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U.S. Citizenship
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Services

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File: WAC 03 229 53628 Office: CALIFORNIA SERVICE CENTER Date: **FEB 10 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president and chief executive officer as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that is engaged in importing and **marketing products** manufactured by its parent company. The petitioner claims that it is the subsidiary of [REDACTED] located in Mumbai, India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and subsequently granted a three-year extension of stay. The petitioner now seeks to extend the beneficiary's status for an additional three 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 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 asserts that the director inappropriately emphasized the number of subordinates supervised by the beneficiary, rather than his actual job duties or his level of authority within the organization. Counsel submits a brief and photocopies of previously submitted evidence in support of the appeal.

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 issue in the present matter is whether the petitioner established that the beneficiary will be employed by the United States entity in a 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 petition was filed on August 6, 2003. The petitioner indicated on the Form I-129 petition that it employs "2+" people with gross annual income of approximately \$160,000. The petitioner stated on the petition that the beneficiary's duties during the last three years included:

Marketing the companies [sic] products in the U.S.A. and other countries. In charge of overall administrative, financial and legal matters of the U.S. company. Responsible for developing and coordinating all future ventures in the U.S.A.

The petitioner stated that the beneficiary's proposed duties under the extended petition would include the following:

International marketing and in charge of making key decisions related to finance, project and new ventures. Work hand in hand with the parent company to trouble shoot any major issues or negotiations. Develop and coordinate future ventures.

In a letter dated August 4, 2003, the petitioner stated that the beneficiary performs the following duties as the company's president/chief executive officer:

[H]e has been responsible for the international marketing of the company products, key financial decisions and responsible for new projects and ventures. He has the Vice-President to assist him and has retained legal and accounting professional services to ensure compliance with the legal and accounting/tax requirements.

In a letter dated August 5, 2003, counsel stated that the beneficiary "has devoted all his time in working for the subsidiary" and has been in charge of the "day to day operation [of the petitioner] and got it established on a sound footing to expand its customer base." Counsel further described the beneficiary's duties as follows:

[The beneficiary] has complete discretionary authority to run and manage the U.S. subsidiary and make all decisions in regard to the purchase, sale and market [sic] the [foreign entity's] products. He has sought professional and clerical services to run the Company in U.S.A. and keep the Parent Company advised of progress by submitting reports at a regular interval.

On November 4, 2003, the director issued a request for additional evidence (RFE), in part, to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company. Specifically, the director requested: (1) the total number of employees in the U.S. company; (2) a copy of the U.S. company's organizational chart listing all employees by name and job title and including a brief description of job duties, educational level and annual salaries and wages for all employees under the beneficiary's supervision; (3) a more detailed description of the beneficiary's duties in the United States, including the percentage of time the beneficiary spends on each of the listed duties; (4) the petitioner's payroll summary, Forms W-2 and W-3, evidencing wages paid to employees; and (5) the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage and Withholding Report, for the last four quarters.

In a letter dated January 22, 2004, the petitioner provided the following expanded description of the beneficiary's duties in the United States:

[The beneficiary] has complete and discretionary authority to run and manage the U.S. subsidiary and make all necessary key decisions related to sales, purchases, marketing efforts and over-all operations of the business. Furthermore, [the beneficiary] works hand in hand with the parent company and other Marketing Manager to trouble shoot [sic] any major issues or negotiations. [The beneficiary] also develops ... and coordinates future ventures such as the current joint venture with KAPS Investment, Inc. wherein the parent company is in the process of forming a joint venture by the name of SDK International to be engaged inter-alia in the trading of agreed products. . . . Furthermore, [the beneficiary] will establish new goals and policies, have the authority to hire and fire and will receive only general supervision from the other Directors. [The beneficiary] will spend approximately 60% of his time reviewing proposed new projects and meeting with management to come up with key decisions. Approximately 40% of his time will be spent in heading the international marketing efforts

The petitioner stated that the U.S. company employs four individuals and utilizes the services of two independent contractors for accounting and computer networking. The petitioner attached an organizational chart depicting the beneficiary over the vice-president, international marketing. The chart shows that the vice-president supervises a commercial manager, who in turn supervises a sales executive/secretary. The petitioner indicated that the vice president of international marketing is the beneficiary's only direct subordinate, and is responsible for the marketing efforts in North America, South America, Central America and Canada, analyzes marketing trends, designs market strategies to penetrate targeted regions, and establishes the brand image for the company's products.

The petitioner's California Form DE-6, Wage and Withholding Report, for the third quarter of 2003 shows that the petitioner employed two employees in July and August 2003, the month in which the petition was filed, and three employees in September 2003. The three employees listed on the Form DE-6 are: the vice president, international marketing, who received wages of \$4,710; the commercial manager, who received wages of \$1,800; and the beneficiary, who received \$6,000. The petitioner's Forms DE-6 for the previous three quarters showed the vice president as the petitioner's only employee, although it appears the employee identified as the "commercial manager" worked for the company during the first half of 2002. The petitioner submitted an unsigned, undated IRS Form W-4, Employee's Withholding and Allowance Certificate, for the individual identified as "sales executive/secretary." The petitioner stated that the beneficiary has been remunerated by the foreign entity and is not on the U.S. company's payroll.

In a decision dated March 4, 2004, the director denied the petition, concluding that the petitioner had not established that the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition. The director observed that the petitioner had provided a broad and general job description which failed to convey the nature of the beneficiary's actual duties. The director also noted that the petitioner employed only two other employees who had not been shown to be employed in professional, managerial or supervisory positions. The director further determined that the beneficiary would likely be directly providing

the services of the business. Overall, the director found insufficient evidence to establish that the beneficiary's duties would be primarily managerial or executive.

On appeal, counsel for the petitioner asserts that the petitioner provided a detailed description of the beneficiary's job duties and an organizational chart that evidences the level of the beneficiary's authority. Counsel contends that the director placed undue emphasis on the number of employees supervised by the beneficiary, incorrectly determined that the beneficiary only had two subordinates, and denied the petition solely on this basis. Counsel further asserts that the director failed to take into account the foreign company's organizational chart and other evidence demonstrating that the overseas company employs 340 employees, including four directors who report to the beneficiary, and eight other branch offices in addition to the U.S. company and the corporate office in India.

Counsel disagrees with the director's determination that the beneficiary's job description was overly broad and general and asserts that the petitioner submitted sufficient evidence to establish that the beneficiary "will only be heading the marketing efforts in the U.S. as well as over-seeing new projects and ventures."

Counsel notes that the petitioning company was established in 1999, has employed over eight employees, and "has the capacity of employing more employees in managerial capacities," noting that employees "have come and gone." Counsel emphasizes that the Immigration Act of 1990 "made it very clear that [United States Citizenship and Immigration Services (USCIS)] may not discriminate between functional managers and managers who over personnel." Counsel contends that "IMMACT 90 allows an individual to act as a 'functional' manager and supervise employees so long as they are professionals. Counsel also notes that USCIS must take into account the reasonable needs of the organization, component or function in light of the overall purpose and stage of development of the organization, component or function" when analyzing the petitioner's staffing levels. Counsel emphasizes that as a subsidiary of a multimillion-dollar publicly traded parent company, the petitioner has a reasonable need for a president to head the U.S. company and maintain close contact with the parent company. Counsel cites several unpublished AAO decisions in support of his assertion that the number of employees subordinate to the beneficiary should not be determinative in determining whether he is employed in a managerial or executive capacity. In support of the appeal, the petitioner submits copies of previously submitted documents, as well as its IRS Forms W-2, Wage and Tax Statement, for 2000, confirming employment of eight employees during that year.

Upon review of the record, 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.*

As a preliminary matter, the AAO notes a discrepancy in the record with respect to the nature of the beneficiary's role with the U.S. company and the extent of his involvement in or management over its day-to-day operations. The petitioner has offered the beneficiary a full-time, temporary position as its president and chief executive officer. As noted above, counsel for the petitioner has stated that the beneficiary "has devoted all his time in working for the subsidiary" and has been "in charge of the day to day operation" of the

petitioner. However, USCIS records indicate that the beneficiary has been entering the United States only occasionally as a B-1 nonimmigrant visitor, notwithstanding this most recent L-1A petition approval valid from August 6, 2000 until August 6, 2003.¹ It is unclear how the beneficiary could be devoting all of his time to working for the U.S. company, or be in charge of the day-to-day operation, as stated by counsel. 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). 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. *Id.* at 591.

Furthermore, the petitioner's initial description of the beneficiary's duties was brief and did not clearly depict a position that would involve primarily managerial or executive duties. The petitioner stated that the beneficiary "has been responsible for the international marketing of the company products, key financial decisions and responsible for new projects and ventures." The petitioner did not describe with any detail the nature of his marketing activities, or describe the new projects and ventures for which the beneficiary would be responsible. Given that the petitioner initially only claimed to employ a vice president and external legal and accounting service providers to assist the beneficiary in the operation of the U.S. company, this position description fell significantly short of establishing that he would be employed in a qualifying capacity. 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).

Accordingly, the director requested a more detailed description of the beneficiary's duties in the United States, including the percentage of time the beneficiary spends on each of the listed duties. While the petitioner submitted a response to the RFE, the slightly expanded position description merely paraphrased portions of the statutory definitions of managerial and executive capacity and did not approach the level of specificity requested by the director. For example, the petitioner stated that the beneficiary "has complete and discretionary authority to run and manage the company," "will establish new goals and policies," "have authority to hire and fire," and "will receive only general supervision from the other Directors." 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. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner also provided an overly-broad breakdown with respect to how the beneficiary's time would be allocated among his various duties. The petitioner stated that the beneficiary will devote 60 percent of his time to "reviewing proposed new projects and meeting with management to come up with key decisions" and 40 percent of his time to "heading the international marketing efforts." Again, the petitioner failed to describe with any detail the "proposed new projects," nor did it identify with whom the beneficiary would meet to

¹ The beneficiary was in the United States in B-1 status from April 29 2001 until May 11, 2001, from January 21, 2002 until February 1, 2002, and from July 6, 2003 until July 29, 2003. USCIS records reflect that the beneficiary was issued a new B-1 nonimmigrant visa on October 21, 2001.

“come up with” key decisions, or explain what specific managerial or executive tasks are associated with “heading marketing efforts.” The AAO will not accept a vague, generalized position description and speculate as to what specific managerial or executive duties the position may entail. 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 failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Although the petitioner asserts that the beneficiary is managing a subordinate staff, 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. At the time the petition was filed, the petitioner claimed to employ the beneficiary, the vice president and external legal and accounting service providers. While the Form DE-6 for the third quarter of 2003 depicts a third employee, it has not been established that this employee, or any other employees, were working for the petitioner at the time of filing. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Notwithstanding the vice president's position title, the brief position description provided for this employee suggests that he will be performing general marketing duties. The petitioner has not established that he was supervising a subordinate staff or managing a function for the petitioner at the time the petition was filed. In fact, he appears to have been the only full-time employee of the company and would have necessarily been performing a number of operational and administrative tasks in addition to his marketing duties. The AAO is not persuaded that the beneficiary would manage a subordinate staff of managerial, supervisory or professional employees. Although counsel suggests on appeal that the director should have taken into account the foreign entity's large staff in determining whether the beneficiary would be employed in a qualifying capacity for the petitioner, the AAO can find no evidence in the record of the role of the foreign employees in contributing to the operation of the U.S. entity, and therefore, the petitioner has not established that these employees should be taken into account when analyzing the beneficiary's proposed employment capacity in the United States.

The term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an “essential function” within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term “essential function” is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. While counsel puts forth on appeal the claim that the beneficiary manages an essential function, he does not identify the essential function managed by the beneficiary or articulate the amount of time the beneficiary devotes to managing a function. The unsupported assertions of counsel 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).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. Here, the petitioning company, as of the date of filing, appears to have been comprised of a single full-time employee, with the beneficiary making occasional entries to the United States as a business visitor. As discussed above, the petitioner's claim that it currently has a reasonable need for a full-time executive in the United States is not supported by the record, and the beneficiary's actual role with respect to the U.S. company remains unclear. The most critical deficiencies in the evidence do not pertain to the small size of the company, but to the petitioner's failure to provide a specific description of the beneficiary's duties and a credible account of the nature of his role in the company as it is currently staffed. While the petitioner claims that two additional employees have been hired and that the company is capable of supporting additional staff, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

The AAO acknowledges that USCIS previously approved an L-1A extension petition previously filed on the beneficiary's behalf in 2000. If the previous nonimmigrant petition was approved based on the same unsupported 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, the AAO notes that, based on the evidence submitted with the current petition, it appears that the petitioner has undergone a significant decrease in staffing levels subsequent to the approval of the beneficiary's initial L-1A extension request in 2000, when the company employed as many as eight employees. As noted above, the petitioner, as of the date of filing the instant petition, had one full-time employee. Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous petition approval by denying the instant petition.

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.

ORDER: The appeal is dismissed.