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

U.S. Citizenship and Immigration Services

File: EAC 03 027 53304 Office: VERMONT SERVICE CENTER Date:

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, 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 president 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 was incorporated in the State of Florida and registered to do business in the State of Maryland. The petitioner is engaged in the operation of a supermarket located in Hurlock, Maryland. The petitioner claims that it is affiliated, through common ownership, with Maruti General Store, located in Kakamega, Kenya. 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 (1) that the beneficiary was employed in a primarily managerial or executive capacity by the qualifying overseas entity, or (2) that the beneficiary has been or will be employed in a primarily managerial or executive capacity by the United States entity.

On appeal, counsel for the petitioner asserts that the director erred in his conclusions denying the petition.

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.

The first issue in the present matter is whether the beneficiary was employed by the qualifying overseas 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 September 19, 2002, submitted with the petition, the beneficiary's partner in the foreign entity indicated that the beneficiary "was responsible for the daily operation, management, and control of [the foreign entity] since its inception," and that at the time the letter was written, the business employed 12 persons and one or two other persons on an "as needed" basis, "all of whom are under the direct management and supervision" of the beneficiary.

On November 12, 2002, the director requested additional evidence, including information pertaining to the beneficiary's employment abroad, such as (1) a detailed statement describing the specific duties of the beneficiary's qualifying employment abroad, which should include a breakdown of the number of hours per week devoted to each of the beneficiary's job duties, and a discussion of the managerial or executive nature of these duties; (2) the name, job title, minimum educational requirement and job description of each of the beneficiary's direct subordinates; and (3) independent documentary evidence such as payroll records, tax withholding forms of the foreign entity.

In response to the above request, the petitioner submitted another letter from the foreign entity dated December 5, 2002, which provided the following description of the beneficiary's job duties:

> As Managing Partner, he was responsible for all aspects of the business including overseeing personnel matters, purchasing, sales, public relations, and other managerial and executive duties. More specifically, he directed the management of the entire organization and established its goals and policies. Furthermore, he exercised wide latitude in discretionary decision making and he did not receive any direction or supervision from higher level executives since his is the highest position within the organization.

The letter did not include a breakdown of the number of hours per week devoted to each of the beneficiary's job duties, but did indicate that "approximately 95% of his time was spent in executive or managerial functions." The letter also set forth the requested information relating to each of the foreign entity's 12

salaried employees, and the names of its 24 casual workers who are paid on an hourly basis. In addition, the petitioner also submitted tax deduction cards for the year 2001 for its 12 salaried employees.

The director determined that the petitioner has not sufficiently established that the beneficiary's position abroad was primarily executive or managerial in nature. Specifically, the director noted that the job description appears to be merely a reiteration of the statutory definition of executive and manager in an abstract form, and does not explain adequately what the beneficiary actually did for the foreign company on a day-to-day basis, or the actual level of the beneficiary's executive authority. Furthermore, the director noted that it has not been sufficiently demonstrated that the beneficiary supervises other professional employees.

On appeal, counsel for the petitioner asserts that the evidence submitted clearly establishes that the beneficiary was employed in a primarily executive capacity abroad. Counsel contends that the Vermont Service Center had approved the petitioner's initial L-1 petition based on the same information submitted with the present petition. Counsel also objects to the director's denial of the petition based on the petitioner's use of statutory language in describing the beneficiary's job duties. Finally, counsel contends that the director erred in finding that it has not been demonstrated that the beneficiary supervises other professional employees, since none of the positions held by those employees appear to be sufficiently complex as to require a bachelor's degree. Counsel argues that there is no such requirement in the statutory definition of "executive capacity," and that the director has impermissibly intertwined the requirements for executive and managerial capacity.

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

In the instant case, the AAO notes that the petitioner did not specify in the petition and supplementary materials whether it is claiming that the beneficiary was primarily employed in a managerial or executive capacity by the foreign entity. It is only on appeal that counsel seeks to qualify the beneficiary as having been employed in a primarily executive capacity abroad. Moreover, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. Rather than providing specific details of the beneficiary's duties, the description submitted by the petitioner generally paraphrased the statutory definition of executive capacity, and furnished no details, for example, with respect to the different aspects of business for which the beneficiary was responsible, or the goals or policies he had established, or any decision making in which he was engaged. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Repetition of the language of the statute or regulations, without more, does not satisfy the petitioner's burden of proof. *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*, 1997 WL 188942 at *5 (S.D.N.Y.). 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).

Similarly, petitioner's counsel merely asserts on appeal that the criteria for "executive capacity" have been met in the beneficiary's case without providing any factual support for such assertion. 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).

With respect to counsel's assertion that the Vermont Service Center had approved petitioner's initial L-1 petition based on the same information submitted with the present petition, the director's decision does not indicate whether he had reviewed the prior approval of the petitioner's initial petition. If the previous petition 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).

Counsel also challenges the director's determination that it has not been demonstrated that the beneficiary supervises other professional employees, since none of the positions held by those employees appear to be sufficiently complex as to require a bachelor's degree. While counsel is correct that the supervision of other professional employees is not a statutory requirement for establishing "executive capacity," as noted earlier, the petitioner failed to specify in its petition before the director whether the beneficiary was primarily employed in a managerial or executive capacity by the foreign entity. Therefore, the director did not err in considering the statutory criteria for both definitions in this instance.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). The focus, therefore, is on the level of education required by the position, rather than the degree held by subordinate employee. The December 5, 2002 letter from the foreign entity indicated that several salaried positions were those in which a bachelor's degree was *preferred*, but not required, and there

were "no minimum educational requirements" for the remaining positions. As such, none of the salaried positions appeared to be "professional," and the director did not err in concluding that it has not been demonstrated that the beneficiary supervises other professional employees.

Moreover, as noted earlier, the September 19, 2002 letter from the foreign entity stated that all of the salaried employees "were under the direct supervision" of the beneficiary, and the December 5, 2002 letter again stated that the beneficiary "was responsible for the supervision of up to twelve (12) full-time salaried employees, and up to twenty-five (25) full and part-time unsalaried employees." These general statements do not support the conclusion that only "supervisory, professional, or managerial" employees were under the beneficiary's supervision. *See* § 101(a)(44)(A)(ii) of the Act.

In all, the record is insufficient to overcome the director's conclusion that the petitioner has not provided sufficient evidence to establish that the beneficiary was employed in a primarily executive or managerial capacity abroad.

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

The petitioner did not submit with the petition a description of the beneficiary's job duties in the United States. Therefore, in the November 12, 2002 request for further evidence, the director requested information pertaining to the beneficiary's position in the United States entity, including (1) a comprehensive description of the beneficiary's duties and an hourly breakdown of those duties on a weekly basis, and (2) the name, job title and description, minimum educational requirement and educational credentials, and hourly breakdown of duties for each of the employee of the United States entity.

In a letter dated December 9, 2002, the petitioner set forth the following description of the beneficiary's duties:

> [The beneficiary's] primary function is to plan, organize, direct and control the organization's major functions through the company's employees. He confers with the store manager and the various department managers to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives. He reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions. He directs and coordinates formulation of financial and sales programs to provided new sources of income, to maximize returns on investments, and to increase sales. He works with the advertising company to formulate advertising programs for the business, and works with suppliers and distributors to obtain the best prices for the products that the company sells. In addition, he holds regular staff meetings to insure that the above goals are realized, and to evaluate staff performance. In that regard, he is ultimately responsible for the hiring and firing of all employees of the company.

In addition, the letter indicated that the beneficiary has "the task to search out and purchase other businesses to further expand [the petitioner's] investments and business activities in the U.S." No hourly breakdown of the beneficiary's duties was included, although the petitioner states in the letter that the above duties "comprise approximately 90% of his weekly work schedule."

The director found that the description of the beneficiary's job duties in the United States entity is too vague to provide a clear understanding of what the beneficiary actually does on a day-to-day basis. He also observed that while the petitioner indicated that the beneficiary directs the supermarket's major functions, it appears that the beneficiary performs many of the non-qualifying duties of the functions he manages. Moreover, the director noted that it has not been demonstrated that the beneficiary has a sufficient staff of supervisory, professional or managerial employees to relieve him from non-qualifying duties. Accordingly, the director concluded that it has not been demonstrated that the beneficiary will be employed in a primarily managerial or executive capacity by the United States entity.

On appeal, petitioner's counsel challenges the director's conclusion. Counsel asserts that the United States entity is a substantial business operation, which "provides an important service and economic impact [sic] to the town of Hurlock, Maryland" and has shown concrete evidence of its ongoing plans for expansion. Counsel argues that the beneficiary's duties are executive in nature. Counsel also disputes the director's finding that the duties of the beneficiary are not clear.

At the outset, the AAO notes that, as with the beneficiary's position in the foreign entity, the petitioner did not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, with respect to the United States entity. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

Moreover, the AAO agrees with the director's assessment that the description of the beneficiary's duties provided by the petitioner is too vague and non-specific to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's primary function is to "plan, organize, direct and control the organization's major functions through the company's employees," and that, among other things, he "confers with the store manager and the various department managers to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives." While these phrases suggest that such duties could be managerial or executive, there is insufficient detail to demonstrate that what the beneficiary actually does on a day-to-day basis is primarily managerial or executive in nature.

In addition, as the director noted, the job description indicates that the beneficiary appears to be responsible for the marketing, advertising, and supply negotiations of the United States operation. As such, he is performing tasks that are necessary to provide a service or product and this duty will not be considered managerial or executive in nature. 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).

The petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive in nature and what proportion would not. Although the petitioner indicated that the duties set forth in the job description comprise approximately 90% of the beneficiary's weekly work schedule, the petitioner did not provide an hourly breakdown of the beneficiary's duties, as the director requested. This failure of documentation is important because, as noted above, several of the beneficiary's duties do not fall directly under traditional managerial duties as defined in the statute. Without a clear breakdown of duties, the AAO cannot determine whether the beneficiary will be employed by the United States entity *primarily* in a managerial or executive capacity. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel's arguments on appeal are insufficient to overcome the director's determinations with respect to the beneficiary's role in the United States entity. Counsel's assertions regarding the significance of the United States entity to the local economy are not responsive to the issue of whether or not the petitioner has demonstrated that the beneficiary will be employed in a primarily managerial or executive capacity by the United States entity. Counsel argues that the beneficiary's duties are "without a doubt executive in nature," but fails to point to any evidence that would provide any factual support for such assertion. 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*, *supra* at 534; *Matter of Laureano*, *supra*; *Matter of Ramirez-Sanchez*, *supra* at 506. Likewise, counsel's contention regarding the clarity of the description of the beneficiary's is without merit when counsel merely reiterates the statutory criteria for establishing "executive capacity" rather than citing to factual support in the record. As previously noted, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, supra at 1108.

In all, the record is not persuasive in demonstrating that the beneficiary was employed by the foreign entity, and will be employed by the United States entity, in a primarily managerial or executive capacity.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. Originally filing as a Florida corporation, the petitioner's initial new office petition was approved on November 5, 2001. At that time, the petitioner represented that it had acquired sufficient physical premises to house the new operation, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). In the current extension petition, the petitioner now claims that it purchased a grocery store in April 2002 and asserts that it is now registered to do business in the State of Maryland. Based on the petitioner's claims, the petitioner did not begin to do business until April 2002, five months after the original approval. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business from November 2001 through April 2002. For this additional reason the petition may not be approved.

Furthermore, there is conflicting evidence regarding the ownership of the petitioner which casts doubt on the claimed relationship between the petitioner and the overseas company. The petitioner has submitted stock

certificates and a certification demonstrating that the corporation has issued 100 shares of stock at a par value of $1 per share, for a total of $100 in issued common stock. However, the petitioner has also submitted a financial statement which indicates that the petitioner has issued $5,000 in stock. The petitioner has not explained this discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.[1]

ORDER: The appeal is dismissed.

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[1] It is noted that CIS records reflect that the petitioner filed a second extension petition (EAC 03 117 52999) on March 5, 2003, approximately two months after the current petition was denied. That petition was approved by the Vermont Service Center's premium processing unit on April 3, 2003. If that 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 director may choose to review that approval for possible revocation.