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U.S. Citizenship
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Services

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File: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUN 15 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)

IN 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, 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 Sales Manager 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 seller of educational books and related materials. The petitioner claims that it is the affiliate of ██████████ C.A., located in Caracas, Venezuela. The beneficiary was initially approved for L-1 status 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: (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity, and (2) the beneficiary was employed abroad 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 evidence of record shows that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel further asserts that the director's denial was an abuse of discretion, as she failed to articulate why prior Citizenship and Immigration Services (CIS) findings that the beneficiary is employed in a primarily managerial or executive capacity were erroneous. In support of these assertions, counsel submits a brief and 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 first 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 letter submitted with the initial petition on June 4, 2003, the petitioner described the beneficiary's job duties as follows:

[The petitioner] wishes to employ [the beneficiary] in the managerial position of Sales Manager in charge of Sales and Distribution within the company. [The beneficiary] will be responsible for the daily administration, direction and supervision of this division. In addition, he will participate in the formulation, development, recommendation, implementation, and administration of the company's policies and procedures with respect to sales and distribution. He will ensure that proper sales and distribution policies and practices are followed. He will direct the activities of subordinate managers and will supervise the elaboration and implementation of the company's business development plans in the area of sales and distribution.

Based on our experience – and as standard practice in the industry – we assign one Sales Manager to every five to six sales persons.

The petitioner submitted an organizational chart that shows that it employs 12 individuals, including a president, a CEO, two sales managers, an accountant, two collectors, and five salesmen.

On September 25, 2003, the director requested additional evidence. In response, the petitioner provided additional description of the beneficiary's proposed duties as follows:

Under the supervision of the CEO, [the beneficiary] will continue to be responsible for the daily administration, direction and supervision of [the petitioner's] Sales Department in the State of Florida, and for developing a market in the Commonwealth of Puerto Rico. In addition, he will be responsible for the formulation, development, recommendation, implementation, and administration of the company's policies and procedures with respect to sales and distribution in the new market within the Commonwealth of Puerto Rico. [The beneficiary] will ensure that proper sales and distribution policies and practices are followed, and assist the CEO in making purchase decisions, as he is more directly involved with the customers and is able to better identify their needs and desires. He will direct the activities of subordinate managers and supervise the elaboration and implementation of the company's business development plans in the sales and distribution area.

[The beneficiary] will have full authority to hire, fire, and promote his subordinate staff, as well as authorize their leave.

Since [the petitioner] is dedicated to the sale and distribution of didactic materials, sales is an essential function within [the] company.

[The beneficiary] will be relieved of non-managerial duties by his subordinate staff of salespersons. These salespersons are individuals with a high school education, some in the process of completing a university degree. These subordinate employees will be in charge of all non managerial sales duties including, inter alia, shipping and handling of the merchandise sold by our company.

The petitioner provided its Florida State Quarterly Report for the second quarter of 2003 that reflects that it employed three workers in the month that the petition was filed.

On March 29, 2004, the director denied the petition. In part, the director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director stated that the petitioner has not shown that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees. The director found that the beneficiary is merely handling the day-to-day operations of the petitioner and acting as a first-line supervisor.

On appeal, counsel asserts that the evidence of record shows that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel states that Citizenship and Immigration Services (CIS) previously approved an L-1A petition and Form I-140 immigrant petition on behalf of the beneficiary, and thus the director's decision contradicts prior CIS findings. Counsel cites the decision in *Omni Packaging v. I.N.S.*, 733 F. Supp. 500 (D.C.P.R. 1990) to stand for the proposition that the director must explain why the prior approvals were erroneous in order to properly deny the present petition. Counsel further asserts that "CIS did not accord the proper weight to the evidence submitted with regard to [the petitioner's]

organizational structure, and the managerial nature of [the beneficiary's] employment within that structure." Counsel states that [the beneficiary] "supervises other employees, as well as manages a department and essential function of [the petitioner's] United States operations." Counsel claims that the petitioner's organizational chart shows that the beneficiary manages five salespersons and functions at a senior level within the petitioner's hierarchy.

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(I)(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.

In the instant case, counsel cites the statutory definition of managerial capacity contained in section 101(a)(44)(A) of the Act, yet counsel claims that evidence of record shows that the beneficiary will be employed in a managerial or executive capacity. Thus, it is unclear whether the petitioner intends to represent that the beneficiary will be employed primarily in both capacities. To sustain an assertion that the beneficiary will be primarily employed in both a managerial and executive capacity, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity. *See* 8 C.F.R. § 214.2(I)(3)(ii).

The petitioner has not shown that the submitted descriptions of the beneficiary's duties are a true account of the tasks he will perform in the United States. The petitioner states that the majority of the beneficiary's duties involve managing the petitioner's sales by supervising five salespersons. Among the beneficiary's related duties are "ensur[ing] that proper sales and distribution policies and practices are followed," "direct[ing] the activities of subordinate managers," and "supervis[ing] the elaboration and implementation of the company's business development plans in the area of sales and distribution." The petitioner further states that "[the beneficiary] will be relieved of non-managerial duties by his subordinate staff of salespersons." However, the petitioner has failed to document that it employs any subordinates that report to the beneficiary.

The petitioner's organizational chart reflects that it employs 12 individuals, including a president, a CEO, two sales managers, an accountant, two collectors, and five salesmen. Yet, the petitioner's Florida State Employer's Quarterly Report for the second quarter of 2003 shows that the petitioner had only three staff members during June 2003, the month that the petition was filed. Thus, the petitioner's organizational chart is inconsistent with the State quarterly report. 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). The petitioner has failed to explain this inconsistency, or to offer any additional documentation to show that it employs additional workers. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In comparing the organizational chart with the quarterly report, the documents show that the petitioner employed a CEO and two sales managers at the time of filing the petition. As the beneficiary is one of the two sales managers, the evidence of record does not support that he supervises any subordinates. As the petitioner has failed to establish that the beneficiary supervises subordinate employees, it has not supported its claim that his duties involve oversight of a department with significant supervisory authority. Accordingly, the job descriptions are not deemed an accurate account of the beneficiary's true duties. Contrary to the petitioner's assertion, the evidence of record does not show that "[the beneficiary] will be relieved of non-managerial duties by his subordinate staff of salespersons." 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. at 591.

Though counsel claims that the beneficiary manages five salespersons and functions at a senior level within the petitioner's hierarchy, 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 Obaighbena*, 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). Counsel's assertion that "CIS did not accord the proper weight to the evidence submitted with regard to [the petitioner's] organizational structure, and the managerial nature of [the beneficiary's] employment within that structure" is not persuasive in light of the absence of sufficient evidence to support the petitioner's claim.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). 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.

The petitioner operates as a seller of educational books and related materials. Thus, it is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive tasks such as placing orders for books, answering questions from customers about merchandise, tracking the petitioner's inventory, managing a checking account and paying bills, answering telephones, receiving deliveries, conducting sales transactions and performing related sales duties. The petitioner states that "[s]ince [it] is dedicated to the sale and distribution of didactic materials, sales is an essential function within [the] company." Thus, it is evident that significant efforts from the petitioner's staff involve non-qualifying sales functions. As the beneficiary is one of only two documented employees with sales duties, it is clear that he must devote a substantial amount of time to non-managerial and non-executive sales tasks. In

fact, the petitioner provides that "[the beneficiary] is more directly involved with the customers and is able to better identify their needs and desires," which supports that he is in direct contact with end customers in the role of a salesman.

Further, as no other employees are charged with the other non-qualifying day-to-day duties listed above, it is assumed that the beneficiary also participates in these activities. Accordingly, the reasonable needs of the petitioner suggest that the beneficiary must spend a significant amount of time performing the tasks necessary to provide the petitioner's services. 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). The petitioner has failed to establish that these non-managerial and non-executive tasks do not constitute the majority of the beneficiary's time. *See* 8 C.F.R. § 214.2(1)(3)(ii).

It is further noted that the petitioner's organizational chart identifies prospective positions for which it intends to hire in the future. Yet, 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). The fact that the petitioner intends to hire additional workers at a future date is not probative of its eligibility as of the date of filing the petition.

Counsel states that CIS previously approved an L-1A petition and Form I-140 immigrant petition on behalf of the beneficiary, and thus the director's decision contradicts prior CIS findings. Counsel cites the decision in *Omni Packaging v. I.N.S.*, 733 F. Supp. 500 (D.C.P.R. 1990) to stand for the proposition that the director must explain why the prior approvals were erroneous in order to properly deny the present petition. 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. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

As counsel correctly states, the court in *Omni Packaging v. United States Immigration and Naturalization Service* found that the Immigration and Naturalization Service (INS) abused its discretion in denying a petition for L-1A status. The court found that the INS had the burden to explain why previous approvals based on identical facts were in error in order to properly deny the petition at issue. Yet, counsel fails to note that the court in *Omni Packaging* revisited the issue and later determined that the Immigration and Naturalization Service had properly denied the immigrant petition and that it was not estopped from finding that the alien was not manager or executive after having determined that he was manager or executive for purposes of issuing an L-1 visa. *See Omni Packaging, Inc. v. INS*, 930 F. Supp. 28 (D.C.P.R. 1996).

Further, in the instant matter, the AAO notes that the present petition is a separate matter from the petitioner's immigrant petition and prior L-1A petition on behalf of the beneficiary. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner must submit sufficient evidence into the current record to sustain its burden. Evidence from the petitioner's immigrant petition or prior L-1A petition on behalf of the beneficiary is not part of the current

record. Contrary to counsel's suggestion, the fact that a prior petition was approved on behalf of the beneficiary does not serve as prima facie evidence that eligibility has been established in the present proceedings. Established precedent reflects that prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 [REDACTED] (5th Cir. 2004). As discussed above, the petitioner has failed to provide sufficient evidence in the present proceeding to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has established that the beneficiary was employed abroad in a primarily managerial or executive capacity.

In a letter submitted with the initial petition, the petitioner described the beneficiary's duties as follows:

In his position of Sales Manager with [the foreign entity], [the beneficiary] was responsible for the day-to-day development, supervision, direction and monitoring of the sales and distribution efforts of [the foreign entity's] sales staff. He participated actively in the formulation, development, implementation and administration of the sister corporation's policies and procedures in the area of sales and distribution. In addition, he managed, directed and supervised the work of numerous other sales professionals employed by the [foreign entity].

In the director's request for evidence, she instructed the petitioner to provide:

A definitive statement describing the foreign employment of the beneficiary, including:

- Position title.
- List all duties.
- Percentage of time spent on each duty.
- Number of subordinate managers/supervisors or other employees who report directly to the beneficiary.
- A brief description of their job titles and duties; give their educational background; if the beneficiary does not supervise other employees, specify what essential function within the organization he manages.
- Specific dates his employment began and ended in each position with your company.
- Indicate the qualifications required for the position.
- Indicate the level of authority held by the beneficiary.
- Indicate whether or not the beneficiary functions at a senior level within the corporation.
- Specify his position within the organizational hierarchy.
- Indicate who provides the product sales/services or produces the product of the business.

In response, the petitioner stated the following:

[The beneficiary] served in virtually the same managerial position with [the foreign entity] from January 1, 2000, to June 30, 2001. [The beneficiary] was employed in the position of Sales Manager of [the foreign entity]. In this position, he was responsible for the daily administration, direction and supervision of [the foreign entity's] Sales Department in Venezuela. In addition, he was responsible for the formulation, development, recommendation, implementation, and administration of the company's policies and procedures with respect to sales and distribution. He ensured that proper sales and distribution policies and practices were followed. He directed the activities of subordinate managers and supervised the elaboration and implementation of the company's business development plans in the sales and distribution area.

The petitioner indicated that as much as 70 percent of the beneficiary's duties involved supervising subordinate employees. The petitioner submitted an organizational chart for the foreign entity that reflects that the beneficiary supervised a sales supervisor and two salespersons.

In denying the petition, the director found that the petitioner did not establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

On appeal, counsel does not directly address this ground for denial. As discussed above, counsel's assertion that the director's decision was an abuse of discretion due to failing to explain why prior approvals were erroneous is not persuasive.

The job description submitted for the beneficiary's duties abroad contains verbatim passages from the description of the beneficiary's prospective duties in the United States. While the petitioner claims that the beneficiary supervised subordinate employees abroad, the only evidence submitted to support this assertion consists of the foreign entity's organizational chart. As noted above, the petitioner's U.S. organizational chart is deemed not reliable evidence due to material inconsistencies with the petitioner's State quarterly report. Thus, the AAO is not inclined to accept the foreign entity's organizational chart as conclusive evidence of its staffing in the absence of independent corroborative evidence. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Further, as noted above, the description of the beneficiary's duties in the United States is not deemed an accurate account of his true duties. The fact that the description of the beneficiary's foreign duties contains verbatim passages from the U.S. job description calls into question its accuracy. Again, 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. at 591.

Based on the foregoing, the petitioner has failed to submit sufficient evidence to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

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. The petitioner has not met this burden.

ORDER: The appeal is dismissed.