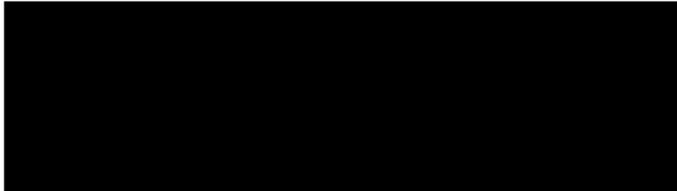


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**U.S. Citizenship
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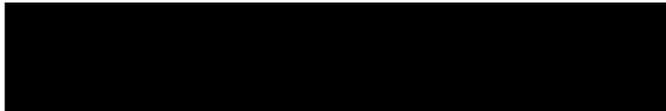
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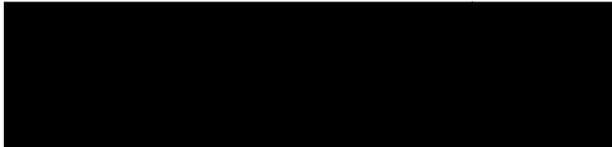
File: WAC 04 124 50269 Office: CALIFORNIA SERVICE CENTER Date: **SEP 18 2007**

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)

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 appeal will be dismissed.

The petitioner seeks to extend the temporary employment of the beneficiary as its president in the United States 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 corporation organized in the state of Delaware, claims to be engaged in electronics sales and distribution. It also claims to be the affiliate of Triangle Research International, Pte. Ltd., an electronics manufacturer in Singapore. The beneficiary was initially granted a one-year period of stay to open a new office, which was subsequently extended for an additional two years. The petitioner now seeks to extend the beneficiary's stay for another two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. On appeal, counsel for the petitioner asserts that there has been no material change in the circumstances surrounding the petitioner's operations and therefore, the extension request should have been approved. In support of this contention, counsel submits a brief and additional evidence in support of the beneficiary's claimed eligibility.

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 primary 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:

- (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 dated March 18, 2004, the petitioner provided the following description of the beneficiary's duties:

[The beneficiary] will continue to exercise overall authority for directing our entire company's operations, formulating and implementing all senior-level administrative, marketing and sales, and corporate policies and procedures, determining corporate goals, determining and establishing budgets, and seeking out funding and financing as required to meet the company's financing goals.

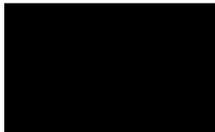
[The beneficiary] will recruit, train, manage and supervise sales, technical support, and project

engineers, and oversee sales, customization, and delivery activities to ensure that customers' needs are met. [The beneficiary] will oversee the development of business strategies to meet sales and marketing objectives, including negotiating with our most important customers, and will have ultimate managerial authority for directing the work of all employees, which currently includes one design engineer, one sales executive, and one marketing executive. [The beneficiary] is in charge of making all personnel decisions regarding hiring, firing, assignments, promotions and discipline. In this senior executive capacity, [the beneficiary] will continue to exercise the highest level of discretion in making all management-level decisions affecting [the petitioner's] operations.

On March 31, 2004, the director issued a request for additional evidence. Specifically, the director requested an organizational chart for the U.S. entity, demonstrating the name and position titles of all employees of the petitioner, including a brief description of their duties. In addition, a more detailed description of the beneficiary's duties was requested, as well as documentation of wages paid to all listed employees in the form of payroll summaries and quarterly wage reports.

In a response dated April 26, 2004, the petitioner, through counsel, addressed the director's queries. With regard to the beneficiary's duties, the petitioner submitted an expanded overview of the beneficiary's duties in a letter dated April 19, 2004. In this letter, the petitioner restated the initial overview of his duties, and further supplemented the record by stating that the beneficiary spends approximately 20 percent of his time carrying out operations management duties; 40 percent of his time managing the petitioner's marketing and promotional activities; 20 percent of his time managing and supervising sales activities; and 20 percent of his time managing product planning and customization.

The petitioner also submitted an organizational chart, indicating that the beneficiary, as president, oversaw three employees; namely:



Sales Executive
Design Engineer
Marketing Executive

It also stated that an Application Engineer would be hired sometime in 2004.

On May 6, 2004, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States. Specifically, the director that the description of duties provided was generic and generalized, and did not sufficiently state the exact nature of the beneficiary's responsibilities. In addition, the director noted that many of the generalized tasks identified in the descriptions were related to sales and marketing, tasks not traditionally deemed managerial or executive in nature.

On appeal, the petitioner contends that the director erred by not giving deference to prior L-1A approvals. The petitioner asserts that there has been no material change in the facts or circumstances and cites a U.S. Citizenship & Immigration Services (USCIS) memorandum in support of its claim.

The AAO, upon review of the record of proceeding, concurs with the director's finding. While the beneficiary is the intended president of the company, there is insufficient evidence to show that he will be acting primarily in a managerial or executive capacity during his U.S. employment. 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). In this case, the description of duties provided in the March 18, 2004 letter of support, as well as those listed in the response to the request for evidence, failed to sufficiently document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The AAO notes that the petitioner divided the beneficiary's duties into four main categories, namely: (1) operations management; (2) marketing and promotional activities; (3) sales activities; and (4) product planning and customization. However, the list is vague, and although the petitioner supplemented each area with a brief overview of the beneficiary's tasks, duties such as "managing daily operations," "seeking out and appointing new distributors," and serving as liaison with distributors and resellers" do not constitute duties traditionally held to be managerial or executive in nature. Although the petitioner notes the percentage of time the beneficiary devotes to each specific area, it fails to quantify the exact amount of time the beneficiary spends on each particular duty identified within these areas. Since the description of the beneficiary's duties includes both managerial and administrative or operational tasks, this omission is important, for the AAO cannot determine what an average day or week consists of for the beneficiary.

Furthermore, the general overview of duties provided in both the initial letter of support and the response to the request for evidence seems to merely paraphrase key areas from the regulatory definitions of managerial and executive capacity. See §§ 101(a)(44)(A) & (B) of the Act. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, 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). Despite the fact that the petitioner did provide a breakdown of the general areas to which the beneficiary devoted his time, these general areas encompass many non-qualifying tasks including sales and marketing related obligations. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Without a more detailed discussion of the specifics surrounding the nature of the beneficiary's duties, it is impossible to conclude whether the beneficiary is employed in a primarily managerial or executive capacity. 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. *Id.* at 1108.

Based on the description provided, it appears that the beneficiary's duties primarily include sales and marketing tasks, such as acting as a liaison between the petitioner and distributors. Generally, the performance of marketing and sales-related tasks is not considered to fit the parameters of managerial or executive capacity. Furthermore, since the organizational chart identifies a marketing executive and a sales executive, it is unclear why such a high percentage of the beneficiary's time is devoted to performing customer-related services in these areas. 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 petitioner also indicates in the record that the beneficiary's job duties include overseeing the petitioner's three other employees. 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.

The petitioner did not provide the level of education required to perform the duties of its marketing and sales executives and its design engineer. While it is noted that the organizational chart states that the design engineer has a B.S.E.E. and the marketing executive has a B.A./M.A., there is no verification that such degrees are actually a prerequisite to performing the duties of these positions. The AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. More importantly, however, is the fact that the petitioner has failed to adequately describe the position duties and obligations of the design engineer and the marketing executive, and instead seems to conclude that based on the position titles of these employees, they are thus professional, managerial, or supervisory. Without more specific information with regard to the exact nature of these positions, as well as any prerequisite degrees required to adequately perform the duties of these positions, the AAO is unable to determine the level of responsibility bestowed on these persons. Thus, the petitioner has not established that these employees require a bachelor's degree to perform their duties, such that they could be classified as professionals. Nor has the petitioner shown that any 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.

With regard to the organizational structure of the petitioner, counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

As touched upon briefly above, the petitioner provides no explanation as to why a majority of the beneficiary's time is devoted to sales and marketing tasks, when two of his three subordinate employees are allegedly "executives" in those departments. Furthermore, no discussion of the manner in which administrative and operational tasks are carried out is provided. The AAO notes that the beneficiary is "in charge" of personnel, purchasing, administrative services and finance, but does not supervise any lower-level employees who perform duties related to these functions. Thus, it is reasonable to conclude that the beneficiary is performing, rather than

managing, these non-qualifying activities, and it is questionable whether all of the administrative, financial, personnel and purchasing tasks require only 20% of the beneficiary's time.

In the present matter, although the petitioner was established in 2000, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not demonstrated that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position. The fact that the company employs three subordinate employee after four years, but still does not have a dedicated administrative assistant or office manager raises questions with regard to the validity of the job descriptions of all employees.

Counsel on appeal asserts that CIS approved other petitions that had been previously filed on behalf of the beneficiary, and that no material changes have occurred since their approval. In support of this premise, counsel relies on an CIS interoffice memorandum by [REDACTED] Associate Director for Operations, entitled "The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity." Specifically, counsel focuses on the policy set forth in the memorandum, which states that a prior determination, involving the same parties and the same underlying facts, should afford deference to a petition when requesting an extension of that same petition. See Memo. from [REDACTED] Dir., Office of Operations, Citizenship and Immigration Serv., to all Serv. Ctr. Dir. et al., *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, 1 (April 23, 2004).

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).

Furthermore, 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). As the director properly reviewed the record before him, it was impracticable for the director to provide the petitioner with an explanation as to why the prior approvals were erroneous, as counsel suggests. 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). Due to the lack of required evidence of eligibility in the present record, the AAO finds that the director was justified in departing from the previous approvals by denying the instant petition.

The petitioner has failed to establish that the beneficiary will be employed in the United States 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.

ORDER: The appeal is dismissed.