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U.S. Citizenship
and Immigration
Services

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File: EAC 05 240 52494 Office: VERMONT SERVICE CENTER Date: DEC 21 2007

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:



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa, and the Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will grant the motion and affirm its previous decision.

The petitioner filed this nonimmigrant visa 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 under the laws of the State of New York and alleges that it is a private express carrier service. The beneficiary was initially granted one year in L-1A classification to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The AAO affirmed the denial of the petition and dismissed the petitioner's subsequent appeal in a decision dated August 6, 2007. The AAO determined that the petitioner had not provided a sufficiently detailed position description to establish the beneficiary's employment in either a primarily managerial or executive capacity, and otherwise failed to establish that the U.S. company had grown to the point that it could support such a position during the first year of operations.

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, the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager. In support of this assertion, the petitioner submits a brief and additional evidence.

Counsel for the petitioner filed this timely motion to reopen and reconsider challenging the AAO's review of the record of proceeding, and its analysis and interpretation of the beneficiary's job duties. Counsel objects to the AAO's finding that "a beneficiary may not claim to be employed in a hybrid 'executive/managerial' capacity and rely on partial sections of the two statutory definitions." Counsel asserts that the beneficiary satisfies both definitions, and contends that nothing in the regulatory language suggests that the beneficiary's position cannot have both managerial and executive characteristics. Counsel submits a brief, an affidavit from the petitioner, and documentary evidence in support of the motion.

The regulation at 8 C.F.R. § 103.5(a)(2) states:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services (CIS)] policy. A motion to

reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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 petitioner established that 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.

The nonimmigrant petition was filed on September 2, 2005. In a letter dated August 31, 2005, the petitioner stated that the beneficiary would perform the following duties as president of the U.S. company:

1. Expanding business objective and developing organizational policies;
2. Setting up a working structure through hiring and supporting staff members;
3. Building up the company as a business window to expand company's business in [the] United States;
4. Coordinating functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives;
5. Making effort to develop and expand [the petitioner's] clients [sic] base in East Coast;
6. Directing and coordinating formulation of programs to provide funding for new or continuing operations to maximize returns on investments, and to increase profit of the company;
7. Initiating personnel actions, such as hiring, promotions, transfers, discharges, or disciplinary measures;
8. Travel overseas to coordinate business.

On September 12, 2005, the director requested evidence establishing that the beneficiary would be employed primarily in an executive or managerial capacity. Specifically, the director requested complete position descriptions for the beneficiary and his subordinate employees, an organizational chart for the United States operation, payroll information, and wage reports for the employees.

In response, the petitioner provided an organizational chart showing the beneficiary at the top of the organization directly supervising an assistant and an office manager. The assistant to the beneficiary was depicted as supervising "sales" and "accounting," while the office manager was portrayed as supervising a secretary, import personnel, export personnel, and pick-up delivery personnel. The petitioner did not identify any employees by name on the organizational chart.

The petitioner also provided job descriptions for the beneficiary and for eight subordinate employees. The beneficiary's job description was materially identical to the previously provided description with the addition of a breakdown detailing the percentage of time devoted to each duty. The petitioner also identified the names, working hours, and duties of eight subordinate employees, including a secretary, an assistant/office manager, a part-time data entry employee, a sales employee, and four drivers. The petitioner's employee list did not include "import personnel" or "export personnel," although such positions were identified on the organizational chart.

The director denied the petition on October 3, 2005, concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner submitted an organizational chart that was materially different from that submitted in response to the request for evidence. Counsel for the petitioner also indicated that the petitioner's secretary is in charge of the "export department," while the assistant/office manager is in charge of the "import department." Counsel argued that the director misconstrued the beneficiary's job duties, erred in relying on an out-of-date wage report, and overemphasized the small size of the petitioner's business in denying the petition.

The AAO dismissed the petitioner's appeal in a decision dated August 6, 2007. The AAO noted that the petitioner had not clearly indicated whether it intended to employ the beneficiary in a primarily managerial or executive capacity and noted that the petitioner cannot claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions at sections 101(a)(44)(A) and (B) of the Act. The AAO nevertheless addressed whether the beneficiary met the criteria for a personnel manager, a function manager, or an executive in its decision, and determined that the petitioner had not established that he would be employed in either a primarily managerial capacity or an executive capacity.

The AAO found that the petitioner's description of the beneficiary's duties was vague, nonspecific, and failed to demonstrate what the beneficiary would do on a day-to-day basis under the extended petition. The AAO also observed that several of the beneficiary's responsibilities, without further explanation, were indicative of an employee who performs administrative, operational and first-line supervisory tasks. The AAO found that the evidence of record did not establish that the beneficiary manages a subordinate staff of professionals, managers or supervisors, or an essential function of the organization. The AAO acknowledged the petitioner's claim that its assistant/office manager and secretary performed supervisory and/or managerial functions, but observed that the job descriptions provided for these employees indicated that they are actually primarily engaged in performing clerical and administrative tasks that had also not been shown to require the services of a professional. The AAO therefore found that the beneficiary would be acting as a first-line supervisor of non-professional employees. In analyzing whether the beneficiary would be employed in an executive capacity, the AAO once again emphasized the deficiency of the position description submitted, and the beneficiary's performance of non-qualifying administrative, operational and first-line supervisory tasks.

In support of the instant motion, filed on September 5, 2007, counsel for the petitioner submits a brief in which he challenges the AAO's decision on the grounds that the statute and regulations do not bar a beneficiary from performing both "executive" and "managerial" functions. Counsel asserts that the beneficiary meets the criteria for managerial capacity because he manages the U.S. entity, and manages, directly or indirectly, all functions of the company, including sales, exporting, importing, marketing and pickup and delivery functions. Counsel asserts that the petitioner began operating an e-commerce division in November 2005 and that the beneficiary has been managing both divisions of the company through subordinate managers, including "high level managerial staff, divisional managers, and departmental managers." Counsel further states that the beneficiary supervises professionals, including a Chief Legal Officer and Chief Financial Officer, and makes all personnel decisions within the company.

Counsel contends that the existing and newly-submitted evidence establish that the beneficiary meets all criteria for classification as an executive, as he has been "establishing the business goals, plans and policies," "exercising wide latitude in discretionary decision-making," and receiving only general direction from the company's shareholders. Counsel emphasizes that the petitioner only needs to establish that the beneficiary meets the criteria for either managerial or executive capacity, and not the criteria for both statutory definitions.

In support of the motion, the petitioner submits an affidavit from its current Vice President and Chief Business Officer, [REDACTED], who states that he was hired in November 2005, subsequent to the denial of the petition. He states that he was initially hired for the position of "Chief Logistics and Operations Officer" with responsibility for the company's export department, import department, and receiving, shipping and delivery

department. Mr. [REDACTED] indicates that at the time he was hired, "the company had just materialized a change in its managerial structure," resulting in the beneficiary managing Mr. [REDACTED] a contracted Chief Legal Officer, a Chief Administrative Officer [REDACTED], who was previously identified as a secretary), and a Chief Financial and Sales Officer. Mr. [REDACTED] affidavit includes an organizational chart which depicts a structure that is considerably more complex than that depicted in the company's previously submitted chart, and includes positions that did not exist at the time of filing. Mr. [REDACTED] discusses changes in the petitioning company's structure, ownership, and business activities, and emphasizes the growth of the petitioner's e-commerce division.

Mr. [REDACTED] states that the beneficiary has consistently been performing managerial and executive duties since he joined the petitioning company, and states that the job descriptions previously submitted for the beneficiary "are not specific enough, and to some extent not accurate from our point of view today." He states that the beneficiary has been performing the following duties:

- 1) Formulate plans and policies for the company's development and operations.
- 2) Analyze operations to evaluate performance of the company, its divisions, departments and staff in meeting objectives, and to determine areas of potential cost saving/reduction, program improvement, or policy change.
- 3) Appoint or hire division managers or department heads, and assign or delegate responsibilities to them.
- 4) Confer with board members, company officers, and staff members to discuss issues, coordinate activities, and resolve problems.
- 5) Coordinate the development and implementation of budgetary control systems, recordkeeping systems, and other administrative control processes.
- 6) Direct and coordinate the company's financial and budget activities in order to fund operations, maximize investments, and increase efficiency.
- 7) Direct human resources activities, including the approval of human resource plans and activities, the selection of officers, other high-level staff, and establishment and organization of major divisions and departments.
- 8) Establish divisional and departmental responsibilities, and coordinate functions among divisions and departments.
- 9) Implement corrective action plans to solve corporate, divisional or departmental problems.
- 10) Prepare and present reports concerning activities, expenses, budgets, government statutes and rulings, and other items affecting businesses or program services.
- 11) Perform other discretionary duties for the day-to-day management of the company.

In support of the motion, the petitioner submits copies of job offers to twenty-four outsourced employees located in China, which are dated between August 2005 and July 2007. The petitioner also submits copies of employment agreements with its contracted attorney and accountant.

Upon review, the petitioner has not submitted evidence on motion to overcome the prior decisions of the AAO or the director. The record does not establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

On motion, the only specific reference to the findings in the AAO's August 6, 2007 decision is counsel's objection to the AAO's statement that a petitioner cannot claim that a beneficiary is employed as a hybrid "executive/manager" and rely on partial sections of the statutory definitions for managerial capacity and executive capacity. To clarify, it is noted that in order to establish the beneficiary's eligibility for this visa classification, the petitioner must, at a minimum, establish that the beneficiary meets all four criteria for managerial capacity, *or* all four criteria for executive capacity, as set forth at sections 101(a)(44)(A) and (B) of the Act. The AAO did not dismiss the appeal based on the petitioner's failure to establish that the beneficiary qualifies as both a manager *and* an executive. Rather, the AAO considered whether he met the criteria for either employment capacity and determined that he would not be either performing primarily managerial or primarily executive duties.

As discussed at length and in considerable detail in the AAO's decision, the most critical deficiency in the record was the petitioner's failure to submit a detailed description of the beneficiary's position that clearly depicted exactly what it is he does on a day-to-day basis as the president of the petitioning company. While the AAO does not doubt that the beneficiary exercises authority over the U.S. company as its president, the petitioner has the burden of establishing that a majority of his duties would be managerial or executive in nature. This determination cannot be based on the beneficiary's job title, his supervision of subordinates, or a job description that is comprised of vague, conclusory assertions regarding the beneficiary's responsibilities. The actual duties themselves reveal the true nature of the employment. *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). The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

While the petitioner acknowledges in the instant proceeding that the previous job descriptions were "not specific enough" and "to some extent not accurate from our point of view today," the petitioner has not offered a more detailed description of the actual duties performed by the beneficiary as of September 2005, when the instant petition was filed. The job description submitted on appeal, while slightly longer in length, includes such general duties as "formulate plans and policies," "analyze operations to evaluate performance," "direct and coordinate financial and budget activities," "direct human resources activities," "establish divisional and departmental responsibilities," "perform other discretionary duties," and "implement corrective action plans." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has again failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. As noted above, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Counsel also addresses the beneficiary's job duties in general terms, and appears to be describing the beneficiary's duties within the context of the petitioner's organizational structure as of 2007. Counsel refers to the beneficiary's management responsibility for supervising and controlling "high level managerial staff, divisional managers, and departmental managers, both for the company's express courier business and its burgeoning e-commerce business." Counsel also refers to the beneficiary's responsibility for managing professional employees such as a chief legal officer and chief financial officer. At the time of filing, the petitioner was not organized into separate divisions or departments, and did not claim to employ a chief legal

officer or chief financial officer. As noted in the AAO's decision, the beneficiary's subordinates at that time included: a secretary whose duties included administrative and clerical tasks; an assistant/acting office manager whose duties included administrative tasks, planning and coordinating undefined "projects," and data entry; a sales employee; a part-time data entry employee; and four drivers. Although two of the beneficiary's subordinates were depicted as supervisors on the organizational chart, the AAO noted that neither employee's job description included any supervisory tasks. The petitioner has not submitted any additional evidence on appeal to establish that the beneficiary was in fact managing a staff of managers, professionals or supervisors at the time the petition was filed.

A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006)(citing *Matter of Cerna*, 20 I&N Dec. 399, 402 n.2. (BIA 1991). A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary 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). While the petitioner claims to have expanded its business activities and hired additional personnel subsequent to the denial of the petition, these factors have no bearing on a determination of the beneficiary's eligibility as of September 2005 and thus will not be considered on motion. Nor has the petitioner presented any evidence that could be considered "new" for purposes of a motion to reopen. Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹ Evidence that the petitioner hired additional employees in the two years subsequent to the denial of the petition is not "new" evidence.

Overall, the majority of the arguments and evidence provided on motion do not address the AAO's specific reasons for rejecting the petitioner's claims and dismissing the appeal. Therefore, neither counsel nor the petitioner has persuaded the AAO that its determination was incorrect based on the evidence presented at the time of filing and in response to the directors' request for evidence. Such evidence included only a vague description of the beneficiary's duties and showed that he supervised a staff comprised of a secretary, an assistant/office manager, four drivers, one sales employee and one part-time data entry employee. The petitioner now claims to have established an import/export department, logistics department, accounts payable/receivable position, and other positions just shortly after the petition was filed, but still has not explained how the beneficiary was relieved from engaging in the day-to-day operations of the company given the staffing structure at the time of filing.

Although a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in approving a visa for a multinational manager or executive (*see* § 101(a)(44)(C) of the Act), it is appropriate for USCIS 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

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." *Webster's II New Riverside University Dictionary* 792 (1984) (emphasis in original).

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). In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner had not reached the point where it could employ the beneficiary in a predominantly managerial or executive position at the end of its first year of operations.

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 did not establish this essential element of eligibility.

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary would be primarily performing managerial or executive duties under the extended petition, as of the date the petition was filed. The petitioner has not submitted evidence on motion to overcome the prior determination made by the AAO.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met.

ORDER: The AAO's decision dated August 6, 2007 is affirmed.