.