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

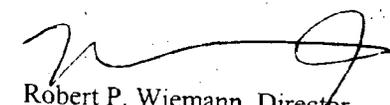
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 filed this nonimmigrant petition seeking to extend the employment of its president 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 California that is engaged in the import and wholesale distribution of small household appliances. The petitioner claims that it is the subsidiary of [REDACTED] Co. Ltd. located in Hainan, China. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and was subsequently granted a two-year extension of stay. The petitioner now seeks to extend the beneficiary's stay for an additional three-year period.

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 performs work in both an executive and a managerial capacity. In support of this assertion, the petitioner submits additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The 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 support of the initial petition, the petitioner submitted a letter dated December 4, 2003, which described the beneficiary's job duties as follows:

1. Direct and supervise the operation of the subsidiary company.
2. Direct, supervise and participate in the negotiation for the company's investment projects and sales projects.
3. Make major decisions on business transactions, expansions, staff recruitment, etc.
4. Work out schedules and duties for the employees.
5. Explore potential investment projects or joint venture products, which meet the investment strategy of the parent company in China.
6. Submit reports directly to the board of directors of the parent company in China.

The petitioner indicated on Form I-129 that it employs five people, and submitted an organizational chart depicting the beneficiary, a sales department manager, a warehouse worker, a sales person, and a secretary/financial department worker.

On December 23, 2003, the director requested additional evidence to establish that the beneficiary would be performing the duties of a manager or executive with the U.S. company. Specifically, the director requested that the petitioner submit a more detailed description of the beneficiary's duties in the U.S. and a copy of the company's organizational chart describing its managerial hierarchy and staffing levels, including a brief description of job duties, educational level and annual salaries/wages for all of the employees under the beneficiary's supervision.

In response, the petitioner submitted the following description of the beneficiary's duties:

1. Exercise discretionary authority in the decision-making process;
2. Make policies for the company in the areas of business planning, financial issues, marketing orientation, sales strategy, customer relations and internal personnel management;
3. Set standards for the work and general guidelines for each of the managerial positions;
4. Make personnel decisions with regard to top and middle level managers;
5. Finalize business negotiations or contracts with other companies;
6. Approve/disapprove budget and financial plans submitted by lower level managers;
7. Explore potential investment projects or joint venture projects which meet the investment strategy of the parent company in China;
8. Develop corporate planning and strategies for approval by the Board of Directors;
9. Submit reports directly to the board of directors of the parent company in China.

In addition, the petitioner submitted an organizational chart that provided the following job descriptions for the four employees under the beneficiary's supervision:

Financial Officer/Secretary: Assist the president in daily operation; In charge of account receivable and account payable. (BA degree in Business)

Sales Manager: Coordinates sales distribution in America; Determine the demand for products in America; Marketing research and market development. (College)

Warehouse Clerk/Customer Service: Inventory, quality and quantity controls of the products in stock. (High School)

Salesman: Represents the company by selling the products in local districts. In charge of order deliveries. (High School)

On January 13, 2004, the director denied the petition concluding that the beneficiary's duties are not primarily managerial or executive. The director noted that the petitioner did not establish that the beneficiary supervises a subordinate staff of professional, managerial or supervisory personnel who would relieve him from performing non-qualifying duties. The director also stated that the U.S. entity does not appear to have the organizational complexity to support an executive position.

On appeal, counsel for the petitioner disputes the director's decision, asserting that it is "arbitrary and capricious and in denial of the Petitioner and Beneficiary's due process rights," and noting that the director approved two previous petitions submitted on behalf of the beneficiary based on the same facts. Counsel further contends that the beneficiary performs duties in both an executive and managerial capacity, and asserts that the director overlooked the two professional employees supervised by the beneficiary. Finally, counsel contends that petitioner's "organizational complexity" was not a valid criterion for determining whether the beneficiary qualifies as an executive under section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary 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.* In this case, counsel claims that the beneficiary is performing the duties of both a manager and an executive. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing that the beneficiary is both an executive and a manager. The petitioner has not done so in this matter.

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 "making major decisions," "making policies," "supervising and participating in" sales projects and "exploring investment projects." The petitioner did not, however, specify or provide examples of the types of decisions or policies enacted by the beneficiary, clarify the beneficiary's actual duties with respect to the sales process, or describe what specific duties "exploring investment opportunities" entails. 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). While the beneficiary clearly performs some qualifying duties, some of his responsibilities, including

participation in sales activities and research of investment opportunities, are not traditionally managerial in nature. Without detailed information regarding what specific tasks the beneficiary performs on a daily basis, the AAO cannot determine whether the beneficiary actually performs management-level duties related to sales negotiations and research of investment opportunities. 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)). The actual duties themselves will reveal the true nature of the employment. *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)."

In its response to the director's request for evidence, the petitioner expanded the beneficiary's duties. However, one third of the beneficiary's expanded job duties involve oversight of several layers of management that do not exist within the petitioner's organization. For example, the beneficiary is described as "making personnel decisions with respect to top and middle level managers," "setting guidelines for each of the managerial positions," and "approving/disapproving budgets and financial plans submitted by lower level managers." The petitioner employs a warehouse clerk, a secretary, a sales person, and a sales manager, and the petitioner does not claim that the sales manager performs managerial duties. Nor does the petitioner describe any lower level employees who have responsibility for preparing budgets or financial plans. Further the AAO notes that the initial description of the beneficiary's personnel responsibilities involved only "working out schedules and job duties for the employees," which are duties typically performed by a first-line supervisor. The initial job description also described the beneficiary as participating in sales projects, while the second description describes him as "finalizing" business negotiations and contracts. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although the director requested a specific description of the duties performed by the beneficiary on a daily basis, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). This failure of documentation is important, because some of the beneficiary's duties, including scheduling the work of non-professional employees and participating in sales projects, do not fall under traditional managerial duties as defined in the statute. The AAO will not accept broad, unsubstantiated assertions regarding the beneficiary's managerial or executive status and speculate as to what the actual managerial or executive duties might be and what proportion of time the beneficiary might devote to them.

Counsel correctly notes on appeal that the beneficiary is not required to supervise personnel. However, since the petitioner claims that the beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. In this case, counsel asserts that two of the beneficiary's subordinates are professional employees: the secretary/financial officer, who is claimed to have a bachelor's degree in business administration, and the sales manager, who the petitioner asserts has a "college degree." Counsel states "both employees perform professional duties in accordance with their respective titles." 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 Obaighena*, 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 petitioner has not claimed or submitted evidence to establish that these employees could be classified as managers or supervisors, nor is there sufficient evidence to establish that they are performing professional duties.

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 the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the administrative and accounts payable/receivable work of the secretary/financial officer, who is among the beneficiary's subordinates, nor has the petitioner provided a sufficient description of the sales manager's duties to establish whether they could be considered professional. 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. Based on the above, the AAO concurs with the director's finding that the beneficiary will not be supervising a staff of managerial, supervisory or professional employees. An individual whose duties encompass duties of 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.

Counsel further asserts on appeal that, even if the beneficiary is not supervising a staff of managerial, professional or supervisory employees, he nevertheless meets the requirements of "managerial capacity" because he manages several essential functions, "including all of the business negotiations the company conducts. Since [the petitioner] is a trading company, negotiations for sales and investment projects are its core business. The Beneficiary has ultimate authority over these decisions, which falls within the letter of the

definition of 'managerial' at 8 C.F.R. § 214.2(l)(1)(ii)(B)(2)." Counsel's assertion is not persuasive. 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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. 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. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). While the petitioner claims on appeal that the beneficiary manages the "business negotiation" including sales and investment negotiations, the petitioner has not actually identified the function with specificity or established the beneficiary's daily duties associated with managing the function. Further, the description of the beneficiary's duties suggests that he directly participates in business, contract and sales negotiations, and the petitioner has not described other employees who perform any non-managerial duties related to the function. For these reasons, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel correctly observes that a company's size or "organizational complexity" 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) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for 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). 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 doing so, CIS reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees and any other facts contributing to a complete understanding of a beneficiary's actual role in a business, when examining the managerial or executive capacity of a beneficiary.

At the time of filing, the petitioner was a three-year old import and wholesale distribution company with gross annual income in excess of \$739,000. Although the company employs staff who are responsible for U.S. sales, warehousing/inventory, clerical tasks, and routine bookkeeping, the petitioner does not employ anyone who is claimed to maintain relationships with foreign suppliers or purchase products to be sold in the United States by the petitioner. Although the petitioner claims that the beneficiary manages all business negotiations, it has not established that anyone, other than the beneficiary, is responsible for negotiating with its suppliers.

If he is actually performing these negotiations, it is noted that 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary, and that all parties had relied on the prior approvals to make decisions to further invest in the United States. Counsel further states that denial of the petition for the extension under these circumstances results in a violation of the petitioner's and the beneficiary's due process rights. 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).

The Administrative Appeals Office, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the Administrative Appeals Office is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See DHS Delegation Number 0150.1* (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's equitable estoppel claim.

The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The description of the beneficiary's

duties provided in response to the Service's request for additional information is vague and therefore does not clarify what the beneficiary actually does on a daily basis. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or primarily managing an essential function within the organization. Further, the record is not persuasive that the beneficiary functions at a senior level within an organizational hierarchy other than in position title. Based on the evidence submitted, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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. § 1362. 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.