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File: WAG 01 197 57833 Office: CALIFORNIA SERVICE CENTER Date: MAR 01 2005

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

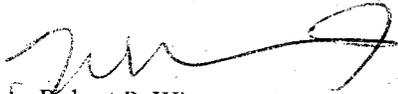
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



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 seeks to employ the beneficiary temporarily in the United States 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 U.S. petitioner, a corporation organized in the State of California engaged in the trading industry, seeks to employ the beneficiary as its president/chief executive officer. The petitioner claims that it is the subsidiary of [REDACTED], located in Taichung, Taiwan.

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's prior year of employment abroad was in a position that was managerial or executive.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the denial was erroneous, and that the beneficiary now functions primarily in an executive capacity. Counsel further contends that the beneficiary's prior employment abroad was in a managerial capacity as required by the regulations. In support of these contentions, counsel for the petitioner 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 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 management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The first issue in this 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 the initial petition, counsel submitted a letter from the foreign employer outlining the beneficiary's proposed duties while employed in the United States. The petitioner described her duties as follows:

[The beneficiary] has made several trips to the United States for 5 years to oversee the opening of U.S. operations The U.S. company has now reached a critical state in [its] development, and [the beneficiary's] presence to oversee the future growth of the company requires her continuous presence at this time.

The foreign petitioner further stated that the beneficiary would be entering the United States in order to apply her experience as a sales manager to the start-up of the U.S. business.

On July 21, 2001, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business, including a detailed list of the beneficiary's proposed duties and evidence of the employment and wages paid to the petitioner's U.S. employees. In a response received on October 12, 2001, the petitioner submitted several documents in response to the director's request, including organizational charts for both the U.S. and foreign entities, position descriptions for the beneficiary and the employees of the U.S. entity, and Employment Eligibility Forms (I-9) for the two employees of the U.S. petitioner.

On March 21, 2002, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, found that the beneficiary's stated duties had satisfied neither. The director noted that the nature and structure of the business as currently functioning did not appear to support the position of a bonafide manager or executive. Instead, the director found that the beneficiary's proposed duties included a combination of duties normally performed by a first line supervisor, a secretary, a sales person, recruiting personnel, and/or a trainer. In addition, the director found that the beneficiary's stated duties while employed abroad were limited to that of a sales manager, and thus did not demonstrate those of a managerial or executive position.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous, and suggests that with regard to the U.S. position, the director erroneously focused on the beneficiary's previous duties and not her current duties. Counsel further asserts that despite the beneficiary's job title of sales manager, she was performing executive duties for the foreign employer abroad during her period of employment prior to the petition's filing. Finally, counsel submits additional evidence in support of the viability of the U.S. 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.

The AAO will first examine the beneficiary's proposed duties in the United States. On appeal, counsel clarifies that the petitioner is employing the beneficiary in a primarily executive capacity, and requests consideration under this definition. However, counsel suggests that in the alternative, the beneficiary "may also perform certain tasks and responsibilities generally associated with an employee in a managerial capacity." The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary will not be employed in either a primarily managerial or executive capacity. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner claims that the beneficiary's duties are exclusively executive, yet the identified duties of the beneficiary in the record include non-executive tasks. For example, in a statement submitted in response to the request for evidence, the petitioner states that the beneficiary will spend 80% of her time preparing furniture samples and contacting prospective buyers. Such duties are not included in the definition of executive capacity, which counsel urges the AAO to consider.

The record contains no additional independent evidence or explanation establishing that the beneficiary is truly working as an executive. Merely claiming that the beneficiary is an executive is insufficient to establish eligibility in this matter. 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). In addition, counsel's statements on appeal are likewise unsupported by independent evidence. 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).

The AAO will next look to the definition of managerial capacity to determine whether the beneficiary is alternatively qualified under this aspect of the regulations. On appeal, counsel states that the beneficiary will exercise discretion over the day-to-day operations of the manager's activities when the manager is away. The record, however, only suggests that the U.S. entity employs two sales persons in addition to the proposed position of the beneficiary. Consequently, this statement is somewhat confusing and is inconsistent with the previously-submitted evidence. 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). Nevertheless, counsel's discussion of managerial duties is restricted to the times when the unidentified manager of the U.S. entity is away. Since counsel affirmatively supports this premise, the AAO has no choice but to conclude that the primary duties of the beneficiary are not those of a manager. If the beneficiary "may" perform these duties, and only performs these duties when the manager is away, the beneficiary cannot be *primarily* acting in a managerial capacity.

Finally, although counsel on appeal asserts that the beneficiary's proposed duties would now have evolved to the point where they are strictly executive, this assertion is not persuasive to find that the beneficiary's proposed duties satisfy the regulatory definitions. 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). In this case, the petitioner had not established the need for a managerial or executive position at the time of filing. For this reason, the petition may not be approved.

The AAO will next examine the beneficiary's position while employed by the foreign entity. The AAO again concurs with the director's finding that the beneficiary was not employed in managerial or executive capacity abroad. In this case, the petitioner claims that the beneficiary's duties as Sales Manager while working abroad required 80% of her time to be spent on "mak[ing] client contacts inside and outside of Taiwan, visit[ing] clients, attend[ing] furniture exhibitions" and making strategies and plans for expansion of the U.S. business. Such duties are not included in the definitions of managerial or executive capacity. As a result, the AAO is not persuaded that the beneficiary was employed in a managerial or executive capacity while abroad. The duties described, as stated by the director, suggest that the beneficiary was working as a sales person and/or client recruiter. Since the record contains no independent evidence to establish the executive and managerial capacity of the beneficiary, other than her title abroad and the statements of the petitioner and counsel, the AAO cannot reasonably conclude that the beneficiary was in fact a manager or executive. As previously stated, merely claiming that the beneficiary was employed as a manager or an executive is insufficient to establish eligibility in this matter. 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. at 190. In addition, counsel's statements on appeal are likewise unsupported by independent evidence. 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. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

The petitioner has failed to establish that the beneficiary was employed abroad in managerial or executive capacity, as required by 8 C.F.R. §214.2(l)(3)(iv). For this additional reason, the petition may not be approved.

Beyond the decision of the director, the AAO notes several inconsistencies in the record not addressed by the petitioner. First, the petitioner's Articles of Incorporation, signed and filed with the Secretary of State of Florida on October 16, 2000, designate the beneficiary as the corporation's resident agent. Florida requires

that an individual or service company, be responsible for receiving important legal and tax documents. In order to be a registered agent in the State of Florida, one must be an adult, *residing in the State of Florida* with a physical address, and be available during business hours. The petitioner's Form I-129, however, indicates that the beneficiary entered the United States in B-1 status on March 6, 2001, which subsequently expired on June 5, 2001. Since the Articles of Incorporation were filed nearly five months prior to her entry into the U.S., it is unclear how the beneficiary could legitimately serve as the petitioner's resident agent. 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). 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).

Furthermore, the petitioner's address is also listed as the beneficiary's home address. More importantly, this home address was listed as the business address of the petitioner when incorporated in October 2000. Again, since the beneficiary was not yet in the United States at the time of incorporation, it is unclear why this home address was in existence, and why this address continues to serve as the petitioner's primary business address. Again, 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. at 591-92.

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.