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

U.S. Citizenship and Immigration Services

[redacted]

OCT 10 2004

FILE: [redacted] Office: NEBRASKA 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)

ON 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

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DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be an adventure sports tours company. The petitioner seeks to extend its authority to employ the beneficiary temporarily in the United States as its general manager of operations. The director determined that the petitioner failed to establish that the beneficiary has been or will be primarily employed in a managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and submits a brief in opposition thereto.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

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.

According to the documentary evidence contained in the record, the petitioner was originally an unincorporated branch office and ultimately incorporated in 2002 in the State of Colorado. The petitioner claims that the U.S. entity is an affiliate of Rocky Mountain Adventures, Ltd, located in Liverpool, England. The petitioner claims to have five employees. The petitioner seeks to continue to employ the beneficiary for two years at an annual salary of $40,000.

The issue presented in this proceeding is whether the petitioner has established that the beneficiary is primarily employed in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily—
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> (i) Manages the organization, or a department, subdivision, function, or component of the organization;
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> (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;
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> (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
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> (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), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily—
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> (i) Directs the management of the organization or a major component or function of the organization;
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> (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 response to the director's request for additional evidence, counsel asserted the beneficiary was employed by the U.S. entity as both an executive and manager. Counsel further asserted that the beneficiary was the director of both the U.S. and foreign entities. Counsel asserted that the beneficiary's duties included: ". . . the control and management of the affairs, property and interest of the Corporation, and may exercise all powers of the Corporation . . ." Counsel further asserted that as vice-president of the U.S. entity, the beneficiary's duties included: undertaking "those responsibilities and functions assigned to them by the President." Counsel also noted that the beneficiary, as shareholder, director, and corporate officer, establishes the goals and policies of the organization and exercises a wide latitude in discretionary decision making. Counsel stated the beneficiary serves as a member of the board of directors and is a 50 percent shareholder of the U.S. entity, and that he receives only general supervision or direction from higher-level executives. Although specifically requested by the director, the petitioner failed to submit a detailed description of the beneficiary's proposed job duties along with an estimate of the percentage of time spent on each duty. The petitioner also declined to submit an organizational chart.

Counsel noted the beneficiary managed the day-to-day operations of the U.S. entity in that he was "responsible for performing whatever duties are required to serve the customer of the business." Counsel also stated that the beneficiary, as the only manager of the company, "spends 40 hours per week accomplishing the organizations goals," and supervises and controls the work of other employees and/or contractors. The petitioner stated in the affidavit that the beneficiary "works on the receiving end of our tour operations, organizing and managing all the services provided."

The petitioner submitted copies of the U.S. entity's Corporate By-Laws that describe the duties and powers of the board of directors and vice president to include:

> The Board of Directors shall be responsible for the control and management of the affairs, property and interests of the Corporation, and may exercise all powers of the Corporation, except as conferred upon or reserved to the shareholders by law, the Articles of Incorporation, or these Bylaws. The Directors shall perform their duties in good faith and in a manner reasonably believed to be in the best interests of the Corporation.
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> * * *
>
> Vice President shall undertake those responsibilities and functions assigned to them by the President. In the President's absence or in the event of the President's inability or refusal to act, a Vice President shall perform the duties of the President, with all the powers and subject to all the restrictions pertaining to the President.

The director determined that the record did not establish that the beneficiary had been or would be primarily employed in either a managerial or an executive capacity. The director stated that the petitioner failed to provide a comprehensive description of the beneficiary's duties and did not provide a detailed breakdown of the time spent by the beneficiary performing his duties. The director noted that the evidence submitted was not sufficient

to establish that the beneficiary was primarily managing, directing, or overseeing the U.S. entity. The director also noted that based upon the evidence presented, it appeared that the beneficiary was operating a small business, and that the entity was not of sufficient complexity to support a managerial or executive position.

On appeal, counsel disagrees with the director's decision and asserts that the petitioner has provided sufficient evidence to establish that the beneficiary has been and will be employed in a managerial or executive capacity. Counsel continues by asserting that the beneficiary's job duties are the same as they were with the initial petition that was approved, except for his ownership duties. Counsel further asserts that the beneficiary manages all the services offered to customers in the company's brochure, and that he organizes and manages the adventure tours bought by customers. Counsel gives an example of the services provided as "hiring a rafting company." Counsel further asserts that the beneficiary is a senior person in the U.S. entity and supervises five other employees. Counsel contends that the beneficiary's duties are widely varied, and that his primary duties are "to meet with tourists and provide the services the customers purchased." Counsel further contends that the type of service purchased by the customers dictate the beneficiary's duties.

Counsel's assertions are not persuasive. The petitioner submits no further evidence on appeal. The record as presently constituted does not demonstrate that the beneficiary has been or will be employed by the U.S. entity in a primarily executive or managerial capacity. The AAO first turns to counsel's assertion that this petition must be approved because it pertains to the extension of the beneficiary's L-1 status. Counsel asserts that, because neither the facts nor the circumstances have changed since the approval of the initial visa petition, the director's denial is erroneous. Counsel implies that the director's favorable review of the initial L-1 petition is sufficient, by itself, to approve the petition before Citizenship and immigration Services (CIS) at the present time.

The AAO does not concur with counsel on this point. The record of proceeding before the AAO at the present time does not contain any of the supporting evidence that was submitted to the Nebraska Service Center with the initial request for the L-1 petition approval. In the absence of the corroborating evidence contained in that record of proceeding, the AAO cannot determine whether the initial L-1A nonimmigrant petition was approved in error or whether the facts have changed since the original petition was filed.

Nevertheless, it is important to emphasize 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 the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If, however, the prior petition was approved based on evidence that was substantially similar to the evidence contained in the record of proceeding that is now before the AAO, the approval of the initial petition would constitute gross error. CIS is not required to approve 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 (Comm. 1988). The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch,* 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D. La.), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

The petitioner must establish that the beneficiary qualifies for an extension of his L-1 status regardless of any prior petition that CIS have approved on the beneficiary's behalf. For these reasons, the petitioner's statements do not warrant a reversal of the director's decision to deny the 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 information provided by the petitioner describes the beneficiary's proposed duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the issues raised by the director. The following duties are without any context in which to reach a determination as to whether they are qualifying as executive or managerial: responsible for performing whatever duties are necessary to comply with customer requests, supervising employees, and organizing and managing all the services the company provides. Although the U.S. entity's company brochures contain descriptive information of the outdoor activities offered, they do not contain detailed descriptions of the duties performed by the beneficiary in conjunction with those activities. Contrary to counsel's contentions, the ability of the beneficiary to accommodate all requests made by customers in conjunction with the services offered by the entity is broad and vague and fails to meet the regulatory requirements for intracompany transferee.

There is no evidence to show that the beneficiary supervises subordinates. In the instant case, counsel states that the beneficiary supervises five employees. However, there is no evidence to establish that anyone other that the beneficiary and his partner are employed by the U.S. entity. Furthermore, the petitioner has failed to submit evidence to establish the nature of the subordinate's duties or how much time is spent performing those duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972). Moreover, the evidence of record demonstrates that the beneficiary will perform the services of the organization, rather than directing or supervising the activities of the organization. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service 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).

Although counsel contends that the beneficiary will be responsible for the day-to-day development and operation of the U.S. company, there has been no documentary evidence submitted detailing how he will carry out those duties or how much time will be devoted to each duty. On appeal, counsel states "his day-to-day duties vary greatly and it is extremely difficult to estimate the time devoted to such duties." The petitioner has provided no comprehensive description of the beneficiary's or the subordinate's duties that would demonstrate that the beneficiary will be directing the management of the U.S. entity.

Furthermore, the AAO notes that the petitioner failed to provide a complete position description for the beneficiary or a breakdown of the number of hours devoted to each of the beneficiary's job duties, as requested by the director. Based on the current record, the AAO is unable to determine whether the claimed managerial and executive 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).*See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he has or will be establishing goals and policies, exercising a wide latitude in discretionary decision-making, or receives only general supervision or direction from higher level individuals. *Matter of Treasure Craft of California,* 14 I&N Dec. at 190. In the instant matter, counsel's description of the beneficiary's duties as vice president is general and paraphrases the regulations. Paraphrasing the regulations as a substitute for a

description of the beneficiary's day-to-day job duties is insufficient to demonstrate that the beneficiary is acting in an executive or managerial capacity. *Fedin Bros. Co., Ltd. V. Sava,* 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd,* 905 F.2d 41 (2d Cir. 1990); *Avyr Associates, Inc. v. Meissner,* 1977 WL 188942 at *5 (S.D.N.Y.). There has been no evidence presented to demonstrate what goals and policies have been and will be established by the beneficiary in his capacity.

Furthermore, it does not appear that the reasonable needs of the petitioning company would plausibly be met by the services of the beneficiary as vice president or operations manager. Counsel asserts the U.S. company employs five individuals. Counsel infers that the beneficiary supervises subordinates who perform non-qualifying duties. Contrary to counsel's contentions, the record does not demonstrate that the U.S. entity employs five persons, professional or supervisory, or that its current structure can support another managerial or executive position. The petition did not submit any evidence, such as payroll records or tax documents, to establish that the petitioner employs a subordinate staff. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California,* 14 I&N Dec. at 190. Despite the director's specific request, the petitioner failed to submit an organizational chart to illustrate the organizational structure of the corporation. 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 alone, the petition may not be approved. Finally, it is noted that the petitioner's IRS Form SS-4, Application for Employer Identification Number, filed on June 18, 2002, indicates that the petitioner will employ no more than two employees in the following twelve months, presumably the beneficiary and his partner.

The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring and firing of personnel, discretionary decision making, and setting company goals and policies constitute significant components of the duties performed by the beneficiary on a day-to-day basis. Nor does the record demonstrate that the beneficiary will primarily manage an essential function of the organization.

In summary, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Absent details concerning the beneficiary and his subordinates daily activities and percentage of time spent and to be spent performing each duty, the record is insufficient to establish that the beneficiary has been or will be performing primarily in an executive or managerial capacity. The record and counsel's statements appear to indicate that the beneficiary primarily provides touring services to customers interested in skydiving, snowboarding, river rafting, mountain biking, and other outdoor activities. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. Nor does the evidence of record demonstrate that the U.S. entity possesses the organizational complexity to support a managerial or executive position. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, another remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has not demonstrated that a qualifying relationship still exists with a foreign entity and has not persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. In addition, there has been insufficient evidence submitted to establish that the employment offered to the beneficiary is temporary. Generally, the petitioner for an L-1 nonimmigrant classification need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the

beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovic*, 18 I&N Dec. 361 (Comm. 1982); *see also* 8 C.F.R. § 214.2(l)(3)(vii). The record indicates that the beneficiary is a majority owner of the petitioning organization, and that it appears that there is no existing foreign entity abroad to employ the beneficiary. Therefore, the beneficiary's stay in the U.S. does not appear to be temporary. For these additional reasons, the appeal will be dismissed.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.