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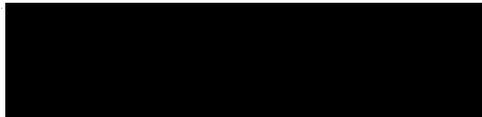
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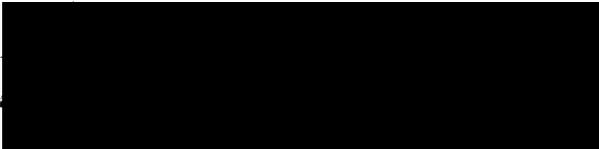
File: SRC 03 185 53621 Office: TEXAS SERVICE CENTER Date: JUL 14 2005

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, 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 filed this nonimmigrant petition seeking to extend the employment of its executive chef 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 Florida that operates as a restaurant. The petitioner claims that it is the affiliate of Loy-Lum Co., Ltd., located in Bangkok, Thailand. 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.

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's decision is in error. 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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 the present matter is whether the beneficiary would 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.

On the L Supplement to Form I-129, Petition for Nonimmigrant Worker, the petitioner described the beneficiary's job duties as: "Operate and supervise all necessary functions in running the U.S. Thai restaurant." There was no other description of the beneficiary's duties submitted with the initial petition.

On July 24, 2003, the director requested additional evidence. Specifically, the director requested (1) an organizational chart of the U.S. entity, specifying the beneficiary's position within the hierarchy, as well as the names, job titles and duties of the employees the beneficiary supervises; (2) copies of the petitioner's state Employer's Quarterly Tax Returns for 2002 to the present; and (3) copies of the Quarterly Wages Reports for all employees from 2002 to the present.

In response, the petitioner submitted an organizational chart showing the beneficiary under the supervision of the vice president of operations. The beneficiary in turn is shown supervising eight employees – a cook, a cashier, four servers, a dishwasher, and a "prep." The petitioner also submitted (1) job descriptions for the employees under the beneficiary's supervision; (2) copies of the petitioner's quarterly statement of deposits & filings filed with the State of Florida for the last three quarters of 2002 and the first quarter of 2003; and (3) copies of the petitioner's Employer's Quarterly State Report of Wages for the quarters from September 30, 2002 through June 30, 2003.

On October 1, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director observed that while the beneficiary exercises discretion over the day-to-day operations of the U.S. entity, the beneficiary also performs much of the day-to-day activities of the U.S. entity. The director found that the petitioner has not demonstrated that the beneficiary's primary assignment has been or will be directing the management of the organization, or that the beneficiary has been or will be primarily directing or supervising a subordinate staff of professional, managerial or supervisory employees who will relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that the director has erred in her decision. Counsel claims that the evidence demonstrates that the beneficiary exercises discretion over the day-to-day operations of the

business and is by training, experience, and actual job performance a managerial level employee. In support of this claim, counsel submits additional evidence, including the following job description for the beneficiary's position:

**Job Title:** *Executive Chef*

**Job Summary:** To operate and supervise all necessary function in running the U.S. Thai restaurant by:

Directing and coordinating the activities of the organization such as the daily operations and administration of policies pertaining to the activities of the restaurant as evidenced by (but not limited to) performing essential functions such as setting the menu according to current demands and trends including the adaptation of traditional ethnic Thai cuisine to the American audience, management of inventory control and documenting compliance with State and Federal Health and Safety Regulations.

Reporting to the Vice President and providing guidance in formulation and administration of the organization's policies (in a position of Senior-Level Decision Maker) in the development of long-range goals and objectives.

Reviewing and analyzing activities, operating costs, operations and forecasting trends/data in the determination of progress towards stated goals and objectives.

Conferring with the Vice President and owners to review achievements and identification of necessary changes in goals and objectives resulting from fluctuation in current market trends.

Establishing goals and defining policies that both indicate and determine success.

Performing duties in an independent and autonomous fashion with minimal supervision using desired characteristics of: 'vision' to foresee market trends, 'foresight' to predict changes and fluctuations in the market and 'anticipation' to adapt to necessary changes and develop strategies to cope with changes in the directions of the organization.

Counsel asserts that the beneficiary is a "functional manager." Counsel also asserts that the initial application was approved and the extension should also be approved. Finally, counsel claims that in addition to qualifying in a managerial or executive capacity, the beneficiary also possesses "specialized knowledge" in connection with the petitioner's restaurant business.

Upon review, counsel's assertions are not persuasive. 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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail

executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant petition, the only description of the beneficiary's job duties that the petitioner provided in the record before the director was the statement on the L Supplement to Form I-129 that the beneficiary "operate[s] and supervise[s] all necessary functions in running the U.S. Thai restaurant." Such a conclusory statement regarding the beneficiary's employment capacity is not sufficient to meet the applicable regulatory requirements. See 8 C.F.R. § 214.2(l)(3)(ii). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The AAO notes that counsel submits a more detailed description of the beneficiary's job duties on appeal. However, the regulations clearly require "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*," and the petitioner was given a reasonable opportunity to provide the required evidence for the record before the visa petition was adjudicated. 8 C.F.R. § 214.2(l)(3)(ii) (emphasis added). The petitioner failed to submit the required evidence earlier and now submits it on appeal. Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The AAO further concurs with the director's conclusion that the petitioner has not demonstrated that the beneficiary has been or will be primarily directing or supervising a subordinate staff of professional, managerial or supervisory employees who will relieve him from performing non-qualifying duties. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). Here, 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. Based on their job descriptions, the beneficiary's subordinates do not appear to have any supervisory or managerial roles. As a first-line supervisor, the beneficiary would not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act, 8 U.S.C. § 1101(a)(44)(A)(iv). Moreover, the petitioner has not established that these subordinate employees possess, or that their positions require, an advanced degree, such that they could be classified as professionals. Since the beneficiary is primarily supervising a staff of non-professional, non-supervisory employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

Counsel claims on appeal that the beneficiary "will continue directing the daily operations and performing essential administrative functions, such as menu selection, licensing compliance, inventory control, development and evaluation of long-range goals and objectives, managing activities, costs, trends, goals and evaluating and reporting the restaurant's success in each area," and as such, the beneficiary qualifies as a "functional manager." The term "function manager" applies generally when a beneficiary does not supervise

or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If the petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this matter, the record does not contain evidence that the beneficiary manages rather than performs the duties relating to the "essential administrative functions" identified 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). Accordingly, counsel's assertion that the beneficiary qualifies as a functional manager is not persuasive.

In light of the foregoing, the AAO concurs with the director's conclusion that the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

The AAO also does not find persuasive counsel's assertion that since the Citizenship and Immigration Services (CIS) approved the previous petition filed on behalf of the beneficiary, the petition for extension should also be approved. The director's decision does not indicate whether he reviewed the prior approval. If the previous nonimmigrant petition 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. at 597. It would be absurd to suggest that CIS 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's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001). In addition, approval of a prior petition does not preclude 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).

Finally, with respect to counsel's assertion on appeal that the beneficiary possesses "specialized knowledge" in connection with the petitioner's restaurant business, the AAO notes that the petitioner is requesting classification as an L-1A nonimmigrant intracompany transferee, based on employment in a managerial or executive capacity, rather than an L-1B classification, based on employment involving specialized knowledge. See section 101(a)(15)(L) of the Act. In filing the petition, the petitioner did not request consideration based on the beneficiary's specialized knowledge, nor did the petitioner submit any evidence relevant thereto. The assertions of counsel on appeal do not constitute evidence. *Matter of Obaigbena*, 19

I&N Dec. at 534; *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Beyond the decision of the director, the evidence does not establish that the foreign entity employed the beneficiary in a primarily managerial or executive capacity. On the L Supplement to Form I-129, the petitioner lists the employer abroad as [REDACTED] in Bangkok, Thailand, but the petitioner did not specify the dates of the beneficiary's employment, or describe the beneficiary's duties, with that employer.<sup>1</sup> The petitioner did submit a letter from [REDACTED] in Bangkok, Thailand, certifying that the beneficiary was employed as a chef in the main kitchen of that restaurant from February 2001 through March 2002. However, there is no evidence indicating that [REDACTED] in any way affiliated with the entity named as the foreign employer on the L Supplement to Form I-129. In light of the foregoing, the AAO must conclude that the evidence does not establish that the foreign entity employed the beneficiary in a primarily managerial or executive capacity. The petition will be denied for that additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

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.

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<sup>1</sup> In response to a question on the L Supplement to Form I-129 asking for the dates of the beneficiary's employment with the foreign employer, the petitioner stated, "Employed in the United States as L1A manager since 9-12-2002." The petitioner also indicated on that form that a description of the beneficiary's duties was attached. However, the AAO finds no document in the record that contains a description of the beneficiary's duties for the previous three years.