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20 Massachusetts Ave., N.W., Rm. A3042
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U.S. Citizenship
and Immigration
Services

DF

[Redacted]

File: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 19 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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its Finance Officer and Chief Administrative Manager for International Operations 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 Hawaii that operates as an engineering consulting firm. The petitioner claims that it is the branch of [REDACTED], located in Manila, Philippines. The beneficiary was initially approved for L-1A 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 the beneficiary will 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 beneficiary will be employed in a primarily managerial capacity. Counsel further asserts that, in the alternative, the beneficiary is eligible for L-1 status due to her employment in a specialized knowledge capacity. In support of these assertions, counsel submits a brief, a detailed letter from the petitioner, 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 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 filed with the initial petition on August 8, 2003, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] will continue to serve in Honolulu for the next three years as our Financial Officer and Chief Administrative Manager for International Operations. Her duties are the following activities:

1. review all contracts for financial requirements, invoicing requirements, cash advances for operations, local currency conversion factors; provide documents for opening local (in country) bank accounts, and prepare estimated budgets for the profit-loss of each contract;
2. Prepare, under the direction of the President, all employment contracts for expatriate employees and prepare and have signed the forms for taxes, medical plans, family travel, etc. Forward employment contracts for signature and record the information to assure that employees are placed on proper payrolls. Reserve airline flights for employees and family members as necessary, purchase tickets and forward to employees and/or family members;
3. Prepare cash budgets and arrange bank transfers for opening cash needs of contracts. Keep watch on exchange rates to consider forward purchase or hedging of local currency, if needed, due to fluctuating exchange rates;
4. Prepare invoices in U.S. dollar and local foreign currencies and review all invoices prepared on-site for compliance with contract and income projections. Assure receipts are legal and correct and in accordance with local requirements;
5. Prepare local employee regulations for locally employed staff in each country to meet local customs and laws. Assure the regulations meet company policy and that benefits fit the costs negotiated for the contract. Assure that all regulations are followed and that employees receive benefits as required under said regulations;
6. Prepare all accounting and bookkeeping for overseas contracts and provide project management with copies of contract status, and brief them as required;
7. Prepare, using in-country professional help, all required tax returns, etc;
8. Travel to countries as needed to assist project managers;
9. Maintain balances in all in-country and foreign exchange bank accounts and work with accounting departments on fund transfers needed to maintain operations and meet payrolls;
10. Be available to assist management, as needed, on all contractual matters.

The petitioner provided three separate organizational charts. A global chart shows that the accounting department, comprised of the beneficiary as accountant, international operations and a chief accountant, provides the accounting function for the foreign entity's international offices and international project offices, as well as for the petitioner. The global chart does not indicate that the beneficiary supervises subordinate employees or directs a department. A chart for the petitioner shows that the beneficiary serves in the position of international administration/accountant under the president and vice president, and that she does not supervise subordinate employees or direct a department. An organizational chart for the foreign entity's Manila office presents the beneficiary as administrative officer/accountant as part of the administrative/accounting department. Though the beneficiary's name appears first in a list of employees of the administrative/accounting department, the chart does not clearly reflect whether she supervises the other four employees in the department.

On August 14, 2003, the director requested additional evidence. In part, the director requested: (1) a more detailed description of the beneficiary's duties in the United States including an indication of the percentage of time in each of the listed duties; (2) the petitioner's Hawaii State quarterly reports for the previous two quarters; (3) the petitioner's payroll summary and Forms W-2 and W-3; and (4) a more detailed organizational chart as follows:

Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current names of all executives, managers, supervisors, and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, annual salaries/wages (in U.S. Dollar equivalents) and immigration status (L-1, H-1B, B-1, E-1, E-2, F-1, permanent resident, citizen, etc.) for all employees under the beneficiary's supervision. Finally, explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission.

NOTE: The submitted organizational chart does not contain sufficient information stated above.

In a response dated October 24, 2003, the petitioner submitted: (1) a letter from counsel that repeats the beneficiary's initially submitted job description as provided above; (2) evidence that the beneficiary is a signor on the petitioner's accounts; (3) a new organizational chart for the petitioner; (4) the petitioner's payroll summaries for 2000, 2001, and 2002; (5) the petitioner's Hawaii State quarterly reports for the first and second quarters of 2003; and (6) a breakdown of the beneficiary's duties as follows:

Office/Administrative/Accounting Manager . . .

Administrative/Technical Support Department & Accounting Department

Regular Staff 3

Project Admin. Staff Average, 5 (Varies at various times and depending on the

size and life of the project)

Duties included

Percentage of time spent Per function

Administrative Duties (General)

30%

- Personnel administration
- Bank representation
- Assist in the preparation of proposals, both technical and financial (gather data to back up financial proposal such as logistical supplies and equipment); manning and selection of staff for proposal use; and preparation of resumes to match the formats required by the prospective client.
- Recruitment of personnel for local and overseas placements for the company
- Airline and hotel bookings both foreign and local travel including car rentals, long-term housing, etc.
- Keep all project contracts, revisions, extensions, etc. and see to it that all concerned principals are furnished with copies and updated on their status.

Financial (Manila – General)

30%

- Accounting, budgeting, cash flow
- Payroll
- Procurement
- Financial statements
- Accounts receivable and payables

Projects Admin and Finance (local)

25%

- Expatriate staff per diem and travel arrangements including visas and clearances (arrivals and departures)
- Arrange for expatriate staff (and dependents) short- and long-term accommodations (house or condo rentals) and transportation;
- Recruit and conduct orientation of project administrative personnel, from administrative officer to drivers and utility personnel. Prepare their contracts of employment; and issue termination of employment upon completion of the projects.
- Assist in the recruitment of technical staff, set up interviews and prepare contract of employment;
- Check billings/invoices prepared by the project accountants; coordinate with the projects' administrative officers/accountants with regard to proper costing of staff time charges and costs for billing to client;
- Assist in the set up of project office by doing the procurement of vehicles, office equipment, furniture and other logistical supplies for project offices' use;
- Monitor contract costs for full optimization of all budgeted project costs;

- Liaison with local government agencies and clients for contract extension and re-alignment of budget costs and collection follow up.
- Contract closure (final billing and adjustments)
- Document the turn over of all project-funded equipment and other materials to the client upon completion or termination of the contract
- Coordinate filing of taxes and duties
- On various projects, especially with the U.S. Navy, was personally involved in the preparation of financial proposals, invoices and collection process.
- For the SBMA Power/Electrical Manager Project:
 - Full involvement in preparation of invoices, accounting and follow ups
 - Request of contract extension and re-alignment of contract budget
 - Assisted the expatriate project manager with his and his wife's immigration documents
 - Procurement of vehicle for use of the Project Manager
 - Turnover of equipment to the client upon completion of the project.

Projects Admin and Asia (international) 15%

- Billing/Invoicing
- Liaison with Asian Development Bank for contract extension and re-alignment of budget costs and collection follow-up.
- Contract closure and final billing including adjustments
- Recruitment of Filipino engineers for overseas projects
- Travel arrangements

The petitioner indicated that the beneficiary regularly supervises staff, including an IT-Computer Operator, a Secretary/Bookkeeper, and a General Clerk/Utility.

On November 7, 2003, the director denied the petition. 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 noted that the petitioner's organizational chart does not reflect that the beneficiary supervises subordinate employees who would relieve her from performing day-to-day tasks. The director states that "the petitioner's description of the beneficiary's duties clearly show[s] that the beneficiary has been performing and will continue to [perform] the day-to-day duties to maintain the petitioner's accounting department." The director commented that the petitioner has provided no evidence to show that it is currently hiring additional employees. The director interpreted the petitioner's State quarterly reports to show that the beneficiary did not commence employment with the petitioner in the United States until July 1, 2003. The director pointed out that an organizational chart submitted with the initial evidence suggests that the beneficiary supervises a bookkeeper, a secretary, a utility man, and a driver, which renders her, at best, a first-line supervisor.

On appeal, counsel asserts that the beneficiary will be employed in a primarily managerial capacity. Counsel explains that, during her initially approved I-1A period, the beneficiary returned to Manila to work on a

project for the foreign entity. Thus, she is not included on all of the petitioner's quarterly filings. Counsel further asserts that the beneficiary is eligible for L-1 status due to her employment in a specialized knowledge capacity. Counsel lists the beneficiary's duties that purportedly require specialized knowledge, the majority of which involve administrative tasks and the preparation of various technical and financial documents under the supervision of senior management. Counsel further states the following:

[The beneficiary] also performs in a managerial capacity. She supervises, monitors and sometimes rejects requests from professional engineers or other professional staff members, and also manages the technical aspects of their international projects, which constitutes 35% of their business. This is a senior level position, which requires [the beneficiary] to exercise management and direction of professionals as well as other employees and/or subcontractors.

The petitioner provides a letter that further discusses the beneficiary's duties and role in the company's operations. The petitioner explains that the beneficiary coordinates the preparation of the petitioner's contract proposals. The petitioner states that the beneficiary supervises and assists in preparing documentation to attempt to have the petitioner short-listed for desired projects. The petitioner provides that the beneficiary "supervises and assists the technical staff on the methodology, recommendations for the staffing to be proposed, and editing/tailoring to the needs of the client." The petitioner further states that:

Because of the financial liability involved [in] decision-making, it is necessary that only the top management have the final word regarding professional engineering and construction-management services; however, [the beneficiary] does take a high-level role in this process. She works with, supervises, monitors and even rejects requests from professional engineers and/or other professional staff on technical aspects of our international projects.

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. In the instant matter, the petitioner claims that the beneficiary will be employed in a managerial capacity. Yet, the descriptions of the beneficiary's duties reflect that the majority of her time is devoted to non-qualifying administrative and clerical tasks.

The petitioner indicates that the beneficiary will spend 30 percent of her time on administrative tasks such as assisting in preparing proposals, booking travel reservations for staff, and maintaining and distributing records of the petitioner. These tasks do not constitute managerial or executive duties as defined by sections 101(a)(44)(A) and (B) of the Act. The petitioner provides that the beneficiary will commit 25 percent of her time to local project administration and finance tasks. Many of the duties listed under this category are non-qualifying administrative tasks, such as: making arrangements for staff per diem payments, visas, and accommodations for travel; assisting in the set up of project offices by procuring of vehicles, office equipment, furniture and other logistical supplies for project offices' use; creating invoices; and setting up job interviews and preparing employment contracts. While some tasks under this category appear to be

managerial in nature, the petitioner has failed to indicate the percentage of time the beneficiary will devote to them as opposed to other tasks within this group. The petitioner provided that the beneficiary will commit 15 percent of her time to international project administration. Yet, the tasks listed under this category are primarily administrative, non-managerial activities, such as billing and invoicing, performing final billing including adjustments, and making travel arrangements. Within this category, the petitioner states that the beneficiary will be responsible for "[l]iaison with Asian Development Bank for contract extension and realignment of budget costs and collection follow-up," yet without further explanation it is unclear whether this is a managerial or executive task.

The petitioner indicates that the beneficiary will commit 30 percent of her time to financial tasks. Yet, from the vague list of duties under this category, it is unclear what actual tasks the beneficiary will perform in this regard. For example, the beneficiary is responsible for payroll, but the petitioner has not explained whether she will perform the administrative tasks such as issuing checks, or whether she will direct others to do so. The beneficiary is responsible for financial statements, yet it is unclear whether she will prepare such statements, or work through subordinate employees to accomplish this goal. The beneficiary is responsible for accounts receivable and payables, yet it appears that she performs the routine administrative functions in this regard, as the petitioner clearly stated that she prepares invoices. The beneficiary's procurement activities under this category appear to be non-qualifying functions related to acquiring materials such as office furniture and automobiles.

Accordingly, the beneficiary's job descriptions and the breakdown of her duties reflect that she is primarily engaged with non-qualifying, administrative tasks.

The petitioner claims that that beneficiary will have supervisory authority over subordinate employees, including an IT-Computer Operator, a Secretary/Bookkeeper, and a General Clerk/Utility. Yet, these three employees are based in the foreign entity's Manila office, and none of them are listed as the beneficiary's subordinates on the foreign entity's organizational chart. Further, these three employees do not appear on the organizational charts submitted with the initial petition. While counsel claims that the beneficiary's duties require her "to exercise management and direction of professionals as well as other employees and/or subcontractors," the evidence of record does not support this contention. 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)). 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).

Further, the evidence of record does not support that the beneficiary is a function 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 a 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. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In this matter, the beneficiary's duties are primarily non-managerial. Further, the beneficiary does not have primarily responsibility for an essential function. While the petitioner indicates that the beneficiary operates at a "high level," the petitioner states that "it is necessary that only the top management have the final word regarding professional engineering and construction management services." The petitioner's explanation clearly excludes the beneficiary from "top management." Thus, the petitioner has not provided evidence that the beneficiary manages an essential function.

Further, counsel and the petitioner assert that the beneficiary is eligible for L-1 classification due to her possession and utilization of specialized knowledge. However, on Form I-129, the petitioner clearly requested that the beneficiary's L-1A status be extended. The petitioner did not request that the beneficiary's status be changed to L-1B as an intracompany transferee employed in a capacity involving specialized knowledge. As such, the present petition will be adjudicated solely based on the provisions relating to L-1A intracompany transferees employed in a primarily managerial or executive capacity. If the petitioner wishes to have the beneficiary considered for L-1B status, it is permitted to file a separate Form I-129 petition to make such a request.

In the denial, the director further noted that the petitioner failed to show that it is making efforts to hire additional employees. 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). Whether the petitioner intends to hire additional employees in the future is not probative of its eligibility as of the date of filing the petition. Thus, the fact that the petitioner did not include evidence of efforts to hire additional staff has no material bearing on this visa petition. The director's comment on this issue will be withdrawn.

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.

Beyond the decision of the director, counsel has not established that the beneficiary was employed abroad in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(1)(3)(iv). The petitioner indicates that the beneficiary's duties abroad were largely the same as her duties in the United States. Thus, for the reasons discussed above, the petitioner has failed to establish that the beneficiary was employed with the foreign entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

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. The petitioner has not met this burden.

ORDER: The appeal is dismissed.