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U.S. Citizenship
and Immigration
Services

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File: WAC 03 267 54799 Office: CALIFORNIA SERVICE CENTER Date: **DEC 22 2005**

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 wholesale and retail sale of fine jewelry and diamonds. The petitioner claims that it is an affiliate of [REDACTED] located in Manila, the Philippines. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and was subsequently granted a two year extension. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

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 filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the director erred by finding that the beneficiary would not be employed in a primarily managerial or executive capacity. In support of this contention, counsel 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 primary issue in this 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, both the petitioner and counsel submitted letters dated September 25, 2003 which provided an overview of the beneficiary's position in the United States. Counsel's letter stated:

[The beneficiary] will [] continue to be temporarily employed in the position of Operations Manager and Corporate President for the U.S. entity. In this Executive capacity she will be in overall control of the establishment, organization, direction, policy and strategy of the business. [The beneficiary] will be responsible to hire managers and supervisors for the business as well as workers to be employed under the guidance of the supervisors, the latter in turn under the management of the managers in the business, said managers will be carrying out the directives of [the beneficiary].

The petitioner's letter which accompanied the petition further explained the need for the beneficiary's continued services in the United States:

It is in our best interest to temporarily request [the beneficiary's] services as our President and Operations Manager for a temporary period of two (2) years. We would like to continue to employ [the beneficiary] with [the petitioner] in the aforesaid capacity. She will continue to be the individual responsible to establish, plan, and develop the overall business of our corporation and she will see to the negotiating of contracts, the hiring and firing of personnel including managers and supervisory staff. [The beneficiary] will set policy and strategy for the business and also negotiate all the necessary financial affairs required for the operation of the business. In her executive capacity [the beneficiary] will guide and direct the establishment, development, and growth of the business and make all necessary executive level decisions pertaining thereto.

The petitioner also submitted an organizational chart which showed that the beneficiary oversaw five employees: a vice president/general manager; a marketing associate; a store salesperson; a marketing coordinator; and a delivery person. Also listed on the organizational chart were three jewelry setters who were employed on an as-needed basis. The petitioner also submitted copies of the payroll records for these five employees for the pay date of September 15, 2003.

The director found this initial evidence to be insufficient, and consequently issued a request for evidence on October 8, 2003. The request asked the petitioner to submit additional information that established that the beneficiary was functioning in a capacity that was primarily managerial or executive. Specifically, the director requested in part a more detailed organizational chart, a more specific description of the beneficiary's position and duties, and a statement regarding the duties, position titles, educational levels and salaries of all employees under the beneficiary's supervision. In addition, the director requested quarterly wage reports and a payroll summary verifying the employment of other persons named on the organizational chart.

In a response dated December 24, 2003, the petitioner, through counsel, submitted an updated organizational chart along with the resumes of each of the identified employees. With regard to the director's request for a more detailed description of the beneficiary's duties, the petitioner submitted the following statement:

[The beneficiary] directly supervises [REDACTED] and also is delegating job duties to Marketing Associate [REDACTED]. The salesperson, marketing coordinator, delivery person and jewelry setters do not report to [the beneficiary]. The specific duties of [the beneficiary] in this present state of operations are as follows:

1. Planning, developing, establishing and modifying new policies and objectives of the US office, Act as a Liaison between the foreign entity and the US entity on a need basis (10%)
2. Supervise and manage store manager who reviews inventory levels in conjunction with sales and purchase orders to ensure proper inventory levels available at all times. Facilitates the supply and demand factor of products affecting the operations of the company. Discusses needs with managers and authorizes orders of more stones and settings. (20%)
3. To visit trade shows and research about newer types of jewelry, contact new diamond and colored stone vendors and pursue higher end customers to ensure company awareness. Deal with all Filipino publicity and advertising and enter the company into contracts with the magazines and other mediums (15%)
4. To review and approve major sales deals and finalize points of a transaction in which the Salesperson or General Manager is unable to resolve. (15%)
5. To review employees work/sales figures, discussions and meetings with General manager and sales associates regarding major business issues, employee training (15%)
6. Oversee and manage all financial budget and personnel salary operations as well as reviewing Company's financial position with the Company's accountants (10%).
7. Reviewing/Allocating sales leads and following up on their progress with vendors and consignment sellers across North America. Head sales expansion strategies to neighboring countries; Canada, Mexico, and Central America (15%)

The petitioner also submitted payroll summaries for September, October, November, and December. The petitioner did not submit the requested quarterly tax returns, alleging that the employees had previously been compensated as independent contractors so no such forms existed, and that the current quarterly return had not yet been filed, thus precluding the petitioner's ability to submit such evidence.

On January 9, 2004, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization. The director further concluded that the beneficiary was performing the tasks necessary to provide the petitioner's goods and services since the evidence indicated that the beneficiary would be performing numerous marketing and sales functions. Finally, the director concluded that the petitioner did not have the organizational complexity to support a managerial position, particularly since it did not appear that the beneficiary would be supervising other managerial, professional, or supervisory employees.

On appeal, counsel for the petitioner restates the beneficiary's qualifications, and claims that the more detailed statement of the beneficiary's duties provided in response to the request for evidence clearly established that the beneficiary was performing in a *managerial* capacity.¹ Furthermore, in addition to this claim, counsel

¹ Prior to appeal, the petitioner maintained that the beneficiary was functioning in a primarily *executive* capacity.

asserts that the beneficiary simultaneously performs executive duties based on a list of newly-submitted duties. This assertion is not persuasive, because in addition to claiming for the first time that the beneficiary is functioning in a managerial capacity, counsel also provided a new list of associated job duties not previously identified or discussed. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Consequently, the AAO will examine the description of duties provided with the initial petition and in response to the director's request for additional evidence in evaluating the beneficiary's qualifications. In order to thoroughly evaluate the beneficiary's eligibility, the AAO will review the stated duties for compliance under both regulatory definitions.

Upon review, counsel's assertions are not persuasive. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* §§ 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is a manager or an executive by virtue of her position title, experience, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed managerial duties. 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 description of the beneficiary's duties, provided in the initial letters of support as well as in response to the director's request for evidence, is vague and seems to merely paraphrase the regulatory definitions. Specifically, the identification of duties such as "planning, developing, establishing and modifying new policies and objectives," "guide and direct the establishment," and "set policy and strategy for the business" did little to clarify what the beneficiary does on an average workday. In fact, these duties are extremely similar to the executive duties set forth in Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). In response to the request for evidence, a more detailed description of duties was submitted, which indicated that the beneficiary traveled to trade shows, dealt with publicity and advertising, and managed all financial operations. Essentially, the claim that the beneficiary deals with advertising and publicity in addition to handling financial operations, such as the budget and payroll, is inconsistent and contradictory to the petitioner's claim that the beneficiary handles only managerial and/or executive functions. In addition, the fact that the beneficiary visits trade shows, researches jewelry, and heads sales expansion strategies suggests that the beneficiary is performing the majority of the necessary functions required to generate the goods and services of the business. The actual duties themselves reveal the true nature of the employment. *Id.* In reviewing the beneficiary's stated duties, it appears that the majority of her time is devoted to the company's sales and marketing. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner further claims that the beneficiary oversees a subordinate staff, specifically, the vice-president and the marketing associate. Although the beneficiary is not required to supervise personnel, if it is claimed that her 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.

Though requested by the director, the petitioner did not provide the level of education required to perform the duties of the marketing associate or the vice president. Although the marketing associate's resume was submitted, the petitioner failed to discuss the nature of her position, the experience and education required to perform the position, and the type of duties the position required. The petitioner likewise failed to submit any evidence pertaining to the duties of the vice president. Any 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). Thus, the petitioner has not established that these employees require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. In fact, the updated organizational chart indicates that the vice president is not currently employed by the petitioner pending the adjudication of his visa petition. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Moreover, the subordinate staff members the beneficiary is claimed to oversee have not been verified, since despite the director's request, quarterly wage reports and payroll summaries for the employees were not submitted. 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). Additionally, it should be noted that the reason the quarterly wage reports were not submitted is due to the petitioner's contention that all employees were previously employed as independent contractors, thus obviating the need for such a filing. Furthermore, the petitioner alleges that although these persons are currently employees, the current wage report has not yet been filed.

These statements are troubling for two reasons. First, as noted by the director in the denial, the petitioner's U.S. Corporation Income Tax Return for 2002 indicates no expenses for salaries and wages or for cost of labor. 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). Second, although the petitioner submitted payroll records for September 2003 through December 2003, it claims that it had not yet filed its quarterly wage reports since payroll had not yet been done for a full quarter. However, quarterly tax returns are typically filed four times per year for the quarters ending March 31, June 30, September 30, and December 31. While the petitioner's reasoning correctly notes that the report for the quarter ending December 31, 2003 was not yet due at the time of the response to the request for evidence, there is no explanation as to why the report for the quarter ending September 30 was not submitted. Since the petitioner, based on its payroll submissions, claims to have paid wages for the month of September 2003, there is no reason that a quarterly tax return should not have been filed for that quarter. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Since there is no evidence in the record to corroborate the petitioner's claim that it employs six persons, it is questionable whether the petitioner does in fact have a subordinate staff to relieve the beneficiary from day-to-day tasks. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. 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)).

Finally, counsel on appeal alleges that the director erred by relying on the size of the petitioning entity in rendering the decision. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

At the time of filing, the petitioner was an almost three-year-old jewelry retailer and wholesaler that claimed to have a gross annual income of \$404,571. The firm employed the beneficiary as its president and operations manager and claimed to employ 5 additional employees and three contractors on an as-needed basis. As noted by the petitioner, the vice president is currently removed from the payroll pending adjudication of his visa petition. Therefore, the petitioner claims that the beneficiary oversees a marketing associate, a store salesperson, a marketing coordinator, and a delivery person. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and the four named staff members. The description of the beneficiary's duties indicates that the beneficiary is required to perform the duties that would normally be delegated to subordinate employees (such as financial management, sales, marketing, and advertising) in order to keep the business operational. Although the petitioner asserts that the beneficiary is truly acting in a managerial or executive capacity, the petitioner provides no independent evidence to corroborate these claims. In addition, the petitioner failed to provide a description of the duties of the subordinates, thereby precluding the AAO from concluding that the non-qualifying duties, identified as tasks of the beneficiary, are delegated to others. As previously discussed, the petitioner does not meet its burden of proof in these proceedings without documentary evidence to support its statements. *Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel on appeal do not constitute evidence. *Matter of Obaighena*, 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 AAO notes that counsel relies heavily on *Mars Jewelers, Inc. v. Immigration and Naturalizations Services*, 702 F. Supp. 1570 (N.D. Ga. 1988) and *Johnson-Laird, Inc. v. INS*, 537 F. Supp. 52 (D.C. Ore. 1981) in support of the premise that the director erred in examining the size of the petitioning entity in reaching the decision. However, counsel fails to recognize or discuss the subsequent holding in *Systronics*, which, as discussed above, permits CIS to examine an entity's size in relation to the reasonable needs of the

entity. Consequently, counsel's reliance on *Mars Jewelers* and *Johnson-Laird* is misplaced and will not have any bearing on this decision. Counsel further refers to unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. 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.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties would be primarily managerial or executive in nature. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner indicates that the beneficiary is the sole owner of both companies. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that she will be transferred to an assignment abroad upon completion of her services in the United States. For this additional reason, the petition may not be approved.

The petitioner noted that CIS approved other petitions that had been 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 and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The 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).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.