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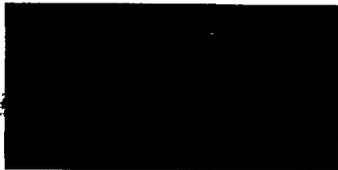


FILE: WAC 03 205 51665 Office: CALIFORNIA SERVICE CENTER Date: JUN 10 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

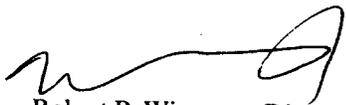
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2002, and claims to be a hotel marketing, real estate investment and development business. The petitioner claims that the U.S. entity is a subsidiary of ALCAT, Inc., located in the Philippines. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and CEO for a period of three years, at an annual salary of \$32,000.00. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been or would continue to be employed by the U.S. entity in a primarily managerial or executive capacity. The beneficiary was initially granted a one-year period of its stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will be managerial or executive in nature.

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.

The regulation at 8 C.F.R. § 214.2(I)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(I)(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 (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.

The regulation at 8 C.F.R. § 214.2(I)(14)(ii) states that 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 (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);
- 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 petitioner has submitted sufficient evidence to establish that the beneficiary's employment with the U.S. entity has been and will be primarily managerial or executive in nature.

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 a letter of support, dated June 30, 2003, counsel for the petitioner described the beneficiary's duties as:

As the President and CEO of LSJJA, [the beneficiary] has been responsible for managing, including, but not limited to, marketing development, budgeting, personnel, project management, and contract negotiations. He also has the authority to hire, train, and terminate all staff. He has been overseeing research of the U.S. real estate market, and implementation of sales and marketing of ALCAT's services and business operations. Receiving only general supervision from the board of directors of the parent company, [the foreign entity], [the beneficiary] exercises wide latitude in discretionary decision-making.

In a letter of support, dated July 1, 2003, the petitioner reiterated the beneficiary's job description given by counsel, and further described the beneficiary's duties, in part, as:

At this time, he oversees the work of four employees (two full-time paid employees, two part-time non-salaried workers) engaged in the varied responsibilities of marketing and sales Please note that the next few years will be the most critical in LSJJA's growth, and that [the beneficiary] will hire additional employees to manage the new functions and individual departments.

[The beneficiary] also oversees research of the U.S. market, especially for the purposes of real estate investment and development, and marketing of the parent company's business operations. He exercises wide latitude and discretionary decision-making. More importantly, he has the critical responsibility of establishing contact and meeting with other executives of U.S. corporations with which the parent company wishes to conduct business. A lower-level manager or employee at LSJJA would lack the knowledge, authority, reputation, and

established ties to successfully develop marketing strategies or to negotiate real estate acquisitions.

[The beneficiary] is properly classified as an executive for L-1A purposes because he meets and negotiates with other senior personnel to develop and coordinate business transactions between LSJJA and major U.S. companies.

The petitioner submitted a Corporate Business Plan, in which the beneficiary's duties, as president and CEO of the U.S. entity, are described as:

Oversees operations of the U.S. office. The CEO/President manages all aspects of the subsidiary, including: executing goals set by parent company, establishing and implementing general guidelines and policies, planning and supervising business activities, negotiating contracts, setting budget, and coordinating interactions with business industry and community.

The petitioner submitted an organizational chart depicting the U.S. entity's hierarchical structure. The chart designated the beneficiary as president and general manager, with a vice president, corporate secretary, and two account executives under his direction. The petitioner also submitted a copy of the U.S. entity's DE-6 for the quarter ending June 30, 2003, which showed the entity employed the beneficiary and the two account executives during that period. The petitioner submitted a copy of IRS Form 1120, U.S. Corporate Income Tax Return for the year 2002, in which it was shown that the U.S. entity paid \$8,100.00 as compensation to officers and paid nothing towards salaries and wages.

In the request for evidence, dated July 11, 2003, the director requested that the petitioner submit copies of the U.S. entity's organizational chart describing, in detail, its managerial hierarchy and staffing levels, Quarterly Wage Reports (Form DE-6 and Form 941) for all employees for the last four quarters, and payroll summaries (Form W-2 and W-3) evidencing wages paid to employees.

In response to the director's request for evidence, the petitioner submitted a copy of the U.S. entity's organizational chart that showed the beneficiary as president, with a vice-president and two account executives as his subordinates. The petitioner listed the employees' duties as:

PRESIDENT AND CEO

- Control the management, including, but not limited to, budgeting, personnel, project management, and contract negotiations [;]
- Oversee research of the U.S. market, especially for the purposes of real estate investment and development, and marketing of the parent company's business operations [; and]
- Research feasibility for setting up new branch of Fernandina 88 Suites in California; including costs and marketing potential [.]

VICE-PRESIDENT

- Assume overall management duties in [the beneficiary's] absence
- Advise President on business development

- Assist with conducting and analyzing marketing research

ACCOUNT EXECUTIVE

- Telecommunicate with agencies and clients
- Provide marketing penetration and sales

The petitioner submitted copies of the U.S. entity's Form DE-6, Quarterly Wage and Withholding Reports for the quarters ending June 30, 2003 and September 30, 2003, which showed the entity employed the beneficiary and two account executives. The petitioner also submitted Form DE-6, Quarterly Wage and Withholding Reports for the quarters ending December 31, 2002 and March 31, 2003, which showed the beneficiary to be the entity's sole employee. The petitioner submitted copies of the U.S. entity's Form 941, Employer's Quarterly Federal Tax Returns, for the quarters ending March 31, 2003 and September 30, 2003. The petitioner also submitted duplicate copies of the beneficiary's Form W-2 for the year 2002. Counsel reiterated the beneficiary's past and proposed job duties with the U.S. entity.

The director determined that the record contained insufficient evidence to demonstrate that the beneficiary had been or would be employed by the U.S. entity in a primarily managerial or executive capacity. The director noted that the administrator/corporate secretary's position, which appeared in the U.S. entity's organizational chart originally submitted, was eliminated in the company's organizational chart submitted in response to the request for evidence. The director also noted that the chart showed the administrator reporting to the vice-president and supervising the two account executives. The director stated that the account executive positions, by description, were not considered professional, and that the vice-president, by definition, was performing duties as a first-line supervisor. The director noted that such evidence did not demonstrate the presence of a subordinate staff to relieve the beneficiary from performing non-qualifying duties. The director further noted that with the beneficiary being engaged in researching real estate opportunities and negotiating real estate opportunities on behalf of the foreign entity, he would be engaged in non-qualifying duties and would be rendering service to the foreign entity rather than the U.S. operation. The director also noted that with the gross annual income reported by the U.S. entity, in comparison to the wages and salaries paid for one quarter to employees, it was unclear how the petitioner could pay the salaries listed in the company's organizational chart.

On appeal, counsel disagrees with the director's decision and asserts that the U.S. entity's organizational charts differ because "the parent company ... determined that a change in a more effective organization was required." Counsel reiterates the beneficiary's job description given and asserts that such duties are typical of executives, and not that of first-line supervisors. Counsel contends the account executives are responsible for interacting with and recruiting travel agencies and clients, and also perform some sales and marketing, therefore, their duties are critical and of a "professional caliber," within the meaning of the regulations. Counsel further contends that supervision of professionals is not required to qualify as an executive. In response to the director's concerns with the U.S. entity's ability to pay salaries and wages, counsel asserts the company's fiscal year 2002 was shortened due to the short time in which the entity had been in business; and that proper calculations demonstrate that, at years end, the total amount of salaries and wages paid will equal to the amounts shown in the company's organizational chart. Counsel claims that the vice-president assumes management duties in the absence of the beneficiary, and therefore, is the subordinate staff that is used to relieve the beneficiary from performing non-qualifying duties. Counsel also claims that the beneficiary, by exploring and negotiating real estate investment opportunities on behalf of the foreign entity, is performing proper executive duties. Counsel further claims that the same duty descriptions were included in the initial

“new office” petition that was approved by Citizenship and Immigration Services (CIS), and therefore, the director’s denial constitutes an “abuse of discretion.”

Counsel's assertions are not persuasive. On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or will be employed in a 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 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.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary’s duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary’s duties include: managing the operation, executing goals, policies, and guidelines, negotiating contracts, overseeing research of real estate in the U.S. market, and meeting with other senior personnel to develop and coordinate business transactions. The petitioner did not, however, define the company’s goals, policies, identify how the beneficiary manages the organization, or clarify who actually conducts the research. 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). 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). In the instant matter, it appears that the beneficiary has been and will be engaged in non-qualifying duties such as researching real estate opportunities and negotiating real estate deals on behalf of the foreign entity, and therefore, would be directly rendering a service to the foreign entity, rather than performing managerial or executive duties at the U.S. entity.

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased 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 entire operation of the organization, establishing goals and policies of the organization, and exercising sole discretionary decision-making. 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 at *5 (S.D.N.Y.).

Counsel noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary, which contained the same job descriptions as is found in the instant matter. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. 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). 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). Further, the prior approvals do 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).

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. A first-line supervisor will 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. The U.S. entity's organizational chart indicates that the company vice-president supervises the two account executives. Counsel contends on appeal, that the vice-president assumes management duties in the absence of the beneficiary, and therefore, relieves him from performing non-qualifying duties. Contrary to counsel's contentions, there is no evidence contained in the record to demonstrate that the U.S. entity employs a vice-president. None of the corporate tax records submitted by the petitioner indicate that the vice-president exists or has been paid a salary by the U.S. entity. Although the petitioner asserts that two of the four employees work on a part-time basis and are not compensated for their services, the petitioner has not explained why a vice-president would forgo payment for his or her services to an employer. Further, there has been no independent documentary evidence submitted to substantiate such a claim. 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*, *supra* at 190. In the instant matter, even were the AAO to determine that the vice-president's services were voluntary, there has been no evidence submitted or plausible explanation given to demonstrate that a part-time vice-president could manage full-time employees and the operation of the organization in the absence of the beneficiary. Therefore, it appears from the record that the beneficiary has been and will continue to perform the day-to-day functions of the business, which includes supervising non-professional employees, rather than working as manager or executive of the U.S. entity.

Although counsel asserts on appeal that the two organizational charts depicting the U.S. entity's hierarchy differ because "the parent company ... determined that a change in a more effective organization was required," there has been no independent documentary evidence submitted to substantiate the assertion. 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 pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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*, *supra*. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel contends the account executives are responsible for interacting with and recruiting travel agencies and clients, and also perform some sales and marketing tasks, and that therefore, their duties are of a "professional caliber." However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In this matter, the petitioner has not, in fact, established that a baccalaureate degree is actually necessary, for example, to perform the administrative work of the account executives.

On appeal, counsel claims that the beneficiary explores and negotiates real estate investment opportunities in the United States on behalf of the foreign entity and therefore, is performing proper executive duties. Contrary to counsel's claim, evidence of research conducted to explore the possibilities available in the U.S. real estate market and entering into a lease agreement for commercial space is insufficient to establish that the beneficiary was even partially engaged in activities involving executive duties. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he will be managing the overall operation, establishing goals and policies, exercising a wide latitude in discretionary decision-making, or receiving only general supervision or direction from higher level individuals. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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, supra*.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In a letter of support the petitioner stated: "Please note that the next few years will be the most critical in LSJJA's growth, and that [the beneficiary] will hire additional employees to manage the new functions and individual departments." Based upon a review of the record, the petitioner has not reached the

point that it can employ the beneficiary in a predominantly managerial or executive position. Further, the petitioner has failed to overcome the objections of the director with regard to the U.S. entity's ability to pay the proffered salaries and wages cited in its organizational chart. Accordingly, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.