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U.S. Citizenship and Immigration Services

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FEB 23 2005

File: SRC 03 154 50344 Office: TEXAS 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, Texas 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 EDP manager 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 Texas that is engaged in manufacturing and importing diamond jewelry. The petitioner claims that it is the affiliate of [redacted] Pvt. Ltd. located in Mumbai, India. The beneficiary was initially granted a three-year period of stay to serve as the petitioner's EDP manager 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 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 director confused the requirements for managerial and executive capacity and did not apply the appropriate standard in adjudicating the petition. Counsel further asserts that sufficient evidence was submitted to establish that the beneficiary manages a major component or function of the organization and functions at a senior level within the organizational hierarchy and with respect to the function managed. Counsel submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in 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.

On Form I-129, the petitioner indicated that the beneficiary is "[r]esponsible for overall management of all data processing activitiesm [sic] including input of data; production of reports; production of in-house promotional materials using desk-top publishing, maintaining and updating company web site." In a letter appended to the petition, dated May 2, 2003, the petitioner describes the beneficiary's duties as follows:

> In this position he has developed and implemented data processing solutions to all aspects of our operations. In addition, he manages our graphics department. His primary responsibilities include overall management of all data processing activities which include accounts receivable, accounts payable, inventory control, general ledger, production of MIS reports, updating and proper storage of data, liaise with software company for periodic updates of Jewels2000 software and troubleshooting and upgrading and maintaining computers and peripherals.

In support of the initial petition, the petitioner submitted an organizational chart depicting the beneficiary's position within its "Accounts, Administration, Data Processing." Department. The organizational chart shows that the beneficiary supervises a design manager.

On May 28, 2003, the director requested additional evidence. Specifically, the director requested a definitive statement describing the employees that the beneficiary will be responsible for in the United States and abroad, including: (1) the number of subordinate managers/supervisors or other employees who report directly to the beneficiary, along with a brief job description of their job titles, duties and educational background; (2) if the beneficiary does not supervise any other employees, an explanation as to what essential function within the organization he manages; (3) the qualifications required for the beneficiary's position; and (4) the beneficiary's position within the organizational hierarchy. In addition, the director specifically requested that the petitioner indicate who provides the sales/services or produces the product of the business, and who is responsible for shipping and handling activities for the U.S. company. The director also requested various documents as evidence that both the foreign and U.S. entities are currently doing business.

In response, the petitioner submitted the following description of the beneficiary's duties:

> [The beneficiary] manages one of the most important functions of [the petitioner]. He is responsible for our EDP function and oversees the day to day operations of our computer systems. He operates at the highest level within the organization regarding the EDP function. The importance of the EDP function cannot be overstated. Without the proper selection and operation of our EDP department employees would not be paid, vendors would not be paid, goods would not be sold and accounts would not be collected. Our annual sales are over $10 million per year. Although he reports administratively to [redacted] it is [the beneficiary] who has control and authority of the EDP function.

The petitioner also submitted a revised organizational chart, which shows that the beneficiary supervises an assistant manager. In a supporting statement submitted with the organizational chart, the petitioner identified the beneficiary's subordinate as "EDP assistant" and states that she is responsible for preparing and reviewing invoices, shipping merchandise to customers, and authorizing and approving customer returns. In this

statement, the petitioner lists the beneficiary's subordinate's qualifications as a bachelor of commerce awarded in 1997 and states that the position requires knowledge of computer systems, accounting systems and a bachelor's degree in business or commerce. The petitioner further states that the general manager of the company is responsible for production and sales activities which are performed by the sales, marketing and production staff, including three marketing managers, the inventory control manager, an assistant manager, and a diamond buyer. Finally, the petitioner states that shipping and handling activities are the responsibility of the assistant manager, inventory control.

On September 25, 2003, the director denied the petition. The director determined that the petitioner did not demonstrate the beneficiary manages or directs the management of a department, function or component of the organization, nor did the petitioner establish that the beneficiary will be involved in the supervision or control of the work of other supervisory, professional or managerial employees who will relieve him from performing the services of the business. Consequently, the director concluded that the majority of the beneficiary's work time would be spent in the "non-executive" day-to-day operations of the business, and thus he would not be employed in a bona fide executive position.

On appeal, counsel for the petitioner asserts that the beneficiary manages an essential function within the company. Further, counsel contends that the director incorrectly applied both managerial and executive standards and ultimately based her decision on the definition of executive when the petitioner never claimed that the beneficiary was an executive. In addition, counsel states that the director incorrectly utilized staffing levels as a factor in making her decision when the beneficiary's duties should have instead been evaluated as those of a function manager. Counsel cites several precedent decisions in support of his assertion that staffing levels need not be used as a determining factor in order to qualify for L-1A classification. Finally, counsel contends that the director's decision is inconsistent with the approval of the beneficiary's initial L-1A petition, particularly in light of the petitioner's considerable growth in the three intervening years.

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 AAO recognizes that the petitioner in this matter specified that the beneficiary will be employed in a managerial position as defined under section 101(a)(44)(A) of the Act, and notes that the director incorrectly utilized the terms "manager" and "executive" interchangeably in her decision.

Specifically, the petitioner has clearly articulated it claim that the beneficiary will serve as a function manager within its organization. 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 an organization. *See* section 101(a)(44)(A) 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 related 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, the petitioner has not provided evidence that the beneficiary would in fact manage an essential function, rather than perform the routine duties related to the function. The beneficiary is described as being responsible for "overall management of all data processing activities" and overseeing the company's computer systems, but no other management-level duties are provided. It is clear from the record the beneficiary is directly responsible for all day-to-day EDP-related activities, including implementation of data processing solutions, data input and storage, production of MIS reports, creation of in-house promotional activities, maintenance of the company web site, updating software, and maintenance of the petitioner's computers and peripherals. The petitioner states that the beneficiary manages the "graphics department" but there is no supporting evidence on record that the company has a graphics department. Further, the organizational chart in response to the director's request for evidence reveals that there is another level of management above the beneficiary that holds responsibility for accounts, administration and EDP activities. Although the petitioner claims the beneficiary reports to this manager only "administratively," and "has control and authority" over the EDP function, there is no corroborative evidence of the beneficiary's discretionary authority over the function, nor evidence to support petitioner's claim that the beneficiary functions at a senior level within the organizational hierarchy or with respect to the function managed. 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 actual job duties themselves reveal the true nature of the employment. *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).

Whether the beneficiary is a managerial employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. *See* section 101(a)(44)(A) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because virtually all of the beneficiary's daily tasks as described by the petitioner, such as troubleshooting computers and peripherals, maintaining a web site, obtaining software updates, and data entry, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is 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).

On appeal, counsel for the petitioner questions the director's utilization of staffing levels as a factor in determining whether the beneficiary is employed in a managerial capacity. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Counsel asserts that the petitioner is not using staffing levels to determine the beneficiary's classification as a manager, and that the director inappropriately applied this standard. In addition, counsel contends that it is clear from precedent decisions of the AAO that staffing levels need not be used as a determining factor in order to qualify for the L-1A classification. Counsels cites *Matter of*

Vaillancourt, 13 I&N Dec. 654 (Reg. Comm. 1970); *Matter of Bocris*, 13 I&N Dec. 601 (Reg. Comm. 1970); and *Matter of Pozzoli*, 14 I&N Dec. 569 (Reg. Comm. 1974), as examples of cases in which CIS found the job offered to the beneficiary to be managerial without a discussion of the job duties or levels of supervision. However, counsel did not furnish evidence to establish that the facts of the instant petition are analogous to those in the cited matters. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, the AAO notes that none of the cited precedent decisions turned on the qualifying nature of the beneficiary's job duties, thus a discussion of job duties or levels of supervision was understandably absent at the appellate level. It appears that counsel has misconstrued the findings of these decisions and his reliance on these precedents in this matter is not persuasive. It is noted that counsel also cites two unpublished AAO decisions on appeal. However, while 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Accordingly, the AAO need not and does not consider the findings of the non-precedent decisions cited by counsel.

On appeal, counsel further states that even if staffing levels are considered, the Act at section 101(a)(44)(C) states that the reasonable needs of the organization should also be considered. However, rather than discussing the organization's reasonable needs in terms of staffing, counsel goes on to note the significant growth in sales experienced by the petitioner and submits that the responsibilities of the data processing department have likewise increased, making the function even more essential to the operation of the business.

The AAO does not doubt that the petitioner has a need for the services provided by the beneficiary, or that the beneficiary performs duties that are critical to the business. However, the petitioner has not indicated that any other employee is directly responsible for any of the routine data processing, systems and computer maintenance tasks of the business, and although it is claimed that the beneficiary supervises an "assistant manager," the petitioner does not indicate that the beneficiary performs any personnel related tasks. Further, the beneficiary's claimed subordinate apparently performs shipping and customer service tasks which are wholly unrelated to the EDP function. Despite counsel's assertions on appeal that the beneficiary manages the EDP function, the mere fact that the beneficiary is the sole employee performing activities included in the EDP function does not make him the "manager" of the function by CIS definitions. To qualify as a function manager under section 101(a)(44)(A) of the Act, the beneficiary must be shown through probative evidence to exercise discretionary authority over the day-to-day operations of the function managed, and to function at a high level within the company's organizational hierarchy. Without documentary evidence to support the claims, 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).

Moreover, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the beneficiary may justify a beneficiary who allocates 51% of his duties to managerial or executive tasks as opposed to 90%, but those needs will not excuse a beneficiary who spends a majority of his or her time on non-qualifying duties, as is the case in the instant petition.

Finally, counsel for the petitioner has noted that CIS approved the initial petition filed on behalf of the beneficiary. The director's decision does not indicate whether she reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial capacity. The record does not establish that a majority of the beneficiary's duties have been or will be directing the management of an essential function of the organization, as claimed by the petitioner. CIS is not compelled to deem the beneficiary to be a manager simply because the beneficiary possesses a managerial job title. The record indicates that a preponderance of the beneficiary's duties have been and will be directly performing the operations of the EDP function, including personally performing all routine data processing, systems maintenance and computer troubleshooting activities for the company. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.