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U.S. Citizenship
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Services

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FILE: WAC 04 156 50515 Office: CALIFORNIA SERVICE CENTER Date: NOV 15 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, 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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its general manager 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, a California corporation, claims to be the subsidiary of Yongjia Daily-Use Individual Products Company, located in Zhejiang, China. The petitioner claims to be engaged in international trade and wholesale of daily-use industrial products. The beneficiary was initially granted a one-year period of stay in 1999 to open a new office in the United States, which was subsequently extended at two year intervals in 2000 and 2002. The petitioner now seeks to extend the beneficiary's stay for an additional three years.¹

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 filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision, based on the finding that the record contained insufficient evidence to qualify the beneficiary for the benefit sought, was erroneous, and in response, counsel submits additional evidence that he claims satisfy the regulatory requirements. In addition, counsel asserts that the denial of the petition without a detailed request for evidence or notice of intent to deny was a denial of the petitioner's right to due process. Counsel submits a detailed brief in support of these contentions.

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 issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

¹ In a request for evidence dated May 12, 2004, the director requested documentation verifying the beneficiary's previous stays in the United States in L-1 status. In a response dated May 20, 2004, the petitioner submitted documentation demonstrating that the beneficiary had been in the United States in L-1 status for a total of five years. Pursuant to regulations at 8 C.F.R. §§ 214.2(l)(12)(i) and 214.2(l)(15)(ii), a beneficiary's stay in the United States in a managerial or executive capacity may not exceed seven years. In addition, an extension of L-1 status may only be authorized in increments of up to two years. 8 C.F.R. § 214.2(l)(15)(ii). As a result, the petitioner's request for an additional three year extension is not warranted.

- (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 from counsel dated May 4, 2004, the beneficiary's duties were described as follows:

[The beneficiary] will determine and formulate company's policies and provide overall direction of the US subsidiary. His job duties will include:

1. Directs the management of the US subsidiary and [oversees] overall operation of [the petitioner];
2. Establishes goals and policies of [the petitioner], including financial goals and [m]akes budget proposals to the board of directors of the parent company;
3. Exercises wide latitude in discretionary decision-making such as:

- (1) Directing the organization structure of [the petitioner], including hiring, promoting and firing managerial staff of [the petitioner];
 - (2) Directs and supervises the work of officers, managerial and professional staff of [the petitioner];
 - (3) Makes decisions on retaining outside professional services, such as certified public accountants and attorneys;
 - (4) Directs the preparation of annual financial report to the Board of Directors;
 - (5) Decides necessary adjustments of operational and financial plans in accordance with the company's performance;
 - (6) Coordinating the business operations of [the petitioner] with the overseas parent company[;]
4. Receives only general supervision/direction from the board of directors and higher level executives and the board of directors of the parent company.

Additionally, a letter from the petitioner dated May 4, 2004 further described the beneficiary's duties as follows:

Since his entry in to the United States, [the beneficiary] has been performing [in] his current position of the president of [the petitioner]. In the field of management, [the beneficiary] is personally involved in all of major decision making and strategic planning with respect to the business operation of [the petitioner] in the United States. As the chief executive officer of the US entity, [the beneficiary] has been primarily directing the management of the US subsidiary, establishing the goals and policies of [the petitioner], exercising wide latitude in discretionary decision making and he only receives general supervision and direction from the board of directors and higher level executives of the parent company. Under the guidance of [the beneficiary], [the petitioner] has made great achievement in international trade and wholesale of daily-use industrial products.

* * *

In sum, the [beneficiary] has autonomous control over, and exercises wide latitude and discretionary decision making in, establishing the most advantageous courses of action for the successful management and direction of [the petitioner's] business activities. His business achievements have brought so much profit to [the beneficiary]. The leadership and presence of [the beneficiary] is essential to the expansion and the development of [the petitioner] and his continuing performance as the president will definitely help to lead [the petitioner] to a better future. Having a wide range of knowledge of button and zipper as well as other daily-use industrial products market and profound experience in management, accounting, production and international trading business, [the beneficiary] is the most suitable candidate for the position of president of this US subsidiary.

The petitioner finished by stating that it currently employed nine persons, and submitted an organizational chart in support of this premise. The organizational chart demonstrated that the beneficiary directly oversaw Meimei Cai, the vice president of the company. Her duties were described as follows:

Assist president to plan & establish policies & objectives of business organization & direct the organization structure of the company, including hiring, promoting & firing employees & professionals; Makes proposals on plans and budgets of research & development of new products; assists president to coordinate formulations of financial programs & to review activity reports & financial statements.

Under the vice president, three departments were listed: the financial department, the marketing and sales department, and the warehouse and freight department. The chart indicated that financial department employed an accountant, the marketing department employed a manager and two sales representatives, and the warehouse department employed a manager and two warehouse workers. The petitioner's quarterly tax returns for the previous quarter supported the claimed employment of these persons.

On June 3, 2004, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary was managing the organization or implementing policies as claimed. The director concluded that based on the information contained in the record, it appeared that the beneficiary was responsible for performing the tasks necessary to provide the petitioner's services, and thus was not functioning in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner argues that the beneficiary is functioning in a primarily managerial capacity, and argues that the evidence provided was sufficient to establish this capacity. Counsel resubmits the descriptions previously submitted, and further contends that the position description of the beneficiary's alleged subordinates shows that the beneficiary is in fact primarily a manager. Finally, counsel asserts that the denial was erroneous because the petitioner was not given the opportunity, through a request for evidence or notice of intent to deny, to supplement the record with additional evidence prior to adjudication.

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 description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a vague overview of the nature of his duties. The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what

proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner contends that the beneficiary's duties are solely managerial and/or executive in nature, but appears to merely paraphrase the regulatory definitions when providing these descriptions. It is unclear exactly what the beneficiary does on a day-to-day basis from these descriptions. Absent a more detailed description of the beneficiary's engagement in these functions, the AAO is unable to determine the exact nature of the beneficiary's role in the company. This failure of documentation is important because in evaluating the annual salaries of the petitioner's other eight employees, it is unclear whether these persons are actually employed full time and thus able to relieve the beneficiary from performing non-qualifying duties. For example, the stated annual salaries of these workers are as follows:

Vice President:	\$18,000
Financial Manager:	\$12,960
Marketing Manager:	\$13,800
Sales Representative (1):	\$ 3,888
Sales Representative (2):	\$ 4,800
Warehouse Manager:	\$12,960
Warehouse Worker (1):	\$12,960
Warehouse Worker (2):	\$12,960

Considering that the minimum wage in the State of California in 2004 was \$6.75 per hour (which would equal an annual salary of \$14,040), it stands to reason that the only subordinate employee who could possibly be a full-time employee would be the vice-president.² With the organizational structure of the petitioner being unclear, it is not possible to determine what an average day consists of for the beneficiary without further information. In addition, without evidence of sufficient staff to actually perform the functions the beneficiary reportedly manages, the AAO is left to conclude that the beneficiary himself performs these non-qualifying tasks. 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).

One of counsel's main arguments on appeal is that the petitioner was prejudiced as a result of the director's failure to request additional evidence prior to adjudication. The regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

² See www.dol.gov/esa/minwage/america.htm

On appeal, counsel submits a more detailed description of the duties of the beneficiary's subordinates, but fails to articulate how these duties relieve the beneficiary from responsibility for the overall composition of the company. In addition, no discussion or mention of the work schedules of these employees has been provided. For example, in reviewing the employment of the sales representatives, assuming both were full-time positions, it appears that at best, these persons were employed for an approximate total of four months in 2004. As their annual salaries were \$3,888 and \$4,800, respectfully, and the minimum wage was \$6.75 per hour, they feasibly worked a maximum of 14 weeks and 17.7 weeks, respectively. It is unclear who performed the duties of the sales representatives for the remainder of the year.

The petitioner claims on appeal that the beneficiary oversees subordinate personnel and is in charge of the overall operations of the company. Although the beneficiary is not required to supervise personnel, if it is claimed that his 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.

While the petitioner claims that the beneficiary oversees nine subordinate employees, the petitioner has failed to establish that these positions require an advanced degree, such that they could be classified as professionals. Although many of these employees possess impressive titles such as "vice president," "accountant," and "manager," no additional information regarding their qualifications, or the requirements of the positions, has been provided. In addition, it is unlikely that true professional employees possessing advanced degrees would be employed in positions that paid less than or just over the minimum wage. Additionally, the petitioner has failed to show that these employees supervise subordinate staff members or manage clearly defined departments or functions of the petitioner, such that they could be classified as managers or supervisors. While the organizational chart suggests that a hierarchy exists between the employees, the record contains insufficient evidence with regard to the nature of the duties of all employees, as well as their actual work schedules, to allow the AAO to conclude that any of these employees are managerial or supervisory. Thus, the petitioner has not shown that the beneficiary's claimed subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

As previously stated, the salaries of the employees relative to their position titles raise questions with regard to the legitimacy of these identified positions. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Regardless, the evidence of record failed to establish that the beneficiary will be relieved from having to primarily perform non-qualifying tasks at the time the instant petition was filed. Although counsel reasserts the beneficiary's qualifications on appeal, no independent documentation or evidence has been submitted to support these claims. 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). 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 notes that Citizenship and Immigration Services (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 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 petitioner has failed to submit sufficient documentary evidence that demonstrates the employment of the beneficiary in a primarily 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. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.