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U.S. Citizenship
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Services

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[redacted]

DEC 14 2005

File: LIN-04-026-53178 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)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 Manager North American Sales 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 operates as an importer and exporter. The petitioner claims that it is the subsidiary of The Ocean Command International Trading Co., Ltd., located in China. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary 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 will be employed in a primarily managerial capacity, and that the director failed to consider all of the available evidence in denying the petition. In support of this assertion, the petitioner submits a brief and additional evidence.

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 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 a letter submitted with the initial petition on November 6, 2003, counsel described the beneficiary's job duties as follows:

> As Manager of North American Sales, [the beneficiary] is responsible for management of the company's sales activities throughout North America. Managing the firm's sales function is an absolutely essential component of the company's business.
>
> [The beneficiary's] responsibilities include setting specific sales goals and objectives for the company. He also formulates policies to ensure that these objectives are met. [The beneficiary] negotiates contracts on behalf of the petitioner as well as manages the day-to-day operations of the company. He also has the authority to hire and fire managerial and non-managerial sales personnel.
>
> [The beneficiary] is responsible for building and maintaining relationships with North American companies. He has also acted as a liaison at a high level between client executives and contractors to resolve problems. [The beneficiary] has devised and successfully implemented the company's sales plan and set out to establish a solid public relations and advertising campaign to assure future growth. He has also delivered numerous sales presentations.
>
> [The beneficiary] has had to develop distribution channels. He is also responsible for reviewing market analysis to determine customer needs, price schedules, and discount rates. [The beneficiary] has monitored and evaluated competitive activities as well as maintained an effective knowledge of external market factors to make educated account decisions; this included undertaking sales, forecasting and assortment analysis.

> [The beneficiary] has developed and analyzed account and product pricing strategies. He has also implemented pricing programs to ensure corporate profit needs are met. To this end, [the beneficiary] has had to analyze sales records/trends in relation to company objectives. He has also developed and implemented the company's distribution strategy in order to achieve market penetration goals. Finally, [the beneficiary] has represented the petitioner at trade association meetings.

On December 22, 2003, the director requested additional evidence. In part, the director instructed the petitioner to "clearly define the beneficiary's duties and the proportion of time devoted to specific duties," and to "[c]larify who is performing the day-to-day duties of the function if not the beneficiary and provide evidence to support your statement."

In a response dated March 12, 2004, the petitioner submitted: (1) a letter from counsel addressing the director's concerns; (2) copies of job announcements from other companies as examples of managerial positions; (3) a letter from an accountant attesting that his firm provides accounting, bookkeeping, payroll and tax services for the petitioner, including invoices for the months of February 2003, and January, February, and March 2004; and (4) copies of three unpublished AAO decisions.

In counsel's letter, he asserted that the beneficiary will be employed in a primarily managerial capacity. Counsel cited two unpublished AAO decisions to stand for the proposition that a sole employee can be employed in a primarily managerial capacity. Counsel stated that the beneficiary does not perform the petitioner's day-to-day functions, and that such duties are contracted out to an accounting firm. Counsel cited a third unpublished AAO decision to stand for the proposition that a beneficiary can perform some non-qualifying duties, so long as his duties are primarily managerial or executive. Counsel claimed that "[the beneficiary] is (and will continue to be) ***exclusively*** engaged in high-level, managerial work." (Emphasis in original). Counsel referenced job descriptions for positions advertised by other companies, and asserted that they serve as examples of how an individual can be a manager without supervising other employees. Counsel confirmed that the beneficiary is the petitioner's sole employee, and asserted that he is eligible for L-1A status nonetheless as he "functions at a senior level within the organizational hierarchy."

On April 14, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted that it appears that the beneficiary will perform primarily non-qualifying sales functions. The director stated that "[t]here is no break down [of] the beneficiary's duties to corroborate [the] assertion [that the beneficiary's duties are primarily managerial] nor any evidence to indicate who would be performing the routine duties of the sales function if not the beneficiary." The director observed that the example job postings do not establish that the positions are managerial or provide additional information regarding the beneficiary's duties. The director noted that the unpublished AAO decisions submitted by counsel are not binding precedent, the facts do not parallel the facts in the present matter, and one of the decisions relates to H-1B classification.

On appeal, counsel asserts that the beneficiary will be employed in a primarily managerial capacity, and that the director failed to consider all of the available evidence in denying the petition. Counsel states that the director failed to adequately identify evidence that suggests that the beneficiary will perform routine duties of a function rather than manage a function. Counsel again claims that the beneficiary will act as a functional manager.

Upon review, the evidence of record does not support that the beneficiary will be employed in a primarily managerial or executive capacity. 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. In the present matter, counsel indicates that the beneficiary will be primarily engaged with managerial duties.

The job description for the beneficiary reflects the he will be primarily perform sales activities for the petitioner. The beneficiary's duties include tasks that are clearly non-qualifying sales functions, such as "deliver[ing] numerous sales presentations." While counsel indicates that the beneficiary will direct the sales function, as the sole employee, it is clear that the beneficiary must also directly perform all day-to-day tasks related to sales. Counsel states that "[the beneficiary] is responsible for building and maintaining relationships with North American companies," yet with no subordinates, it is understood that the beneficiary must perform the non-qualifying related tasks such as making sales calls to companies and serving as a first-line account representative for existing customers. Counsel states that "[the beneficiary] has devised and successfully implemented the company's sales plan and set out to establish a solid public relations and advertising campaign to assure future growth," yet, it is evident that the beneficiary was directly responsible for performing the daily tasks in cultivating public relations and implementing advertising efforts. Counsel states that the beneficiary "has also developed and implemented the company's distribution strategy in order to achieve market penetration goals." As the sole employee, it is clear that the beneficiary performed all non-qualifying tasks related to implementing the petitioner's distribution efforts.

As correctly noted by counsel, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The evidence of record supports that the beneficiary will perform some managerial tasks. Yet, despite the director's request, the petitioner has failed to indicate the amount of time the beneficiary will devote to managerial tasks as opposed to non-qualifying duties. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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). Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial

administrative or operational tasks. 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).

Counsel asserts that the beneficiary will act as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In this matter, the petitioner has not provided evidence that the beneficiary primarily manages an essential function rather than performs the non-qualifying related tasks.

In response to the director's request for evidence, counsel provided that the petitioner's routine financial tasks are performed by an outside accounting firm. As evidence, the petitioner provided invoices from the accounting firm covering services provided in the months of February 2003, and January, February, and March 2004. However, as the petition was filed on November 6, 2003, three of these invoices cover activity that occurred after the date of filing. 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). Thus, the invoices for 2004 are not probative of the petitioner's eligibility as of the filing date. Further, the invoice for March 2003 reflects that the accounting firm charged the petitioner $200 for services. This single invoice is insufficient to show that all of the petitioner's non-qualifying financial tasks are performed by outside contractors. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, as the sole employee, the evidence of record suggests that the beneficiary must spend a significant amount of time performing non-qualifying financial tasks such as paying bills, managing a checking account, preparing quarterly federal and state tax filings, and performing payroll functions.

Counsel correctly states that a sole employee may qualify as an L-1A intracompany transferee. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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 stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive

or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. As discussed above, in the instant matter the petitioner has not established that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

In response to the director's request for evidence, counsel cited three unpublished AAO decisions. However, as observed by the director, counsel failed to adequately discuss the facts of the cited matters or explain how they support the present petition. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. As one of the cited matters involves a petition for H-1B classification, it is not instructive in the present proceeding. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). For this reason, the appeal will be dismissed.

In denying the petition, the director further noted that the petitioner submitted photographs with apparent alterations. Counsel takes issue with the director's comments, and asserts that the director failed to adequately describe his observations to support such an assertion. Upon review of the photographs, the AAO notes that the photographs cannot be deemed fraudulent without further forensic analysis. A visual inspection does not immediately reveal evidence that the photographs are not a true representation of the petitioner's premises. Accordingly, the director's finding in this regard will be withdrawn.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.