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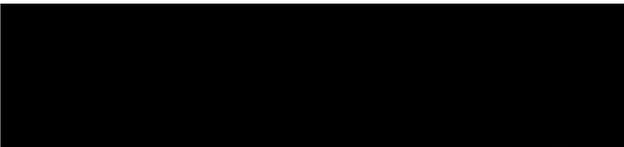
File: EAC 03 080 52062 Office: VERMONT SERVICE CENTER

Date: JUN 13 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, 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 executive manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the state of New York, which is engaged in the wholesale and import of a wide range of high fashion ladies garments. The petitioner claims to be the subsidiary of [REDACTED] located in New Delhi, India. The beneficiary was previously granted a two year period of stay which the petitioner now seeks to extend for an additional two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary had been and will continue to 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 contends that the director erred by denying the petition, citing the "tremendous" amount of evidence that had been submitted to date in support of the beneficiary's managerial duties. In addition, counsel points out that the previous petition filed on behalf of the beneficiary for his initial stay in the U.S. was granted under almost identical circumstances, and therefore contends that the director was in error by failing to follow the previously issued decision in that matter. 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 managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

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.

In the initial petition, counsel for the petitioner submitted a detailed letter outlining the beneficiary's duties while employed by the U.S. entity. Specifically, counsel alleged that the beneficiary's duties were exclusively managerial in nature, and described his duties as follows:

1. Analyze market conditions under New York and other parts of the United States to determine an appropriate marketing policy; determine the scope of business operations in the United States and design appropriate marketing policy; determine the scope of business operations in the United States and design appropriate operational and managerial structures in order to get this company to be fully operational and successful;
2. Be responsible for all aspects of operating the company, including selection of location, personal matters, pricing policies, determination of products to be offered, negotiations with appropriate business partners etc. [T]he duties will also include overseeing and managing the finances of the company, including review and determination of appropriate strategies to make the company profitable;
3. Develop and implement plans for both short-term as well as long term growth; determine and set corporate policies, goals, and objectives[;]

4. As [the beneficiary] is well versed with the working of both organizations he manages coordination of production and supply with selling i.e. [c]oordinating between India office and US office[;]
5. He also manages invoicing, payment realization and banking aspect of the corporation for which an honest and dedicated person is needed[;]
6. Being both technically and professionally qualified in the garment trade he is able to forecast trends and fashion before hand to enable sampling and production.

In addition to the description of the beneficiary's duties, the petitioner submitted an expert opinion from [REDACTED] Ph.D., and [REDACTED] Ph.D., of [REDACTED] dated January 3, 2003.

On February 21, 2003, the director requested additional evidence establishing that the beneficiary was employed in a capacity that was primarily managerial or executive in nature. The director requested specific documentation for the record, including evidence that the beneficiary would be employed in an executive capacity,<sup>1</sup> a breakdown of the beneficiary's hours and the time spent devoted to each particular duty, and information regarding the other employees of the U.S. entity, their positions, duties, and the hours they spent performing their duties.

On April 11, 2003, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. Counsel's response, which provided a detailed overview of the beneficiary's duties and the percentage of time devoted to each of these duties, also included an updated expert opinion prepared by [REDACTED] Ph.D.

On May 27, 2003, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director found that the evidence in the record did not demonstrate that the beneficiary was supervising a subordinate staff of qualifying personnel.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous. Specifically, counsel alleges that the director ignored the expert opinions submitted on behalf of the beneficiary, and erred by failing to follow the precedent set by the approval of the previous petition in this matter.

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a

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<sup>1</sup> The AAO notes that the petitioner claimed that the beneficiary was employed in a primarily *managerial* capacity, whereas the director's request for evidence requested evidence of his performance of duties in an *executive* capacity. Despite any labels given to a beneficiary's position, the Service Centers and the AAO analyze the beneficiary's duties for eligibility under both definitions.

managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Prior to adjudication of the petition, counsel contended that the beneficiary had been employed in a capacity that was primarily managerial in nature. In support of these contentions, counsel submitted a detailed response to the director's request for evidence, which included an affidavit from Shri Bhanu Joshi, the general manager of the foreign entity. The affidavit provided the following description of the beneficiary's proposed duties:

- Managing the entire import and wholesale department of our corporation;
- Managing and overseeing the work of other management employees in our corporation in the United States;
- Hiring and firing high level employees and supervisors; and handling the day to day operations and major responsibilities of [the petitioner].

In addition, a letter from the petitioner provided a breakdown of the beneficiary's duties in a forty-eight hour workweek, which demonstrated that the majority of his time has been spent coordinating production and supply through selling, formulation of all policies regarding import and export sections of the business, and planning and forecasting business relations.

The petitioner additionally provided a detailed description of the subordinate employees and their position requirements. The sales manager, who works thirty hours per week, is primarily responsible for going to appointments to book new orders and to report to the beneficiary on market timing. The assistant manager, who works twenty-five hours per week, is primarily responsible for general office work and paper work. There is no mention of the educational background of these employees, nor did the petitioner claim that either of these positions required a baccalaureate degree as a prerequisite to employment.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary was not employed in a primarily managerial or executive capacity. Specifically, upon review of the beneficiary's stated duties and the duties and credentials of his subordinate employees, it appears that the beneficiary is merely a first line supervisor. Despite the job titles given to the subordinate personnel, the beneficiary does not appear to be supervising other professional, managerial or supervisory employees.

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.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions 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).

In the instant case, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the customer service and administrative work of the assistant manager, who is among the beneficiary's subordinates. In addition, there is no mention of any educational prerequisite for the sales manager's position, which primarily entails booking new clients. Finally, there is no documentation in the record that indicates that these two employees supervise a staff of subordinate employees, thereby leading to the conclusion that the beneficiary is not supervising other managerial or supervisory employees. 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 the 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.

In addition, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner claims that his duties are "exclusively" managerial, yet the list of duties provided includes almost all non-managerial tasks. For example, the petitioner states that the beneficiary coordinates production and supply through sales, manages inventory and stocking, and is responsible for business expansion. It appears that in lieu of primarily performing managerial or executive functions, the beneficiary is in fact performing many of the same day-to-day tasks as his alleged subordinates. Although the assistant manager's position includes in its responsibilities the general office work and paper work, he is only employed with the U.S. entity for twenty-five hours per week and, of those hours, he devotes only sixteen hours to general clerical work. It is questionable, therefore, as to who conducts the general office duties during the sales manager's absence, since the sales manager is primarily out of the office at appointments. 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).

A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Id.* In this case, the supervised employees are not professional or managerial employees, as reflected by the record of proceeding. Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity, as required by 8 C.F.R. § 214.2(1)(3). For this reason, the petition may not be approved.

In addition, counsel for the petitioner asserts that the small number of employees in the U.S. entity unfairly prejudiced the director's decision. Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs

of the enterprise. 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, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a 4-year-old import and export company that claimed to have a gross annual income of \$394,226.00. The firm employed the beneficiary as president/executive manager, plus a sales manager and an assistant manager. The AAO notes that all of the employees have managerial or executive titles. The petitioner did not submit evidence that it employed any additional subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. 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 two managerial employees. Regardless, 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.

Counsel for the petitioner also alleges 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).

Finally, counsel contends that the director's disregard of the expert opinions submitted in support of the petition was erroneous. The AAO disagrees. While the opinions provided certainly show a diligent effort on behalf of the petitioner to provide a complete and thorough overview of the beneficiary's duties and his level of employment, the conclusion made by the doctors at Educated Choices LLC are merely persuasive, not definitive. Specifically, the expert opinions' conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp.

1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Upon review of the evidence in the record, the AAO concludes that the beneficiary will not be employed in a capacity that is primarily managerial or executive in nature. For this reason, the petition may not be approved.

Although not discussed by the director, the AAO notes that the record contains insufficient evidence that the petitioner has a qualifying relationship with the foreign entity. The stock certificate submitted indicates that [REDACTED] is the owner of the U.S. entity. This document contradicts the claim in the petition that [REDACTED] is the sole owner of the U.S. entity. Moreover, as general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. Therefore, for this additional reason the petition may not be approved.

In addition, the AAO notes that the stock certificate submitted is filled out incorrectly and is not supported by additional corroborating evidence. 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. 582, 591 (BIA 1988).

Finally, the AAO notes that the petitioner submitted its Forms 1120, Corporate Tax Returns, for the years 2000, 2001, and 2002. As required under 8 C.F.R. §214.2(l)(14)(ii)(d) and as requested by the director, a petitioner is required to submit evidence of wages paid to its employees in order to be eligible for a visa extension. The tax returns for all three years indicated that *no* wages or salaries were paid to any employees during these years, yet the petitioner claims that the beneficiary and two additional employees have been working for the U.S. entity in managerial capacities. These documents are contradictory and inconsistent with the petitioner's claim that the U.S. entity employs three individuals. 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.

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.

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**ORDER:**      The appeal is dismissed.