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File: LIN 04 053 50543 Office: NEBRASKA SERVICE CENTER Date: **OCT 18 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:
[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 Director, Nebraska Service Center, denied the petition for a nonimmigrant visa, and upheld the denial after granting a subsequent motion to reconsider. 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 director 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 Nebraska that is engaged in health care staffing. The petitioner claims that it is an affiliate of [REDACTED] and [REDACTED] located in Ghaziabad, India. The beneficiary was initially granted a six month period of stay to open a new office in the United States and was subsequently granted an additional two year extension. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Counsel for the petitioner filed a motion to reopen and/or reconsider, which was granted by the director. Counsel asserted that the director's denial was erroneous based on the previous approvals in this matter. The director disagreed, and affirmed the denial.

The matter is now before the AAO on appeal. On appeal, counsel for the petitioner contends that the director erred by finding that the beneficiary would not be employed in a primarily managerial or executive capacity, particularly in light of the prior approvals. In addition, counsel alleges that the beneficiary has met the statutory requirements in that he operates as a function manager, thus satisfying the regulatory requirements of managerial capacity. In support of these contentions, counsel submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

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

With the initial petition, the petitioner submitted a letter dated December 4, 2003 which provided an overview of the beneficiary's position in the United States. The letter explained that the beneficiary was the petitioner's executive officer and that he supervised and oversaw the daily operations of the petitioner. With regard to his duties, the petitioner stated:

Specifically, on a day to day basis [the beneficiary]:

- Directs, plans, and implements policies and objectives of the business in accordance with charter and board of directors.
- Analyzes operations to evaluate performance of the company and to determine areas of cost reduction and program improvement.
- Confers with board members to establish policies and formulate plans.
- Reviews financial statements and sales and activity reports to ensure that the company's objectives are achieved.
- Directs and coordinates activities of the business by contacting, negotiating, and entering into contracts with healthcare organizations for nurses.
- Establishes internal control procedures and nurse criteria.
- Presides over or serves on board of directors, management committees, or other governing boards.

The director found this initial evidence to be insufficient, and consequently issued a request for evidence (RFE) on January 26, 2004. The RFE requested the petitioner to submit additional information that established that the beneficiary would function in a capacity that was primarily managerial or executive. Specifically, the director requested a detailed and comprehensive description of the beneficiary's duties, an overview of his position in the organizational hierarchy of the petitioner, the percentage of time he devoted to each of his duties, and the duties and roles of his subordinates.

In a response dated February 26, 2004, the petitioner, through counsel, submitted the requested information. The petitioner indicated that the beneficiary filled all the responsibilities of a chief executive officer, and provided the following updated description of the beneficiary's duties:

- Formulation of strategic and operational mandates for [the petitioner]
- Budgeting and resourcing of corporate funds
- Negotiating with clients and prospective clients
- Supervision of all personnel, including the hiring and firing of staff
- Execution and evaluation of business operations
- Overseeing compliance of all Federal and State statutes as applied to the business of [the petitioner]
- Other management duties

With regard to the amount of time the beneficiary devoted to each of these duties, the petitioner stated:

The approximate proportion of time allocated to the strategic component (i.e. budgeting and re-sourcing, negotiating with clients, etc.) is 40%. The operational component, i.e.,

supervision of staff, hiring and firing, compliance issues, etc., generally consume about 40% of time available. The rest of the 20% is divided up as required by business conditions. The number of hours devoted weekly to [the petitioner] is 48-55 hours.

The petitioner also described the structure of the organization and explained that the beneficiary reported only to the president. The petitioner further explained that there are two employees in the U.S office and two employees abroad. The beneficiary, the petitioner contended, oversaw these four employees and explained that there were two divisions within the petitioner: administrative services and human resources. Although the petitioner did not specifically state which employees worked in the U.S. office, he identified a vice president, two administrative assistants, and a data entry clerk. Although the petitioner did not specify which employees were stationed in the United States, it appears from his description of duties for the vice president, which include "reporting to [the U.S.] office," that the vice president is stationed abroad.

On April 14, 2004, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization. The director further concluded that the beneficiary was performing the tasks necessary to provide the petitioner's goods and services since the evidence indicated that the beneficiary would be performing numerous marketing and sales functions. Finally, the director concluded that the beneficiary was merely a first line supervisor and not a manager or executive as required by the regulations.

On motion, counsel asserted that the director's denial was erroneous, and that deference should be afforded to the previous approvals granted on behalf of this beneficiary. In addition, counsel asserted that the beneficiary was in fact managing an essential function of the petitioner and thus satisfied the regulatory requirements for managerial capacity.

The director found these arguments unpersuasive and affirmed the previous denial. Counsel now raises the arguments first introduced on motion on appeal.

Upon review, counsel's assertions are not persuasive. Although counsel focuses on two key points in her appeal brief, namely that the director erred by disregarding prior approvals and that the beneficiary qualifies for status by virtue of his management of an essential function, the AAO will first review the beneficiary's stated duties. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is a manager by virtue of his position title, experience, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed managerial duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The description of the beneficiary's duties, provided in the initial letter of support as well as in response to the director's request for evidence, is vague and seems to merely paraphrase the regulatory definitions. Specifically, the identification of duties such as "directs, plans, and implements policies and objectives of the

business," "formulation of strategic and operational mandates," and "other management duties" did little to clarify what the beneficiary does on an average workday. In fact, some of these duties are extremely similar to the executive duties set forth in Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). In response to the request for evidence, a more detailed discussion of the petitioner's organizational structure was submitted, which indicated that the beneficiary oversaw an administrative assistant and a data entry clerk while negotiating all contracts and handling the recruitment of nurses. Essentially, the petitioner claims that the beneficiary enters into contracts with clients, solicits new clients, recruits nurses, handles the corporate budget and payroll, and establishes internal control policies. Furthermore, the petitioner alleges that 40% of the beneficiary's time is devoted to this strategic component of the company. With the beneficiary spending such a large percentage of his time dealing personally with clients and attempting to solicit new clients in addition to handling payroll matters and budget questions, and with 20% of his time undefined, with as much as 11% or more possibly devoted to non-qualifying duties, it appears the beneficiary is performing the majority of the necessary functions required to generate the goods and services of the business. The actual duties themselves reveal the true nature of the employment. *Id.* In reviewing the beneficiary's stated duties, it appears that the majority of his time is devoted to the company's recruitment, marketing, and financial functions. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, the AAO notes that for the first time on appeal, counsel asserts that the beneficiary is acting as a function manager by way of overseeing the nurses. This assertion is not persuasive. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Furthermore, although asked for a more comprehensive description of the beneficiary's duties in the request for evidence, counsel failed to include this seemingly important role of the beneficiary in her response. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The petitioner further claims that the beneficiary oversees a subordinate staff, specifically, the vice-president, two administrative assistants, and a data entry clerk. The record indicates that the vice president and one of the administrative assistants are in India; therefore, it appears that the beneficiary merely oversees at most one administrative assistant and one data entry clerk. 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. It is noted that in this case, the petitioner contends that the beneficiary devotes 40% of his time to the supervision of staff, a claim which appears unlikely given that the supervision of staff is not the only operational duty listed.

The petitioner did not provide the level of education required to perform the duties of the administrative assistant or the data entry clerk. By virtue of their titles alone, it is presumed that these positions are non-professional as the description of their duties clearly indicates that they perform administrative and support functions. Thus, the petitioner has not established that these employees require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. In fact, the petitioner's claim is that the beneficiary supervises the vice president and another administrative assistant in India as well, but does not clarify how this is accomplished with the time difference and distance between them and the apparent issue of which company actually employs these two individuals, the petitioner or the foreign entity. 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).

Counsel's main argument on motion and again on appeal is that the director disregarded policy by denying the petition in light of the two previously granted petitions on behalf of the beneficiary. Counsel asserts that a memo by William R. Yates, Associate Director for Operations, dated April 23, 2004 clearly instructed service center directors to give deference to prior determinations when adjudicating petitions for extensions involving the same parties and same underlying facts. Counsel asserts that all facts remain the same and the employment situation of the petitioner has likewise remained constant. The director, however, found counsel's reliance on this memorandum unpersuasive and noted that, when a material error is involved, deference need not be given to prior approvals.

The AAO concurs with the director's conclusions. The evidence in the record pertaining to the beneficiary's duties is insufficient to show that the beneficiary has satisfied the regulatory requirements for managerial or executive capacity. By the petitioner's own admission, the beneficiary spends 40% of his time dealing directly with clients and the public by negotiating contracts, soliciting new clients, and handling fiscal operations of the company and 20% of his time devoted to undefined and unassigned duties. None of these duties are incorporated in the regulatory definitions of managerial or executive capacity. Likewise, an additional 40% of the beneficiary's time is supervising a non-professional, non-supervising staff of subordinates, both of whom merely perform secretarial or administrative functions. The beneficiary, therefore, is not overseeing professional, managerial, or supervisory employees as required by the regulatory definitions. Moreover, the petitioner has failed to show that the beneficiary oversees a salesperson, a marketing associate, a bookkeeper, or other similarly qualified person to relieve the beneficiary from devoting a majority of his time to non-qualifying duties. Clearly, the prior approvals in this matter constituted material error in that the preponderance of the beneficiary's duties were non-qualifying and therefore directly contradictory to the regulatory requirements.

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). The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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).

Beyond the decision of the director, the petition also may not be approved because there is insufficient evidence of a qualifying relationship between the petitioner and the foreign entity. The petitioner claims that it is an affiliate of the foreign entity, and its Articles of Incorporation, dated October 11, 1999, indicate that 10,000 shares of stock at a par value of \$1.00 per share were authorized. The petitioner corroborated its claimed relationship by submitting stock certificates dated October 15, 1999 which indicate that the foreign entity owns 6,000 shares and a second shareholder, identified as [REDACTED], owns 4,000. However, the petitioner also submitted what it refers to as "recent" share certificates, dated September 25, 2002, which indicate that the foreign entity owns 8,500 shares and [REDACTED] owns 1,500. It is unclear whether the ownership interests have been revised or whether additional shares of stock have been issued in addition to the initial 10,000 authorized.

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.

As stated above, the stock certificates dated September 25, 2002 directly contradict the ownership interests set forth on the stock certificates dated October 15, 1999 and outlined in the extracts of the meeting minutes dated September 8, 1999. 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). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.