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File: WAC 03 049 53123 Office: CALIFORNIA 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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its 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 is a corporation organized in the State of California that is engaged in the provision of computer software consulting services. The petitioner claims that it is the subsidiary of Jaico Group, located in Jalandhar, India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and subsequently obtained an extension of stay. The petitioner seeks to extend the beneficiary's status for an additional two-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary has been and will be employed in a managerial position. Specifically, counsel states that the beneficiary manages a subdivision or component of the Indian parent company. Counsel also claims that the beneficiary has responsibility for supervising and controlling the work of all other supervisory and managerial staff, and exercises authority to hire and fire staff. Finally, counsel notes that the beneficiary has twice been granted L-1A status based on the same facts presented in the instant 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 first issue in the present 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 the initial petition, the petitioner stated on Form I-129 that the beneficiary will be responsible for "preside [sic] the company and supervise [sic] operations, decision making regarding new contracts and expansion of business abroad." In addition, petitioner asserted that the beneficiary will "oversee the operation of the company, make new contacts, hire and fire new staff." The petitioner did not submit a letter in support of the initial petition.

On March 7, 2003, the director requested additional evidence. Specifically, the director requested the following evidence to establish that the beneficiary had been or would be performing the duties of a manager or executive for the U.S. company: (1) U.S. business organizational chart describing its managerial hierarchy and staffing levels, along with a brief description of job duties, educational level and wages for all employees under the beneficiary's supervision; (2) a list of specific goals and policies the beneficiary had established, and a list of specific discretionary decisions exercised by the beneficiary in the six months prior to filing the petition; (3) evidence that the beneficiary only receives general supervision from higher level executives, the board of directors or stockholders; (4) a specific day-to-day description of duties performed by the beneficiary for the six months prior to filing the petition; (5) a more detailed description of the beneficiary's duties in the U.S., indicating exactly whom the beneficiary directs including their job title and position description; (6) copies of the petitioner's California Employment Development Department (EDD) Forms DE-6, Quarterly Wage Reports for the last four quarters; (7) copies of the petitioner's Form 941, Quarterly Wage Reports for the last four quarters; and (8) copies of the petitioner's payroll summary, W-2s and W-3s evidencing wages paid to employees. In addition, the director requested signed copies of the petitioner's Federal Income Taxes certified by the Internal Revenue Services (IRS) with all required schedules and statements for the year 2002 as evidence that the U.S. company is doing business.

In response, the petitioner submitted, in lieu of an organizational chart, a letter from the petitioner, stating "the nature of the US business does not allow to hire [sic] more than one person." The petitioner also submitted a copy of its DE-88ALL for the second quarter of 2003; copies of Forms 940-V for 2002 and 2003; unsigned, uncertified computer printouts of the petitioner's IRS Forms 1120 for 1999 through 2002; and unsigned, uncertified computer printouts of the beneficiary's IRS Forms 1040, U.S. Individual Income Tax Returns for 1999 through 2001, in which he claims to be self-employed. In response to the director's request for a detailed description of the beneficiary's day-to-day duties and evidence of executive discretionary decision-making authority, counsel for the petitioner submitted the following statement in a letter dated May 29, 2003:

> The beneficiary did come to open a new office in the USA for its Indian parent company Jaico Exports and Jaico Computers. He maintained his position with this branch office as president and extended their services, software development and maintenance along with full line of technical support. The unique demand for this outsourcing position does not require to hire [sic] more than one person since there is no physical work or labor involved in the local office.
>
> Please note that the company is almost at the final stages of starting import export business of the fuel and oil filters and tools for which we intend to hire at least two people for this year for distribution.

In addition, the petitioner stated in a letter dated May 29, 2003, that the beneficiary is responsible for "looking after the business venture" of its Indian parent company. Further, the petitioner stated that the role of the beneficiary is "outsourcing its Indian parent [sic] business in the local US and international market. The sales or technical support for the local clientele is provided by the beneficiary." The petitioner also stated that the company outsources its "software development and maintenance" and that technical support is provided by the Indian parent company. No other information or documentation regarding the beneficiary's duties was submitted in response to the request for additional evidence.

On August 11, 2003, the director denied the petition. In his decision, the director noted that, as the only employee, the beneficiary has to perform both professional and managerial or executive duties. The director determined that the beneficiary's duties are not primarily executive or managerial and therefore found him ineligible for classification as an intracompany transferee.

On appeal, counsel for the petitioner asserts that the beneficiary has been and will be working in a managerial position for the petitioner, in that he manages a subdivision or component of the foreign parent company; supervises and controls the work of all other supervisory or managerial staff; and has authority to hire and fire or recommend those as well as other personnel actions. Counsel also notes that the beneficiary was previously granted the requested status to open the petitioner's new office and was subsequently granted an extension of stay. Counsel asserts that neither the position nor the qualifying relationship with the parent company have changed since the approval of the previous positions.

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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

On review, 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. For example the petitioner states that the beneficiary's duties include "presiding over the company," "expanding the business abroad," "overseeing the operation of the company," and "looking after the business venture." 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). The actual duties themselves reveal the true nature of the employment. *Id.*

In the request for evidence, the director requested that the petitioner submit a specific day-to-day description of the duties of the beneficiary, and specific examples of discretionary decisions exercised by the beneficiary. The petitioner failed to submit an adequate response. 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.

In addition, the only specific job duties provided by the petitioner reveal that the beneficiary provides sales and technical support for the Indian company's local clientele. Since the beneficiary actually performs the sales and technical support services, he is performing a task 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).

Further, there is no evidence in the record to suggest that anyone other than the beneficiary provides sales and technical consulting services on behalf of the company. Further, since the beneficiary is the sole employee of the company, he must also perform basic administrative and clerical tasks associated with the business. Accordingly, it appears that the beneficiary has limited time to devote to performing his claimed qualifying managerial or executive-level duties. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and state of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial and non-executive duties, nor has it adequately explained the reasons why a subordinate staff has not and will not be hired. Although the petitioner has stated that it outsources software development and maintenance services, the petitioner has not presented evidence to document the existence of any contracted employees or other service providers. 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).

The AAO notes that, on appeal, counsel states that the beneficiary supervises and controls the work of all other supervisory or managerial staff, and that the beneficiary has the authority to hire and fire or recommend these and other personnel actions. Counsel further asserts that, although the petitioner is not in a position to hire more people, the beneficiary will be in charge of "all the above-mentioned executive activities." 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).

The record reveals that the beneficiary has been the petitioner's sole employee since 1999, apparently working out of a home office. The petitioner has repeatedly asserted that its business "does not allow" it to hire additional staff, or that it is "not in a position" to hire additional staff. Accordingly, petitioner's and counsel's claims that the beneficiary is responsible for hiring, firing and supervising managerial or professional staff are not credible. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218,

1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel for the petitioner notes that CIS approved other petitions that were previously filed on behalf of the beneficiary. 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. at 597. 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).

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The beneficiary's service-oriented activities, vaguely defined responsibilities, the petitioner's failure to provide requested evidence, and lack of a subordinate staff to perform non-qualifying duties preclude CIS from classifying the beneficiary as a manager or executive. The petitioner's evidence is not sufficient in establishing that the beneficiary has been or will be directing the management of the organization; establishing the goals and policies of the organization; exercising wide latitude in discretionary decision-making; or receiving only general supervision or direction from higher level executives. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

Furthermore, the record does not establish that the beneficiary has been or will be primarily managing a function of the organization or functioning at a senior level within an organizational hierarchy other than in position title. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). The beneficiary's job descriptions depict an individual in charge of the day-to-day services of the organization, not that of a functional manager. The record does not demonstrate that there are any employees to perform the function so that the beneficiary is relieved from performing non-qualifying duties.

The petitioner indicates that it plans to hire additional 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).

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the record is not persuasive in establishing that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(9)(1)(ii)(G). The petitioner claims to be a wholly-owned subsidiary of the Indian company, but its 2001 Form 1120 reveals that the beneficiary owns 20% of the petitioner's stock, with the remaining 80% held by an unidentified Indian individual. Without additional evidence regarding the ownership of the petitioner and its claimed foreign parent company, the AAO cannot conclude that a qualifying relationship exists. As the appeal will be dismissed on the grounds discussed, this issue need not be addressed further.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.