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



U.S. Citizenship  
and Immigration  
Services

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JUN 17 2005

FILE: EAC 01 243 54508 Office: VERMONT SERVICE CENTER Date:

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)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2000, and claims to be a distributor of automotive parts and accessories. The petitioner claims that the U.S. entity is an affiliate of [REDACTED] Company, located in Amman, Jordan. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its executive manager for a period of two years, at a yearly salary of \$80,000. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been or would be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will continue to be managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

*Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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 with 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 serves

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) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means 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), provides:

The term “executive capacity” means an assignment within an organization in which the employee primarily—

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter of support, dated July 26, 2001, the foreign entity’s president stated that the beneficiary’s position involved the management of the U.S. entity as follows:

[The beneficiary] has been employed in the position of executive manager that involves executive functions. As director of US operations, [the beneficiary] works closely with [the foreign entity’s] senior managers in Jordan in development of American markets. He evaluates and reviews US demands for various automotive parts and accessories that we distribute and advise the Jordanian management of any modifications in the products which he finds to be more marketable in the USA. He supervises implementation of marketing strategies, advertisement and promotional activities, in order to broaden US awareness of the products we distribute.

In response to the director’s request for evidence counsel described the beneficiary’s job duties as:

With regard to the managerial/executive nature of beneficiary’s duties within the US entity, please be advised that the beneficiary has been performing the following duties: directing distribution, purchasing and marketing operations for the company’s US affiliate . . . . He performs executive duties by selecting US customs and establishing a US client base, evaluating business options, financial aspects of business arrangement and quality of products offered by US sellers and profitability of these arrangements for the parent company overseas. He also evaluates US demand for parent company’s various products and advises Jordanian management of any modifications in these products which he finds to be more marketable in the USA.

[T]he beneficiary really performs managerial functions by establishing, proposing, developing and applying different aspects of business plans between US customers and Jordanian company and execute[s] all details of business arrangements and decisions pertaining to US affiliate business [sic].

With regard to a breakdown of his duties, [the beneficiary] spends 30% of each week working on the development of US market share by establishing, maintaining and developing a client base. He spends approximately 20% per week conferring about business details with the management of the foreign entity and maintaining business contacts with USA distributors as set forth above, and 20% overseeing distribution, as well as financial, marketing and promotional issues [sic].

He further spends 20% monitoring market response to their product lines, and 20% attending to normal managerial and financial responsibilities [sic].

In reference to a complete job description of all employees, please be advised that one administrative assistant was hired as of November 1, 2001. She spends 100% of her week performing normal administrative assistant's duties such as word processing, typing letters and maintaining beneficiary's calendar and files.

The director stated that, based upon the evidence, it appeared that the beneficiary has performed and will perform predominantly the duties of a customer service/sales representative, marketing representative, and purchasing agent rather than managerial or executive duties. The director also noted that the U.S. entity did not employ any person who has or would relieve the beneficiary from performing non-managerial functions associated with the company's distribution, purchasing, sales, marketing, and promotions activities. The director stated that it was difficult to understand how the beneficiary could perform predominantly managerial or executive functions when the only other employee, an administrative assistant, was solely responsible for word processing and typing.

On appeal, counsel argues that the beneficiary has performed and will perform the duties of a customer service representative, marketing representative, and purchasing agent. Counsel also argues that the beneficiary's job duties were clearly described in the letter of support dated July 26, 2001, and in the letter of support dated December 13, 2001. Counsel reiterates the beneficiary's job duties as described by the petitioner. Counsel argues that the duties described are equivalent to that of a branch manager as described in the Department of Labor's Dictionary of Occupational Titles. Counsel contends that the beneficiary's job duty description is identical to that which was submitted with a previous petition that was approved.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or will be employed in a managerial or executive capacity. The petitioner implies throughout the record that the U.S. entity is still in its developmental stages. In a letter of support dated July 26, 2001, the foreign entity's president stated, "...[the beneficiary] has had a great role in the expansion plans, and his continuing presence is essential to bring the expansion effort to a successful conclusion. It is anticipated that the expansion plans will be completed by December 2003." The record reveals that the petitioner has been doing business for more than one year. The petitioner does not qualify as a "new office" pursuant to 8 C.F.R. § 214.2(1)(3)(v)(C) which allows the petitioning business one year to become sufficiently operational. The fact that the petitioner is in a preliminary stage of organizational development does not relieve it from meeting statutory requirements. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel noted that Citizenship and Immigration Services (CIS) approved other petitions that had been previously filed on behalf of the beneficiary that contained the same information as provided in the instant petition. The director's decision does not indicate whether he reviewed details pertaining to the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same information as that contained in the current record, the approval would constitute clear 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).

Counsel asserts that in comparison to the definitions of "branch manager" and "sales manager" found in the Department of Labor's Dictionary of Occupational Titles, the beneficiary's job duties qualify as managerial activities. Contrary to counsel's contentions, the petitioner has not shown that the Department of Labor's description of a branch manager in the DOT has any bearing on this proceeding. The petitioner has not shown that the Department of Labor reserves the title of manager to those working in a managerial capacity as defined at section 101(c)(44)(A) of the Act. Further, the Department of Labor's Dictionary of Occupational Titles is not considered a primary source in evaluating the petitioner's eligibility for benefits and services and will not be considered as such in the adjudication of petitions or applications. CIS policy dictates that the petitioner's eligibility is primarily based upon statutory and regulatory interpretations. See 8 C.F.R. § 214.2(l)(14)(ii). Although the definitions may be useful as an aid in weighing the evidence of record, such evidence is not binding on any CIS officer as it merely indicates the Department of Labor's occupational definitions.

When examining the managerial or executive capacity of the beneficiary, the AAO will look first to the petitioner's description of the beneficiary's 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 addition, the position must involve significant authority over the generalized policy of an organization or a major subdivision of an organization, and the majority of the employee's duties must be at the managerial or executive level. In this matter, the evidence shows that the majority of the beneficiary's duties will be non-qualifying, functional duties rather than managerial or executive duties. Furthermore, there is insufficient evidence to demonstrate that the beneficiary possesses significant authority over the generalized policy of the organization or a major subdivision of the organization.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include: directing the distribution, purchasing, and marketing operations of the U.S. entity. 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.2d41 (2d. Cir. 1990).

The petitioner describes the beneficiary as being involved in the marketing, sales, purchasing, and distribution of the petitioner's and foreign entity's products. Since the beneficiary is directly involved in the sales, purchasing, distribution and marketing of the petitioner's product he is performing tasks necessary to provide a service or product, and these duties are not considered to be managerial or executive in nature. An employee

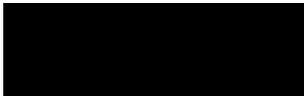
who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International, supra*. In the instant case, it appears that the beneficiary is an agent of the foreign entity rather than a manager of a division or function of the U.S. entity.

The record does not demonstrate that the U.S. entity contains the organizational complexity to support a managerial or executive staff position. The petitioner claims to employ two individuals. Counsel stated in a letter dated December 31, 2001, that the only other employee, an administrative assistant, had been hired by the U.S. entity on November 1, 2001. Counsel stated that the administrative assistant's duties consist of word processing, typing letters, and maintaining beneficiary's calendar and files. Although counsel asserts that a subordinate staff assists the beneficiary, the record does not establish that the subordinate staff is composed of supervisory, professional, 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. Furthermore, because there is no independent documentary evidence to substantiate the petitioner's claim that the subordinate relieves the beneficiary from performing non-qualifying duties, the beneficiary cannot be deemed to be primarily acting in a managerial or executive capacity.

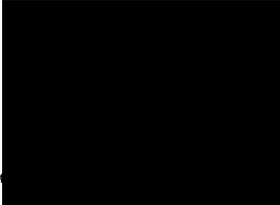
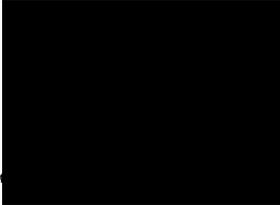
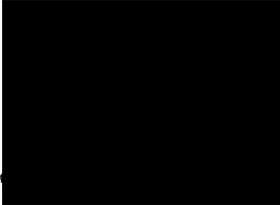
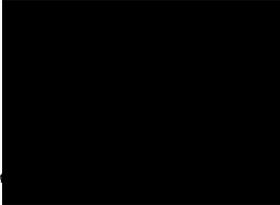
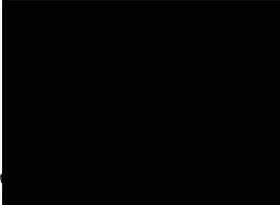
Although the petitioner claims that the beneficiary directs and manages the petitioner's sales, distribution, customer service, and marketing activities, there is no evidence to show that it has anyone on its staff to actually perform those functions. It is noted by the AAO that the administrative assistant was not hired by the U.S. entity until after the petition was filed on August 10, 2001. Thus, either the beneficiary himself is performing the sales, distribution, customer service, and marketing functions or he does not actually manage the functions as claimed by the petitioner. If the beneficiary is performing the sales, distribution, customer service, and marketing functions, the AAO notes that 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, supra*. For this reason, the petition may not be approved.

Beyond the decision of the director, the record is not persuasive in demonstrating that a qualifying relationship exists between the petitioner and a foreign entity as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner claims that the U.S. entity is an affiliate of the foreign entity. In a letter of support, dated December 5, 2001, the foreign entity's president provided the following breakdown of stock distribution for both the US and foreign entities.

**US ENTITY/FAQIR AND COMPANY, L.L.C.**

<u>NAME</u>	<u>% OF STOCK OWNED</u>
	50
	50

**FOREIGN ENTITY/AHMAD AL FAQIR COMPANY**

<u>NAME</u>	<u>% OF STOCK OWNED</u>
	30
	20
	20
	15
	15

The petitioner has failed to establish that there is an affiliate relationship between the U.S. and foreign entities as the record does not show that both entities are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity. Furthermore, there is insufficient evidence to show that a parent-subsidiary relationship exists between the U.S. and foreign entities. Although specifically requested by the director, the petitioner has failed to submit copies of stock certificates, stock ledgers, corporate meeting minutes, Notice of Transactions, or annual reports as proof of ownership and control. In addition, the petitioner has failed to establish that it has secured sufficient physical premises to house the office. The petitioner submitted as evidence a copy of a lease agreement, dated November 1, 2001, for the lease of a "cubicle." The petitioner also submitted copies of invoices dated October, November, and December 2001, which indicate that the petitioner paid \$500.00 monthly for "cube rental." There is no evidence to show that the "cubicle" is sufficient to house the petitioner's business as a distributor of automotive parts and accessories. For these additional reasons, 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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.