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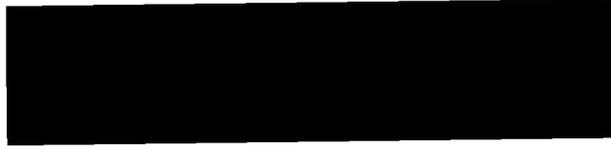
File: WAC 04 165 50598 Office: CALIFORNIA SERVICE CENTER Date: **APR 24 2006**

IN RE: Petitioner:  
Beneficiary:



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, Chief  
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 printing services. The petitioner claims that it is the subsidiary of [REDACTED] located in Shanghai, China. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, which was subsequently extended for an additional two years. The petitioner now seeks to extend the beneficiary's stay for an additional 3 years.

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 director erred by determining that the beneficiary would be directly providing the services of the business and was thus not a qualified manager or executive. In support of this assertion, 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 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 the initial petition, the petitioner described the beneficiary's job duties in a letter dated May 12, 2004 as follows:

[The beneficiary] has been very instrumental in contributing to the continuing successful operations and development of our US petitioner's business. As [p]resident of the US company, [the beneficiary] has been responsible for the overall financial, administrative and business projects of the company. She has been formulating company business policies and directives for implementation by the department managers. She is directing the coordination among the company departments and the Chinese parent company. She has directed the lower managers in the establishment and improvement of systematized marketing transactions with the pertinent U.S. companies.

She also manages company officers in planning business objectives to increase sales volume and products quality. In the process, [the beneficiary] also allocates responsibilities for the different company departments according to the company general business plan and parent company's directives. She supervises and evaluates performance of lower managers in compliance with company business policies and objectives. She reviews activity reports and business documents. Finally, she interviews and recruits corporate employees in accordance with the subsidiary's corporate needs.

[The beneficiary] has been, and will continue to be, in essence, directing the management of [the petitioner], establishing [the petitioner's] goals and policies, exercising wide latitude in discretionary decision making, and receiving only general supervision from the Board of Directors and the Chinese parent company. Her duties are in conformance of "executive capacity" as defined in Title 8, Code of Federal Regulation, Part 204.5(j)(2). Similarly, [s]he has been managing [the petitioner], supervising and controlling the work of her subordinate managers, managing virtually all essential functions within [the petitioner] such as administration, financial and business development, exercising personnel authority, and exercising discretion over the day-to-day operations of [the petitioner].

In addition, the petitioner stated that the U.S. entity employs a total of six professional employees, who, it states, occupy such positions as President, Department Managers, Corporate Secretary, Marketing Representatives, and Accountant. Finally, an organizational chart outlining the hierarchical structure of the U.S. entity demonstrated that the beneficiary answers to the Board of Directors and directly supervises the Chief Financial Officer position, which is incidentally also held by the beneficiary. All other employees are under her supervision.

On June 28, 2004, the director denied the petition. The director determined that the petitioner had failed to establish that the beneficiary had been and would continue to be employed in a primarily managerial or executive capacity. In consideration of the evidence submitted, the director analyzed both the stated duties of the beneficiary and the size of the petitioning entity in reaching the decision.

On appeal, counsel for the petitioner asserts that the director's conclusions were erroneous. Specifically, the petitioner asserts that the beneficiary functions at the highest level within the petitioner's hierarchy and directs the petitioner's key components, functions, and the company as a whole. Furthermore, counsel asserts that the

beneficiary in fact oversees a subordinate staff of professionals, and therefore qualifies as a primarily managerial employee.

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. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this case, the petitioner initially gave a general overview of the beneficiary's duties in its May 12, 2004 letter. In that letter, generalizations were made with regard to the standard activities of the beneficiary. For instance, the petitioner advised that she "has been, and will continue to be, in essence, directing the management of [the petitioner], establishing [the petitioner's] goals and policies, exercising wide latitude in discretionary decision making, and receiving only general supervision from the Board of Directors and the Chinese parent company." The AAO notes that this sentence is almost identical to the regulatory definition of executive capacity. 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Nevertheless, this kind of generalized statement does little to clarify the exact nature of the beneficiary's job, her responsibilities, and her daily functions. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41.

The petitioner also stated in the May 12, 2004 letter that the beneficiary is "managing virtually all essential functions within [the petitioner] such as administration, financial and business development. . . ." Although the petitioner claims to employ professional subordinate employees beneath the beneficiary, it fails to explain why the beneficiary is engaged in such a wide array of fields, and how the subordinate employees relieve her from these obligations. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as those cited above, do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, 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).

Furthermore, the petitioner claims that the beneficiary is a qualified manager because she supervises a subordinate staff of professionals. The record indicates that the beneficiary oversees (1) an Import and Trade Department Manager; (2) a Distribution and Sales Department Manager; (3) a Corporate Secretary/Marketing Representative; (4) a Trade Specialist; and (5) a Marketing Representative. The petitioner has provided a brief description of the duties associated with these positions, but fails to clearly explain the manner in which these employees relieve the beneficiary from performing non-qualifying tasks. Furthermore, there is no definitive evidence that these subordinate employees are professionals. Although the beneficiary is not required to supervise personnel, if it is claimed that her 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.

Although the petitioner noted in general the educational achievements of the subordinate employees (only the Import and Trade Department Manager had a college degree), the petitioner did not provide the level of education required to perform the duties of its marketing and sales representatives. While attainment of a college degree is commendable, there is no evidence in the record to establish that the positions these persons fill require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. Merely submitting an organizational chart with the beneficiary at the top, and alleging that the subordinates are all professionals does not satisfy the petitioner's burden of proof. 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 AAO further notes that the director relied in part on the size of the U.S. petitioner in rendering the decision in this matter. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. 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. 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).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary

who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. Once again, the vague description of duties here, which seem most often to paraphrase the regulatory definitions, fail to establish that the beneficiary's duties are primarily managerial or executive. The mere allegation that the beneficiary is a qualified manager or executive, without documentary evidence to support the claim, is insufficient to satisfy the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. at 165. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. In addition, the unsupported 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).

Finally, counsel further refers to numerous unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, 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).

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the regulation at 8 C.F.R. § 214.2(l)(3)(i) states that the petitioner is required to submit evidence that the prospective United States employer and the beneficiary's foreign employer have a qualifying relationship as defined in 8 C.F.R. § 214.2 (l)(1)(ii)(G)

In the instant matter, the petitioner claims to be a wholly owned subsidiary of [REDACTED] location in China. In support of this claim, the petitioner has provided a number of documents including stock certifications, a stock transfer ledger, a California Notice of Transactions, and evidence of a wire transfer in the amount of the purchased stock. However, the documentation of the wire transfer indicates that Foreign Economic & Trading Co., Ltd. Was the originator of the funds used to purchase the petitioner's stock. The petitioner has explained that the foreign parent entity entrusted the actual fund transfer to a third party company, which the petitioner claims was legally authorized by the Chinese government to handle foreign exchange matters. However, the petitioner has not provided any documentation to support its claims regarding the [REDACTED]'s authority to engage in foreign exchange matters; nor has the petitioner provided any documentation establishing what China's foreign monetary exchange policies were at the time the fund transfer took place. 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 regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the instant matter, the record does not clearly establish that the claimed foreign entity actually paid for its ownership of the U.S. petitioner's stock. Therefore, the AAO cannot conclude that the beneficiary's foreign employer and the U.S. petitioner have a qualifying relationship as claimed.

In addition, the petitioner noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary. 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). The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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).

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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.