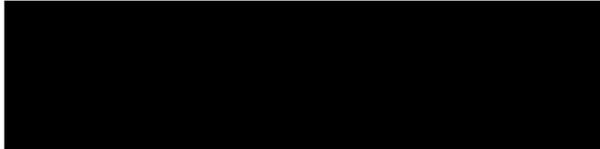


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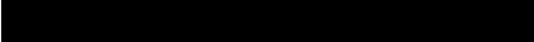
U.S. Citizenship  
and Immigration  
Services

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File: WAC 04 038 50385 Office: CALIFORNIA SERVICE CENTER Date: **JUL 06 2007**

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)

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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its treasurer and chief financial officer 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, states that it is engaged in the development and sale of proprietary voice processing products and application systems. The petitioner claims that it is the affiliate of Diavox Network, Inc., located in the Philippines. The beneficiary was previously granted L-1A status for a three-year period, and the petitioner now seeks to extend her stay for three additional 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 beneficiary qualifies for the classification sought and that U.S. Citizenship and Immigration Services (USCIS) erred in its denial. Counsel emphasizes that the beneficiary was previously granted L-1A classification for the same position with the petitioning company. In support of this assertion, counsel submits a brief but no 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 sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

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.

The nonimmigrant petition was filed on November 24, 2003. The petitioner stated on Form I-129 that it employs nine people in the United States and 207 employees worldwide. In a letter dated November 17, 2003, the petitioner stated that the beneficiary is "responsible for the financial coordination and operating procedures for the US, Philippines and affiliated group of companies," referring to six "international joint ventures operating offices" located in Australia, Indonesia, Philippines, Bahrain, Lebanon and Mexico. The petitioner further described the beneficiary's job duties as follows:

1. Collect and account for the funds received by the company;
2. Maintain records of all financial transactions of the company;
3. Make a report of the financial status of the company to the Board of Directors;
4. Issue and sign all company checks;
5. Handle all correspondences for all joint ventures and sister companies;
6. Determine the projected expenses of all joint ventures;
7. Assist the President analyze [sic] the financial status of the company;
8. Coordinate with the internal and external auditors of the company.

The petitioner submitted an organizational chart for the U.S. entity which depicts the beneficiary as "finance" and shows that she reports to the president of the company. The chart does not indicate any subordinate employees for the beneficiary. The petitioner also submitted its most recent California Form DE-6 Quarterly Wage and Withholding Report, which confirms the employment of three people as of October 2003, including the beneficiary, an employee identified as "operations" on the organizational chart, and an individual who is not identified on the organizational chart.

The beneficiary is also identified as "finance/admin/treasury" on the foreign entity's organizational chart, which shows that she supervises an accountant/bookkeeper and external auditor, both of whom are apparently located in the Philippines.

The director issued a request for additional evidence on December 5, 2003, instructing the petitioner to submit: (1) a more detailed, specific description of the beneficiary's duties in the United States; (2) an organizational chart clearly depicting the beneficiary's position and identifying all employees under the beneficiary's supervision by name and job title; (3) a brief description of job duties for each of the beneficiary's subordinates; and (4) copies of the U.S. company's California Forms DE-6 for the last three quarters. The director also requested that the petitioner clarify the number of employees working for the U.S. company, noting that the petitioner claimed nine employees, yet the latest Form DE-6 showed only three employees.

In response, counsel for the petitioner stated that the U.S. company has five employees, not nine as mistakenly indicated on the Form I-129. The petitioner submitted a revised organizational chart which indicates that the beneficiary supervises the accountant/keeper and external auditor in the Philippines office, and an internal/external auditor in the U.S. office. The petitioner did not provide job descriptions for the beneficiary's claimed subordinates. Finally, the petitioner provided the following revised description of the beneficiary's duties:

1. Collection, disbursements, and interest bearing placement of company funds
2. Assure financial records are properly maintained
3. Conduct periodic analysis of financial statements, measuring standard liquidity and profitability ratios, with emphasis on ratios and guidelines prescribed by creditor institutions and making appropriate and timely recommendations to the Board of Directors
4. Prepare pro forma cash flow statements of the company joint ventures and sister companies and construct appropriate control guidelines under the mandate of the board
5. Determine financial parameters of planned projects either ongoing or at planning stages
6. Negotiate Letters of Credit and arrange forward coverage on foreign currency exchanges
7. Act as liaison officer on all joint ventures and sister companies
8. [C]oordinate with the Internal and External Auditors of the company assuring compliance to accepted accounting principles

The director denied the petition on March 8, 2004, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted discrepancies between the number of claimed employees, and the number of employees documented in the petitioner's quarterly wage reports. The director further observed that the petitioner had not documented the employment of the beneficiary's claimed subordinate, the internal/external auditor, nor provided the requested job descriptions for all employees supervised by the beneficiary. Finally, the director acknowledged the job description provided for the beneficiary and concluded that it appears the beneficiary will primarily perform all finance activities for the petitioner, rather than primarily manage the finance function or supervise a staff of professional, managerial or supervisory personnel who would relieve her from performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial capacity. Counsel explains that the internal/external auditor depicted in the organizational chart is an independent contractor providing auditing services for the company. For this reason, counsel states that the petitioner "could not possibly provide job titles, description of duties performed by all employees under the Beneficiary's supervision." Counsel states that the accountant employed in the Manila office is an employee of the foreign entity, "except that there is coordination between the Beneficiary and the Accountant of its subsidiary in Manila."

Counsel reiterates the position description provided in response to the request for evidence, and states that the petitioner has demonstrated that the beneficiary manages the essential function of "keeping an efficient utilization of corporate funds." Counsel asserts that "considering the size of the organization and with its computer set-up" the beneficiary does not supervise other employees, but she "absolutely exercises functions at a senior level." Counsel emphasizes that the beneficiary has the authority to determine where to place interest bearing funds, negotiate letters of credit, and decide whether to pursue a project or joint venture locally or abroad. Finally, counsel stresses that the beneficiary was previously granted L-1A classification under the same circumstances as those present in the instant petition.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

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.*

Here, the petitioner's initial description of the beneficiary's duties included a number of tasks that could reasonably be construed as non-qualifying in nature. For example, the petitioner indicated that the beneficiary would "collect and account for the funds received by the company," "maintain records of all financial transactions," "issue and sign all company checks," "handle correspondences for all joint ventures and sister companies," "determine projected expenses of joint ventures," and "assist the President [to] analyze the financial status of the company." Based on the limited explanation provided, the beneficiary appears to be responsible for all aspects of the petitioner's finance activities, including bookkeeping, accounting, account collections, records maintenance, banking, and financial analysis. While some of these duties are complex, the job description as a whole does not support a conclusion that the beneficiary's duties are primarily managerial.

Accordingly, the director requested that the petitioner submit a more detailed description of the beneficiary's duties, with particular instructions that the petitioner "be specific." In its response to the director's request for further evidence, the petitioner again provided a list of eight duties with little explanation or the requested specificity. However, in comparing the two job descriptions, it appears that the petitioner merely inflated each of the originally stated duties in an attempt to conform to USCIS requirements. For example, "collect and account for funds received," was removed from the description in favor of "collection, disbursements, and interest bearing placements of company funds," which seems to distance the beneficiary from the accounting or bookkeeping tasks suggested by the initial description. Similarly, the beneficiary's initially stated responsibility to "maintain records of all financial transactions" became "assure financial records are properly maintained," thus suggesting that someone other than the beneficiary is responsible for record-keeping. The beneficiary's responsibilities for handling correspondence with joint ventures and determining their projected expenses were removed and the beneficiary was instead charged with "constructing appropriate control guidelines" for joint ventures, "determining financial parameters of planned projects," "acting as liaison officer" to all joint ventures, and, according to counsel on appeal, exercising authority to determine whether to proceed with projects or joint ventures in the U.S. and abroad.

In sum, the initial description appeared to have the beneficiary doing a number of non-qualifying duties associated with the petitioner's financial operations, while the second iteration of the job has the beneficiary overseeing some of this work, and exercising a higher and broader level of authority. 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). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the record. The petitioner did not attempt to reconcile the two job descriptions or indicate that the beneficiary does not actually perform the initially stated duties. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

As discussed above, the initial description of the beneficiary's duties did not clearly establish that the beneficiary performs primarily managerial or executive duties. The statute requires that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service or other non-managerial duties, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. See sections 101(a)(44)(A) and (B) of the Act; 8 U.S.C. §§ 1101(a)(44)(A) and (B) (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).

As the only employee in the petitioner's finance department, the beneficiary would necessarily perform a combination of managerial and non-managerial duties. 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, as discussed above, do not fall directly under traditional managerial 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, as claimed by the petitioner. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

On appeal, counsel asserts that the beneficiary manages the essential function of "keeping an efficient utilization of corporate funds." 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 provide a detailed job description that explains the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 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. *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)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. As discussed above, the petitioner has not established that the beneficiary's duties are primarily managerial.

Such a conclusion is supported by a review of the petitioner's organizational structure. Although the beneficiary is not required to directly supervise subordinates to qualify as a function manager, the petitioner is still obligated to establish that someone other than the beneficiary performs the day-to-day non-managerial tasks of the function managed. Although the petitioner indicates that the beneficiary will coordinate with a foreign affiliate's accountant, and utilize the services of an external auditor, the fact remains that the beneficiary's job description indicates that she is responsible for a number of non-qualifying duties associated with the day-to-day financial operations of the U.S. entity. There is no evidence that the external employees would relieve her from these responsibilities, and the AAO is left to question how much time she could reasonably devote to her claimed managerial duties.

The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. Accordingly, the appeal will be dismissed.

Counsel asserts that the beneficiary was previously granted L-1A classification to work for the petitioner in the offered position, and thus the initial petition should have been approved. The prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's or beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). It must be emphasized that that each petition filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous petition approval by denying the instant petition.

If the previous nonimmigrant petition was 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).

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.