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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D7

[redacted]

NOV 09 2004

File: EAC 03 148 53707 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 chief executive 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 is engaged in the marketing of specialty directories. The petitioner claims that it is a subsidiary of S.A.R.L. Recherches et Communication, located in Paris, France. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

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.

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's job duties are executive in nature, and that both the United States entity and the foreign entity continue to be qualifying organizations.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

At issue in the present matter is whether the beneficiary would 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 as follows: "Develop and implement new marketing strategies for the U.S. market; retain the services of office staff and/or temporary help as necessary for a particular project. Maintain liaison with customers and developing pricing policy and incentive plance [sic] for advertisers." The petition and supporting materials included no other information pertaining to the beneficiary's proposed job duties.

On April 23, 2003, the director requested additional evidence. Specifically, the director requests that the petitioner provide a comprehensive description of the beneficiary's proposed duties; indicate how the beneficiary's duties will be managerial or executive in nature; and demonstrate that the beneficiary will function at a senior level within an organizational hierarchy as well as in position title, or manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The petitioner is also asked to provide a complete job description for all of its proposed employees in the United States, including the beneficiary, and a weekly breakdown of the hours devoted to each of the employees' job duties. In addition, the director also requested additional evidence showing that the beneficiary was employed in an executive or managerial capacity abroad; the beneficiary's services in the United States are required for a temporary period; and the foreign entity is doing business abroad.

In a letter dated May 12, 2003, responding to the director's request, counsel for the petitioner provided the following information with respect to the beneficiary's proposed job duties in the United States:

> In his capacity as an executive in the U.S. entity, [redacted] will be reviewing analysis of the U.S. market place in order to determine and define both long-term short-term [sic] business objectives and strategies. This requires the development and implementation of realistic strategies for both further establishing the U.S. entity in this new market and for ultimately expanding the customer base to a level which will lead the business towards profitability. [redacted] will continue to utilize many of the marketing strategies that the French company

> used in becoming a successful business venture. However, he intends to be flexible and adapt those strategies to the U.S business market. Thus, from time to time he will make adjustments to both the strategy and the objectives to be realized. The specific form those changes take will depend upon periodic analysis of sales figures. [redacted] intends to further develop and implement the sales program through the utilization of outside consultants and/or internal research. He will determine the pricing structure of the advertising based upon market conditions and adjust this structure in response to demand. Furthermore, in his capacity as Chief Executive Office of the U.S entity he will also establish and maintain contacts with the company's key customers. He will be doing so as an executive function as opposed to a sales function.

Counsel also indicated that the beneficiary would monitor the work of independent contractors and sales representatives, and negotiate contracts for the publication of the company's products. With respect to other employees of the U.S. entity, counsel indicated that at the present there is only one employee who tends to office matters, answering phone calls, preparing correspondence and maintaining liaison with sales representatives and suppliers. Counsel stated that "in the near term" the beneficiary would utilize the services of independent contractors and sales representatives who would sell the advertising that generates the company's revenues. Counsel further noted that "at some point in time" the petitioner would engage the services of a number of sales representatives on a full-time basis, and would eventually hire a sales manager, a customer service manager, and ultimately a general manager, who would fulfill the functions the beneficiary currently performs. The petitioner had submitted with the initial petition IRS Forms 1099 for four persons, and Forms W-2 for two of those four persons, for the year 2002. However, the petitioner did not provide any information regarding the positions held by these persons or their job duties within the U.S entity.

On May 28, 2003, the director denied the petition concluding that the record does not establish that the beneficiary would be employed in a primarily executive or managerial capacity by the U.S. entity. Specifically, the director noted that the petitioner failed to indicate the percentage of time the beneficiary would spend in the various functions of his position, and also did not provide the requested information with respect to duties performed by other employees of the U.S entity. The director found that, contrary to counsel's assertion in the May 12, 2003 letter, the beneficiary does not qualify as a functional manager. Rather than managing or directing a function, the director found, the beneficiary's duties appear to relate to the day-to-day operations involved in producing a product or providing a service, as well as the supervision of non-qualifying employees. The director further found that the petitioner has not shown that the beneficiary functions at a senior level within the organization other than in position title, or that the beneficiary will be involved in the supervision and control of the work of other supervisory, professional or managerial employees who will relieve him from performing the services of the corporation.

On appeal, counsel for the petitioner asserts that, in light of the approval of the petitioner's original "new office" petition in 2002, the denial of this petition for extension is "logically inconsistent and incorrect as a matter of law." Counsel asserts that both the U.S. entity and the foreign entity remain qualifying organizations, and the petitioner's duties continue to be executive in nature. Counsel claims that his failure to provide a weekly breakdown of the number of hours the beneficiary spent on his job duties was due to a misreading of the director's request. In his brief, counsel restated the beneficiary's job duties in a different

format, but still provided no weekly breakdown of the duties. With respect to other employees of the U.S. entity, counsel indicates that, in addition to the beneficiary, the U.S. entity now employs a marketing director and two account executives on a full-time basis, a part-time bookkeeper, and an account manager on an independent contractor basis.

Initially, the AAO disagrees with counsel's contention that the director's denial of the petition in this matter is "logically inconsistent" with the approval by Citizenship and Immigration Services (CIS) of the petition previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the previous petition. If the previous petition were approved based on the same unsupported and contradictory assertions that are contained in the current record, that 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). Moreover, 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, the AAO notes that in the previous petition, the petitioner apparently sought approval for employment of the beneficiary in a new office. In such circumstances, the regulations allow the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. 8 C.F.R. § 214.2(l)(3)(v)(C). There is no provision in CIS regulations that allows for an extension of this one-year preparatory period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, at the time of the filing of the current petition for extension, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Therefore, the AAO does not find the director's denial of the petition for extension to be "logically inconsistent" with the approval of the petitioner's initial petition for employment of the beneficiary in a new office.

Upon reviewing the current petition and the evidence of record, the AAO finds the director properly concluded that the petitioner has failed to establish that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. entity. 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.* In the instant case, the AAO notes that in his response to the director's request for further evidence, counsel for the petitioner characterized the beneficiary's duties as consisting of "a very realistic combination of executive and managerial duties." The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner may not claim, as did

the petitioner in this case, that the beneficiary would be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In his reply to the director's request for further evidence, counsel asserted that the beneficiary qualifies as a "functional manager." 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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In this matter, as the director noted, the petitioner has not provided evidence that the beneficiary manages an essential function. Rather, the beneficiary appears to be directly negotiating contracts for the company, and directly performing tasks relating to marketing and customer relations. While counsel maintained that the beneficiary "will be doing so as an executive function as opposed to a sales function," counsel did not further explain or substantiate this distinction. In all, the evidence is insufficient to establish that the beneficiary qualifies as a functional manager.

As the director noted in his decision, the petitioner failed to submit a significant part of the information requested by the director on April 23, 2003. The petitioner failed to quantify the time the beneficiary would spend on each of his duties, and therefore failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. This failure of documentation is significant because several of the beneficiary's daily tasks as set forth in his job description, such as marketing the petitioner's product, maintaining customer contact, and negotiating contracts for the publication of the petitioner's products, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary would be *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). 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). The 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). For this reason, the petition will not be approved.

Moreover, the AAO questions counsel's claim on appeal that he misread the director's request "as pertaining to the other employees, not the beneficiary." The director's request clearly states, "Submit a complete position description for all of your proposed employees in the United States, *including one for the beneficiary's position.* Submit a breakdown of the number of hours devoted to *each of the employees'* job duties on a weekly basis." (Emphasis added). The clear language of the director's request left little doubt that the request for an hourly breakdown of duties applied to the beneficiary as well as other employees.

It is further noted that counsel also failed to provide an hourly breakdown of duties, or indeed, any job descriptions, for the other employees of the U.S. entity. As noted earlier, the petitioner indicated that there is one other employee who tends to office matters, and several independent contractors who carry out the sales activities. However, there is insufficient evidence to clearly establish the existence and functions of other employees of the U.S entity. Absence such evidence, it cannot be determined that the U.S. entity actually has anyone on its staff to perform the sales, marketing, and customer service functions. Thus, either the beneficiary himself is performing these functions directly, or he does not actually manage these functions as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Moreover, if the beneficiary is performing the sales, marketing, and customer service functions directly, the AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church of Scientology International, supra.*

In addition, to the extent the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The evidence indicates that at the time the petition was filed, the beneficiary was supervising at most an office worker and several sales representatives working on an independent contractor basis. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act, 8 U.S.C. § 1101(a)(44)(A)(iv). Since the beneficiary is primarily supervising a staff of non-supervisory, non-professional, non-managerial employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

Counsel indicated in his response to the director's request for evidence that the petitioner 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). Similarly, counsel's unsubstantiated claim on appeal that the petitioner now has on staff four full-time employees, including the beneficiary, as well as one part-time employee and one independent contractor, is insufficient to remedy the deficiency in the petitioner's evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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).

In light of the foregoing, the AAO finds that the petitioner has failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity by the United States entity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the petitioner has not provided sufficient evidence that the United States and foreign entities are still qualifying organizations, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The AAO

notes that the petitioner failed to provide its articles of incorporation, or any other documentation of its status as a legal corporate entity in the United States. Moreover, the regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between U.S. and foreign entities for purposes of this visa classification. *Matter of Church Scientology International, supra; 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 context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International, supra* at 595. The petitioner indicated on the Form I-129, and counsel stated in his letter dated May 28, 2003, that the foreign entity owns 55%, and the beneficiary owns 45%, of the U.S. entity. However, the petitioner has failed to provide any evidence of the foreign entity's alleged ownership of interest in the petitioner. Without full disclosure of all relevant documents, the AAO is unable to determine the elements of ownership and control. For this additional reason, the appeal must be dismissed.

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).

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.