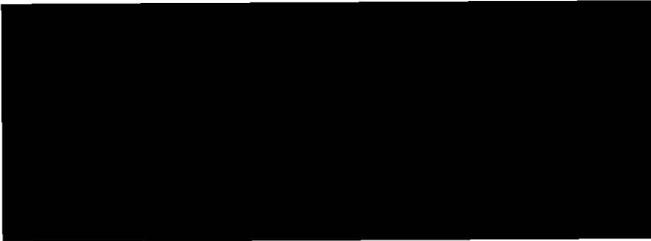


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Services

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File: WAC 05 043 50951 Office: CALIFORNIA SERVICE CENTER Date: **APR 03 2006**

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

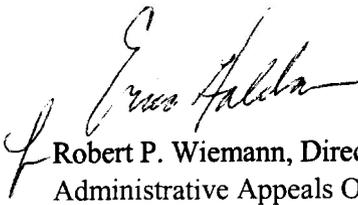
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the intracompany transferee nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims it is a corporation organized in the State of California in 2001. On the Form I-129, Petition for Nonimmigrant Worker, the petitioner states that it is engaged in marketing and developing new products. The petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, indicate that the petitioner is engaged in wholesale distribution of audio systems. The petitioner seeks to extend the temporary employment of the beneficiary as its branch manager. Accordingly, the petitioner endeavors to classify the beneficiary as a 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 claims that it is a subsidiary of [REDACTED] in Seoul, South Korea.

The director denied the petition on January 28, 2005, determining that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner submits a three-page brief.

To establish L 1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

The issue in this matter is whether the petitioner has established that the beneficiary has been and will be employed in a primarily managerial or executive capacity for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a November 22, 2004 letter appended to the petition, the petitioner stated:

[The beneficiary] has been occupying the highest position in the company, a position involving executive functions. In this position, [the beneficiary] sets all corporate policies, and develops strategies for purchasing and marketing.

On December 8, 2004, the director requested further evidence on this issue, including among other items: a more detailed description of the beneficiary's duties; a list of all employees under the beneficiary's direction;

the percentage of time the beneficiary spent on his listed duties; the total number of employees at the U.S. location where the beneficiary would be employed; the petitioner's organizational chart showing the current names of all executives, managers, supervisors, and number of employees within each department or subdivision, clearly identifying the beneficiary's position on the chart; a list of all of the U.S. company's employees from the date of establishment to the present, including names, job titles, and social security numbers, beginning and ending dates of employment, and wages per week; and copies of the U.S. company's California Employment Development Department (EDD) Forms DE-6, Quarterly Wage Report, for all employees for the last three quarters that were accepted by the State of California.

In a January 13, 2005 response, counsel for the petitioner indicated that the petitioner currently employed two individuals but had employed two to four individuals over the past few years. The petitioner provided an "organizational chart" showing the beneficiary in the position of president and one individual in the position of sales manager.

The petitioner in a statement attached to the response indicated:

With regard to the beneficiary's duties, he will continue to occupy the highest position in the petitioning company. He will be essentially unsupervised, and his duties will entail directing the overall management and control of the petitioning company, establishing policy and goals, exercising wide latitude in discretionary decision-making and subject only to supervision of the parent company board of directors. In addition, to the foregoing executive duties, the beneficiary also will continue [to] be hiring, firing, promoting, and demoting personnel. He will be exercising complete discretion over the enterprise's day-to-day operation. The beneficiary will continue to exercise the skill requisite for this position as can be seen from the last few years in this position.

The petitioner also provided its California Forms DE-6 for the 2003 year and for the first three quarters of 2004. The California Forms DE-6 confirmed that the petitioner had employed one individual, the beneficiary, in the last three quarters of 2003 and the first and second quarter of 2004. The California Forms DE-6 for the first quarter of 2003 and the third quarter of 2004 showed the petitioner had employed the beneficiary and one other individual. The petitioner did not provide a copy of the petitioner's California Form DE-6 for the fourth quarter of 2004, the quarter in which the petition was filed.

On January 28, 2005, the director denied the petition, observing that an individual who manages a small business does not necessarily satisfy the criteria set out in the statutory definition of "managerial capacity." The director observed that the petitioner had not established that it had reached or would reach the organizational complexity wherein hiring/firing personnel, discretionary decision-making, and setting company goals and policies would constitute significant components of the duties performed on a day-to-day basis. The director determined that the record established that a preponderance of the beneficiary's duties would be directly providing the services of the organization and supervising no employees. The director concluded that the petitioner had failed to establish that the beneficiary would be employed primarily in a managerial or executive capacity.

On February 25, 2005, counsel for the petitioner submitted a Form I-290B, Notice of Appeal, stating that:

The District Director incorrectly determined that the Beneficiary was not a Manager. The District Director's interpretation of the statutory language defining "Manager" in the context of an L-1 petition was far to limiting. The CIS (previously INS) had previously accorded the Beneficiary L-1 status as a "Manager" with the exact same job duties, as those set forth in the request to extend the beneficiary's L-1 status.

Counsel also submitted a brief indicating that Citizenship and Immigration Services (CIS) (previously the Immigration and Naturalization Service) approved a petition to classify the beneficiary as an L-1A intracompany transferee for a period of one year as well as a two-year extension of the beneficiary's L-1A classification. Counsel claims that the record shows "that over the past three years the petitioner has had between one and four employees (see DE-6 forms, previously provided) and that the beneficiary supervised and managed all of these employees." Counsel also contends that the beneficiary had been making decisions to hire and fire personnel, setting company goals and policies, and other discretionary decision-making on a daily basis and that the beneficiary had total authority over the running of the petitioning company, in consultation with the parent Korean Company's board of directors.

Counsel's contentions 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(1)(3)(ii). The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. In this matter, although the petitioner initially seemed to claim that the beneficiary would perform primarily executive tasks, the AAO observes that on appeal counsel for the petitioner suggests that the beneficiary will perform primarily managerial duties. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner in this matter has failed to provide a comprehensive description of the beneficiary's duties. The petitioner's initial description of the beneficiary's duties paraphrased an element of the definition of executive capacity. *See* section 101(a)(44)(B)(ii) of the Act. In response to the director's request for evidence, the petitioner submitted a broad overview of the beneficiary's duties and his place within the petitioner's organizational structure. Stating that the beneficiary will occupy the highest position in the company and that the beneficiary will be unsupervised is insufficient to describe what the beneficiary will do on a daily basis. Likewise, paraphrasing portions of the definitions of managerial and executive capacity do not convey an understanding of the beneficiary's actual daily duties or what his role in the organization entails. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In addition, 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. 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). Further, the petitioner's failure to provide a detailed description of the beneficiary's job duties with a percentage of time allocated to each listed duty, despite the director's request for this evidence is a ground for denying the petition. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner in this matter failed to provide a description of the beneficiary's duties that would establish the beneficiary's employment as an executive as defined in the statute. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The petitioner in this matter has not established that it employed a subordinate level of managerial employees when the petition was filed. 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)).

Likewise, the petitioner has not established that the beneficiary would perform primarily managerial duties as defined by statute. The petitioner has not provided evidence that it employs individuals, in addition to the beneficiary, on a continuous basis. Contrary to counsel's claim that the petitioner has employed two to four personnel in the past, the record shows that the petitioner employed only the beneficiary the majority of the time and only intermittently employed a second individual. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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). Thus, the record does not establish that the beneficiary's duties primarily comprise the supervision of other personnel. Further, if a petitioner claims that a 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.

As the director observed, the petitioner has also failed to establish that the beneficiary's duties comprise the duties of a function manager. 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 "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The record in this matter does not establish who carries out the petitioner's day-to-day operational and administrative tasks, other than the beneficiary. The petitioner has not provided substantive evidence that it employed a second individual when the petition was filed in December 2004. 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).

Of note, 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). In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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.

On appeal, counsel references the director's review of the beneficiary's managerial or executive capacity on two prior occasions when the director approved the petitioner's nonimmigrant petitions submitted on behalf of the beneficiary. However, it must be emphasized that each petition filing is a separate proceeding with a separate record and a separate burden of proof. See 8 C.F.R. § 103.8(d). The prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

The AAO determines that if the previous nonimmigrant petitions were approved based on the same unsupported 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. at 597. 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, counsel should note that 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 petitioner has not submitted evidence on appeal sufficient to overcome the director's determination. Accordingly, the appeal will be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

ORDER: The appeal is dismissed.