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

U.S. Citizenship and Immigration Services

[redacted]

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File: EAC 03 109 50355 Office: VERMONT SERVICE CENTER Date: APR 01 2005

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] PUBLIC COPY

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 director of U.S. operations 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 under the laws of the State of New York and is engaged in the retail sale of cell phones, lottery tickets, tobacco products, and other sundries. The petitioner claims that it is the subsidiary of its Indian parent company of the same name, [redacted] with offices in Delhi and Jaipur, India. The beneficiary was initially granted a one-year period of stay in L-1A status to open a new office in the United States and was subsequently granted a two-year extension of stay. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

Upon initial review of the matter, the director sent the petitioner a request for additional evidence on March 14, 2003. Specifically, the director requested the following: (1) an organizational chart for the petitioner; (2) evidence that the beneficiary will function at a senior level within the organization; (3) if applicable, evidence that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties; and (4) a complete description of the subordinate employees of the beneficiary, including their educational credentials as well as a breakdown of the number of hours devoted to their job duties on a weekly basis.

In response, counsel for the petitioner submitted a letter, dated April 10, 2003, along with the following: (1) a corporate ownership/relationship chart; (2) an organizational chart for the petitioner; (3) a letter from the petitioner's accountant dated January 9, 2001; (4) a 2002 revenue and expense statement for the petitioner; (5) the petitioner's payroll records for a one-week period, December 19, 2002 through December 25, 2002; (5) a lease agreement for the petitioner's place of business in Orchard Park, New York; (6) a license agreement for the petitioner to occupy premises at McKinley Mall in Blasdell, New York; (7) a license agreement for the petitioner to occupy premises at Walden Galleria Mall in Cheektowaga, New York; (8) a dealer agreement to sell mobile telephones and telephone packages; (9) a retailer agreement with Philip Morris USA; and (10) a New York State Lottery Sales Agent License Agreement. In its April 10, 2003 letter, counsel also provided additional information on the job duties of the beneficiary and his subordinate employees.

The director denied the petition concluding that the petitioner did not establish that the beneficiary has been or 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's decision was "arbitrary, capricious, and in contradiction to the evidence submitted." Counsel further alleges that, based on the evidence submitted, the beneficiary "clearly meets the qualifications of a manager and an executive as defined by the [Act]." In support of this assertion, the petitioner submits additional evidence.

Upon review and for the reasons discussed herein, counsel's assertions are not persuasive and, thus, the AAO will dismiss 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 reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or 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.* In this case, the petitioner does 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. Specifically, in its letter dated April 10, 2003, counsel for the petitioner states that the beneficiary serves in an "[e]xecutive and [m]anagerial [p]osition" and has "managerial/executive duties." In addition, counsel on appeal states on Form I-290B that the beneficiary is an "[e]xecutive/[m]anager for the [U.S. entity]" and, in his appellate brief, he alleges that the "beneficiary has been and will be employed in an executive/[m]anagerial capacity" and that "[he] clearly meets the qualifications of a manager and an executive as defined by the [Act.]." The petitioner, however, 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. If a petitioner chooses to represent the beneficiary as being both an executive and a manager, it must then establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In addition, in what appears to be its attempt to demonstrate that the beneficiary meets the qualifications for both a manager and an executive under the Act, the petitioner has provided vague and nonspecific

descriptions of the beneficiary's duties that fail to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states initially in its letter dated January 21, 2003 that the beneficiary's duties include "[d]irect[ing] overall operations of [the] company," exerting "executive control over all functions of [the] company," and "formulating pricing policies according to profitability requirements as set forth by the parent company." In response to the director's request for evidence, counsel for the petitioner states in his letter dated April 10, 2003 that the beneficiary's "managerial duties" also include: (1) "exercis[ing] wide latitude in establishing the goals and policies of the company;" (2) supervis[ing] the implementation of the policy plans of the organization;" (3) "develop[ing] strategic plans for the stores;" and (4) "formulating procedures to be implemented by the general manager." The petitioner did not, however, define the goals and policies established, how the undefined policy plans were implemented, what specific strategic plans were developed, and what procedures were formulated. In addition, rather than providing specific descriptions of the beneficiary's duties, these stated duties merely paraphrase parts of the statutory definitions of managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). 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). 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).

Furthermore, with regard to other duties of the beneficiary, the petitioner in its letter dated January 21, 2003 describes the beneficiary as being "responsible for negotiating all contracts with leasing agents and suppliers." In addition, counsel for the petitioner states in his letter dated April 10, 2003 that the beneficiary is also responsible for the following: (1) "locates and procures funding, establishes relationships with banks and major vendors, and works with governmental agencies;" (2) "research[es] suitable real estate acquisition[s] and negotiate[es] agreement[s] for a suitable design for the stores;" (3) "is responsible for developing new product lines and their marketing strategies;" (4) "complete[s] negotiations with major vendors of product lines sold in the stores;" and (5) "negotiat[es] and determin[es] prices for products." Since the beneficiary actually negotiates the contracts, procures funding, designs the stores, and develops, markets, and prices the petitioner's products, he is performing tasks necessary to provide a service or product, and these duties 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).

While performing tasks necessary to produce a product or service in itself will not disqualify the beneficiary from being eligible for L-1A status, the petitioner still has the burden of establishing that the beneficiary spends the majority of his time performing managerial or executive duties and not non-qualifying duties. In this case, however, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial or non-executive. As discussed above, the petitioner lists some of the beneficiary's duties, albeit vague and unspecific, as being managerial and some as being executive, but it fails to quantify the time the beneficiary spends on them. Counsel for the petitioner states in its letter dated April 10, 2003 that "100% [of the beneficiary's time is] spent . . . managing the overall operations of the business." First, given that many of the beneficiary's duties

described in the above paragraph are neither managerial nor executive, it is not credible that the beneficiary spends 100% of his time dedicated solely to managerial duties. Second, absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce 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).

Counsel does claim in its letter dated April 10, 2003 that the beneficiary "hired a part time Certified Public Accountant . . . to maintain and manage Source International Inc. accounts." The petitioner, however, has neither presented evidence to document the existence of this employee nor identified the specific services this individual provides. Additionally, the petitioner has not explained how the services of the contracted employee obviates the need for the beneficiary to primarily conduct certain aspects of the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, while counsel claims that many other non-qualifying duties of the petitioner's business operations are handled by the beneficiary's subordinates, the evidence presented appears to raise more questions than it answers. Specifically, the only documents submitted as evidence that the petitioner employs anyone are a few payroll records and the assertions of counsel. First, 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). Second, the single corporate tax return that was submitted, Form 1120 (2001), indicates that only $3,598.00 in officer compensation, salaries, and wages was paid by the petitioner that year. Compared with the 2002 payroll records, which indicate the petitioner employs between 11 and 12 employees, including the beneficiary, and absent any other evidence, it does not appear plausible that the petitioner could go in less than a year from being unable to even pay the beneficiary's proffered wage of $24,000.00 per year to employing over 10 people, including five "executive and managerial" employees.

Regardless, assuming the authenticity and accuracy of the payroll records submitted, it should be noted that the vast majority of the employees, including the general manager, worked less than twenty hours a week. In addition, one of the line-level employees was earning more at $5.90 per hour than two of the alleged "store managers" and was even earning more than the alleged second most senior-level employee, the general manager, who earned only $5.50 per hour. First, while it does appear that the petitioner met Federal and New York laws with regard to the 2002 minimum wage of $5.15 per hour, it does not make sense that it would pay a line-level employee more than the company's alleged senior level employees. Thus, the AAO is left to question the credibility of the petitioner's organizational structure as presented. Second, given the part-time nature of the employees, including the purported managerial staff, and the three business locations in [redacted] Cheektowaga, New York, the AAO is also left to question how much of the beneficiary's time was and will be spent performing the duties of the subordinate staff, particularly the "managers," during the twenty hours or so they are not working. In other words, these issues, collectively, bring into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or

executive. *See* sections 101(a)(44)(A) and (B) of the Act. Moreover, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). As discussed previously, given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

Furthermore, while 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. Given the AAO's doubts regarding the accuracy of the organizational structure of the petitioner, however, it cannot conclude that the beneficiary manages a subordinate staff composed of supervisory or managerial employees. If Citizenship and Immigration Services (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). Thus, absent any credible evidence to the contrary, the record does not establish that the subordinate staff is composed of supervisory or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

With regard to whether the beneficiary manages any professional employees, it is noted that counsel on appeal claims that the beneficiary's subordinate, the general manager, possesses a Bachelor's Degree in Commerce and serves in a "professional position." In evaluating this claim, however, the AAO must evaluate whether the subordinate position(s) *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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the job duties of the so-titled "general manager," who is among the beneficiary's subordinates. Again, absent credible evidence to the contrary, the beneficiary appears to be primarily supervising a staff of non-professional employees and, thus, cannot be deemed to be primarily acting in a managerial capacity.

Finally, 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 stage of development of the organization. In this case, although the director based his decision partially on the revenue of the enterprise and the number of staff, counsel claims on appeal that the director did not base this decision on updated and corrected information submitted in response to the director's request for evidence.

At the time of filing, the petitioner was a three-year-old company that initially claimed to have a gross annual income of $67,287.00. In its initial response and on appeal, counsel states that the petitioner's gross annual income increased in 2002 to $628,897.00 and that, due to a "typographical error," the gross annual income on Form I-129 was not updated. Counsel also claims that the number of employees on Form I-129, which was certified by the petitioner to be true and correct under penalty of perjury, was incorrect and that the actual number of employees was eleven and not ten.

Although it does appear that the director did not base this part of the decision on the updated information, the AAO does not find that the director made any legal error in its analysis or conclusion. In particular, counsel's claims that the petitioner's 2002 gross annual income had increased almost ten fold in two years is only supported by a generic 2002 "Statement of Revenue and Expenses." This un-audited 2002 statement is not probative, and the petitioner chose not to submit any invoices, receipts, or even a 2002 tax return to support its assertions. Thus, while the gross annual income claim of $67,287.00 is only supported by a letter from the petitioner's accountant, the director was proper in his use of discretion in considering only this evidence and not the "updated" gross annual income amount of $628,897.00. Moreover, it should also be noted that the only Federal tax return submitted is the petitioner's 2001 return, which showed only $57,420.00 in gross sales for that year. The AAO is left to question whether the petitioner truly made a typographical error on Form I-129 or whether it attempted to mislead the CIS by using the higher gross annual income from 2000 instead of the lower amount from 2001.

In addition, in considering the number of employees, the AAO, as discussed above, finds insufficient evidence to prove that the petitioner had any employees, much less the ten claimed on Form I-129. Therefore, the director's use of the claimed ten employees on Form I-129 in its analysis was completely within its discretion. Even if the AAO found sufficient evidence that the petitioner had one additional part-time employee, it could not find that the director's conclusion would have been any different. Moreover, it should also be noted that, for some unexplained reason, the petitioner chose not to submit payroll records for the weeks prior to when the petition was filed on February 18, 2003. Despite these concerns, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Accordingly, 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).

Beyond the decision of the director, the petitioner's 2001 tax return, as previously indicated, shows that only $3,598.00 was spent that year on salaries and wages and that nothing was spent on compensation of officers.

The beneficiary was apparently in the U.S. at that time pursuant to L-1A status, valid from February 28, 2000 until February 27, 2003, as an employee of the petitioner (*see* EAC 00 103 52146 and EAC 01 098 52857). Assuming the beneficiary was the only person employed in 2001 and assuming he was employed full-time, he would only have been paid $1.73 per hour, well below the required minimum wage at the time. This information alone could be grounds for the director to review the previous petitions to determine whether the approvals should be revoked pursuant to 8 C.F.R. § 214.2(l)(9)(iii)(A).

In addition, it should also be noted that certain inconsistencies found in the record raises the additional issue of whether there is a qualifying relationship between and U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). Specifically, on Schedule K of the petitioner's 2001 tax return (Form 1120), the petitioner indicates that the corporation is not "a subsidiary in an affiliated group" nor is it "a parent-subsidiary controlled group." In addition, the petitioner also marked No to the question of whether a foreign person, which can be a corporation, "owned, directly or indirectly, at least 25%" of the company's stock. This directly contradicts the petitioner's statement in its letter dated January 21, 2003 that its "parent company" is Source International Inc. in India. In addition, the corporate ownership/relationship chart submitted with the response to the director's request for evidence indicates that the foreign entity owns 100% of the U.S. entity. At the same time, counsel for the petitioner states in its letter dated April 10, 2003 that the U.S. entity is an "affiliate" and not a subsidiary. Finally, the beneficiary indicated on the New York State and Local Sales Tax Returns that he is the owner of the petitioning company. Consequently, based on these inconsistencies in the record, it cannot be concluded that the petitioner is a qualifying organization doing business in the United States and at least one foreign country, or that it has a qualifying relationship with a foreign entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). 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). For this additional reason, the appeal must be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. 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.