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U.S. Citizenship
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Services

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File: WAC 04 001 54303 Office: CALIFORNIA SERVICE CENTER Date: DEC 22 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 general counsel and director of personnel 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, an internet service provider, is a corporation organized in the State of California. The petitioner claims that it is the subsidiary of Nikoma Media Works GmbH, located in Hamburg, Germany. 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. Specifically, counsel contends that the director's decision discriminates against managers and executives of small companies by setting a higher standard for them contrary to legal precedent. 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, the petitioner submitted an attachment identified as "Attachment to L Classification Supplement to Form I-129," which provided an overview of the beneficiary's duties. Specifically, the petitioner stated that "the alien will continue with those duties and responsibilities of General Counsel and

Director of Personnel for [the petitioner]" as discussed in its description of the alien's duties for the previous three years, which stated as follows:

For [the petitioner]: General Counsel and Director of Personnel – His responsibilities are as follows: As General Counsel, to direct the legal staff, to set up new companies and subsidiaries of existing client companies and to oversee the preparation of all cooperative contracts, initial public offerings (IPOs), and Due Diligences for those companies. In addition to leading the in-house Legal Department of the company, [the beneficiary] also is responsible for the selection, coordination, and monitoring of the work of outside professional consultants, including law and accounting firms. As director of personnel, he is responsible for directing the human resources staff, preparing all employment contracts, maintaining personnel records, ensuring compliance with all applicable employment regulations, and overseeing the employee evaluation, hiring, and firing processes for the company. In both positions, he is expected to continue to establish appropriate goals, policies, and procedures for the conduct of the operations of Petitioner and for the functioning of both the Legal Department and the Personnel Department. He has broad discretion in the performance of his duties and the authority to hire and fire and take other personnel actions as required for the proper and efficient functioning of the company. He reports directly to the President/CEO.

The director found this initial description of the beneficiary's duties insufficient and consequently issued a request for evidence on October 10, 2003. The request required the petitioner to submit an organizational chart for the U.S entity which showed the beneficiary's position in the organizational hierarchy as well as all employees under the beneficiary's supervision. In addition, the director requested a more detailed description of the beneficiary's duties as well as quarterly wage reports and a payroll summary verifying the employees of other persons.

In response, the petitioner submitted an organizational chart which demonstrated that the beneficiary directly oversaw an office manager, an employee in charge of carrier sales, and an accountant. The organizational chart further indicated that three employees, whose positions were identified as "customer care" were in turn supervised by the office manager. A supplemental description of the positions of the beneficiary's subordinates was also supplied, and on this statement, the petitioner indicated that the beneficiary supervised a sales technician, an office assistant, and a help desk/customer service employee in addition to the other employees directly under him on the line and block organizational chart. In addition, an updated list of the beneficiary's duties was submitted, which is reproduced below:

[The beneficiary] heads the operations and is coordinating all of the company's ventures.

A [t]ypical [d]ay at the office:

- Oversee all internal operations including finance, human resources, billing
- Correspond with german [sic] development team, agents (as of July 2003; 16 in 10 countries), and worldwide partners (as of July 2003; 17 in 8 countries) daily

- Negotiate various legal issues (contracts for foreign countries; Terms and Conditions; Pending Trademark and Patent Issues)
- Negotiate pricing and contracts with partners worldwide
- Manage rate-changes from Director Carrier Sales
- Oversee status of products (IP Phones and ATAs), and network usage.
- Direct all customer and account activity.
- Expand the business through various meetings with Local Telecom Representatives and/or Interest Groups.

On December 1, 2003, 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/or services and that it had not been demonstrated that the beneficiary was managing an essential function.

On appeal, counsel for the petitioner contends that the director's finding that the beneficiary conducted rather than directed the petitioner's work was erroneous and provides examples which he claims refute this finding. Counsel provides an affidavit from the petitioner which provides an hourly breakdown of an average workday, and this affidavit indicates that the majority of the beneficiary's day is spent on the phone with conference calls or answering emails. Counsel further asserts that the beneficiary is a "hands-on" executive who directs the day-to-day operations of the company, and for this reason claims the beneficiary should not be prejudiced.

Upon review, the petitioner'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 an executive by virtue of his position title, experience, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed executive 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 initially in the supplement to Form I-129, is vague and seems to merely paraphrase the regulatory definitions. Specifically, the identification of duties such as "establish appropriate goals, policies, and procedures," "authority to hire and fire" and "direct the legal staff" 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 § 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 on a typical day, the beneficiary negotiates various legal issues, negotiates pricing and contracts, and oversees all internal operations. On appeal, an affidavit from the beneficiary indicates that the majority of his time during the day is devoted to conference calls and email correspondence.

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 his time is devoted to the company's contract negotiation and acquisitions. Furthermore, it appears that based on the petitioner's statements, the petitioner is still in a start-up phase. Since the beneficiary apparently oversees subordinate staff members who focus on customer service, there does not appear to be sufficient staff to handle the sales functions, the marketing functions, and most importantly, the legal issues. The petitioner claims that the beneficiary is the petitioner's general counsel and that he oversees the legal department by leading the in-house legal department. However, based on the organizational chart and description of employee duties provided in response to the request for evidence, it does not appear that the petitioner has a legal department at all. 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).

Consequently, absent evidence to the contrary, it appears that the beneficiary himself is the sole member of the petitioner's claimed legal department, and thus, all of the stated duties of this department which he allegedly supervises must therefore fall upon his shoulders. It is undisputed that the beneficiary, through counsel's statements and his own admission, directly deals with clients to negotiate contracts and discuss sales. It appears, therefore, that the beneficiary is engaged in the important task of salesmanship in addition to preparing legal contracts to solidify such sales, which undoubtedly is an essential function of the petitioner's business. As correctly noted by the director, 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).

Furthermore, as discussed above, the backgrounds and qualifications of subordinate staff members the beneficiary is claimed to oversee have not been verified despite the director's request for educational backgrounds and specific position descriptions. Although a supplemental statement was submitted in response to the request for evidence which briefly discusses the nature of the subordinate employees' duties, these descriptions are insufficient to establish that the beneficiary qualifies as a manager or executive as defined by the Act.

Although 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. Despite the director's request, the petitioner did not provide the level of education required to perform the duties of the subordinate employees identified on the organizational chart. 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 possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that any 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. 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.

Furthermore, the AAO notes that in response to the request for evidence and again on appeal, counsel refers to an unpublished decision 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 asserts that the beneficiary oversees outside contractors and thus his position is similar to that of the beneficiary in the cited case, yet 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.

Finally, counsel does cite to a published decision in further support of this contention. Counsel relies on *National Hand Tool Corp. v. K.L. Pasquarell*, 889 F.2d 1472 (5th Cir. 1989). Counsel quotes a footnote, which reads "[t]he notion that a relatively large organization can have managerial employees who comply with the regulation, while a small company, with a managerial employee (or employees) discharging virtually identical duties, cannot, finds no support in the statute." *Id.* at 1476 n. 5. Counsel's reliance on this quote, without discussing the facts of the cited case in comparison to the facts at hand, is not sufficient to permit a finding that the beneficiary is a qualified manager or executive. Again, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the decision. In this matter, counsel has failed to show that the beneficiary *primarily* performs the duties of a manager or executive.

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 general counsel and director of personnel and a subordinate staff of customer service employees. The petitioner indicates that the business is still developing and the development is largely attributed to the beneficiary's services. It is evident, therefore, that the beneficiary himself is the sole person responsible for obtaining new clients and expanding the business, and that the petitioner has not yet reached the point where direct interaction with third parties can be delegated to subordinate employees. 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. 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 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).

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 petition also may not be approved because there is insufficient evidence that a qualifying relationship exists between the petitioner and the foreign entity. Specifically, the record indicates that the foreign entity, Nikoma Media Works GmbH is the affiliate of the U.S. petitioner. The petitioner's Form 1120, U.S. Corporation Income Tax Return for 2002, indicates that the petitioner is 100% owned by ██████████. No documentary evidence, however, has been submitted to establish that Mr. ██████████ also owns 100% of the foreign entity, which would satisfy the regulatory definition of "affiliate." In fact, the supplement to Form I-129 submitted with the initial petition indicates that "Mr. ██████████ sold Nikoma Media Works GmbH." Assuming the validity of this statement, there is no documentary evidence which establishes that a qualifying relationship still exists between the foreign entity and the U.S. petitioner. 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 petition may not be approved.

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).

The AAO notes 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).

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.