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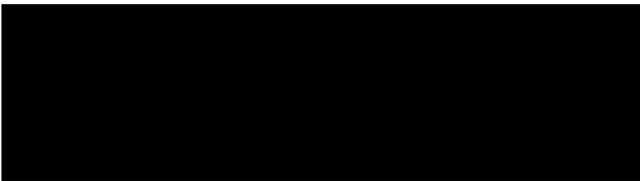
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FILE: SRC 05 139 52316 Office: TEXAS SERVICE CENTER Date: **DEC 22 2006**

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, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a Georgia limited liability company, claims to be in the international marketing and employment business. The petitioner states that it is an affiliate of [REDACTED] and [REDACTED] located in Bulgaria. Accordingly, the United States entity petitioned U.S. Citizenship and Immigration Services (USCIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The beneficiary was initially granted a one-year period of stay to open a new office in the United States and was subsequently granted an extension of status. The petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of general manager.

The director denied the petition concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a managerial or executive capacity. The director noted that the U.S. company did not have a "sufficient support staff to relieve the beneficiary from having to perform non-qualifying duties."

On appeal, counsel for the petitioner notes that this is the petitioner's second request for an extension on behalf of the beneficiary and requests that the director follow the instruction provided in a U.S. Citizenship and Immigration Services (USCIS) memorandum written by William R. Yates, Associate Director of Operations dated April 23, 2004. Counsel for the petitioner asserts that since there has been no material change in circumstances since the approval of the first extension, the director must give deference to the earlier L-1 approval as noted in the memorandum. Counsel submits a brief and supporting documentation in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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 to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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.

The nonimmigrant petition was filed on April 19, 2005. The Form I-129 indicates that the beneficiary will be employed in the position of general manager for the petitioner. The beneficiary's proposed duties in the U.S. are described as the following: "manage operations of international [marketing] & [employment] firm." The petitioner indicated that the current number of employees in the United States is three. In a letter dated April 18, 2005, counsel for the petitioner stated that the beneficiary "has broad managerial control and authority over the development and implementation of policy and procedures," "oversees operations at a senior level within the organization's hierarchy," and "exercises discretion over the day-to-day operations of the marketing, recruitment and business development functions."

On April 25, 2005, the director determined that the petitioner did not submit sufficient evidence to process the petition. The director requested that the petitioner submit additional evidence in support of its petition. In part, the director requested the following: a definitive statement for the position the beneficiary will occupy in the United States including a list of all duties, the percentage of time spent on each duty, the number of subordinate managers/supervisors or other employees who would report directly to the beneficiary and a description of their job duties, and the qualifications required for the position to be held by the beneficiary. In addition, the director requested a copy of the U.S. company's organizational chart.

In response to the director's request for evidence, the petitioner submitted a detailed job description for the duties that will be performed by the beneficiary. The duties are as follows:

- Manages the business and controls how the organization operates. (60%)
- Planning and administering international programs (5%)
- Develops corporate structures and policies (2%)
- Directs and coordinates employees activities (2%)
- Finds and develops alliances with suitable business partners, raises money to grow her organizations, and makes systematic changes, as needed, to keep her businesses profitable. (3%)
- Brings a measure of order and purpose to her organizations. (1%)
- Communicates the value of her organization to the outside world, marketing, strategy, and goals. (2%)
- Sets project goals (2%)
- Makes hiring decisions (1%)
- Provides leadership and coordination of services for international students and programs, including advisement and monitoring of U.S. and UK government regulations and policies for non-immigrants. (3%)
- Develops and oversees programs to provide international experience opportunities for European students and faculty including international exchange and study abroad. (5%)
- Develops and monitors international agreements, evaluates programs, and promotes international opportunities with US employers and companies (3%)
- Represents the company and participates in regional, and national professional and organizations for international exchange. (1%)

- Participates in the establishment, organization, and implementation of short- and long-range goals, objectives, policies, and operating procedures; monitors and evaluates program effectiveness and effects changes required for improvement. (2%)
- Supervises staff support personnel, to include recommendations for hiring, firing, performance evaluation, training, work allocation, and problem resolution. (1%)
- Manages the annual budget planning process and regularly monitors expenditures (1%)
- Oversees the implementation and operation of the U.S. government SEVIS (Student and Exchange Visitor Information System) at the Universities overseas and ensures compliance with federal regulations and policies. (1%)
- Represents the company to various institutional divisions/departments as well as externally to governmental agencies. (1%)

The petitioner also submitted an organizational chart of the U.S. company and a brief job description for both of the beneficiary's subordinates. The organizational chart for the U.S. company indicates that the beneficiary will supervise a vice president and a bookkeeper. The chart also indicates that the beneficiary and the two additional employees will supervise the international exchange department which handles summer programs, student exchange programs and seasonal worker programs; and the marketing department; and the staffing services department. According to the brief job descriptions, it appears that the vice president will assist the beneficiary and will oversee the marketing operations of the U.S. company, and the bookkeeper will direct and manage the "financial programs and supporting information systems of the company, to include budgeting, receipt of revenue, expenditure of funds, and conservation of assets."

The director denied the petition on August 30, 2005 on the ground that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director also noted that the evidence does not support a finding that the petitioner will be supervising a subordinate staff of professionals or managers.

On appeal, on the Form I-290B, counsel for the petitioner asserts the following:

1. The examiner erred in failing to defer to a prior determination of eligibility. The instant application was for a second extension of stay.
2. The examiner failed to consider the substantial evidence submitted of the managerial nature of the beneficiary's position, including the evidence of the employees and contractors in the US and abroad.
3. The examiner erred in finding that the position in question was not managerial in nature.

Counsel also submits a brief indicating that the beneficiary has been granted L-1A nonimmigrant status from April 2002 until April 2005 and "there has not been a material error, substantial change in circumstances, or new material information in the petition filed to extend the L-1A nonimmigrant status on behalf of the beneficiary." Counsel for the petitioner requests that the director follow the guidelines for adjudicating a second extension for L-1A status as outlined in a USCIS interoffice memorandum by William R. Yates, Associate Director for Operations dated April 23, 2004. Counsel for the petitioner quotes the following from the memo:

In matter relating to an extension of nonimmigrant petition validity involving the same parties (petitioner and beneficiary) and the same underlying facts, a prior determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification sought should be given deference... [A] material error, a substantial change in circumstances, or new material information must be clearly articulated in a request for evidence or decision denying the benefit.

Memorandum of William R. Yates, Associate Director for Operations, USCIS, *The Significance of a Prior CIS Approval on a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity* (April 23, 2004) (“Yates Memorandum”).

Counsel's reliance on the Yates Memorandum is misplaced. Counsel's assertion is not persuasive. It must be emphasized that each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

While CIS approved two other petitions that had been previously filed on behalf of the beneficiary, the prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). If the previous nonimmigrant petitions filed by the petitioner's predecessor company were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. Due to the lack of evidence of eligibility in the present record, the AAO finds that the director was justified in departing from the previous approvals by denying the present request to extend the beneficiary's status. As discussed below, the evidence submitted fails to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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). CIS memoranda merely articulate internal guidelines for CIS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.” *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

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).

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

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner's description of her proposed duties suggest that the beneficiary's actual duties include a number of non-managerial and non-executive duties.

The beneficiary's proposed job description, while lengthy, is comprised of vague duties such as the beneficiary "manages the business and controls how the organization operates," "develops corporate structures and policies," "brings a measure of order and purpose to her organizations," and "participates in the establishment, organization, and implementation of short- and long-range goals, objectives, policies, and operating procedures; monitors and evaluates program effectiveness and effects changes required for improvement." The petitioner does not explain how the beneficiary will perform these requirements or what specific tasks are involved. The AAO will not speculate as to what specific tasks the beneficiary performs to "manage the business" or "control how the organization operates." Since this broad responsibility accounts for 60 percent of the beneficiary's time and has not been explained in any detail, it is impossible to determine that the beneficiary's duties are primarily managerial or executive in nature. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the job duties required of the beneficiary include non-qualifying duties such as the beneficiary "finds and develops alliances with suitable business partners, raises money to grow her organizations, and makes systematic changes, as needed, to keep her businesses profitable," "communicates the value of her organization to the outside world, marketing, strategy, and goals," "sets project goals," "provides leadership and coordination of services for international students and programs, including advisement and monitoring of U.S. and UK government regulations and policies for non-immigrants," "develops and oversees programs to provide international experience opportunities for European students and faculty including international exchange and study abroad," and "develops and monitors international agreements, evaluates programs, and promotes international opportunities with US employers and companies." It appears that the beneficiary will devote some portion of her time to providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the

Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I & N Dec. 593, 604 (Comm. 1988).

Overall the job descriptions provided by the petitioner are too vague to convey an understanding of the duties the beneficiary performs, such that they can be classified as managerial or executive in nature. Accordingly, the director reasonably considered the petitioner's staffing levels in order to determine if the company's organizational structure supports the petitioner's claim that the beneficiary will be employed in a primarily managerial or executive capacity.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

According to the U.S. company's organizational chart submitted by the petitioner, the United States company employs the beneficiary as president/general manager, and she supervises the vice president and the bookkeeper. In reviewing the job descriptions submitted for the positions of vice president and bookkeeper, it appears that the beneficiary is responsible for performing the market research, contract negotiations and company development, and several operational tasks inherent in operating a company on a daily basis, such as acquiring new business, acquiring clients, negotiating contracts, and human resources functions. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. at 604. Based on the foregoing discussion, there is insufficient evidence to establish that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity.

In addition, in reviewing the documentation, there are several discrepancies between the organizational chart of the U.S. company submitted by the petitioner and the employer's federal quarterly tax returns. The petitioner submitted the Form W-2 for 2004 for all individuals hired by the U.S. company which included the beneficiary and two additional employees who are named as the vice president and the bookkeeper on the U.S. organizational chart. However, in reviewing the U.S. company's Georgia

Employer's and Quarterly Wage Reports for all the quarters of 2004, it appears that only one employee was employed for each month of 2004. The single individual receiving wages from the U.S. company for 2004 alternated between the vice president and the bookkeeper. Although the organizational chart and the Form I-129 indicates that the U.S. company has two employees in addition to the beneficiary, the state quarterly wage reports indicate that the U.S. company only hired one individual per month. 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).

In addition, 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. 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. The petitioner submitted an organizational chart indicating that the beneficiary will supervise a vice president and a bookkeeper, neither of whom has been demonstrated to be employed in a managerial, supervisory or professional capacity. It appears that the bookkeeper will be in charge of clerical, administrative and basic financial functions. Thus, the petitioner does not establish that the subordinate staff is composed of supervisory, professional or managerial employees.

As noted above, the U.S. organizational chart indicates that the beneficiary, the vice president and the bookkeeper will supervise three departments: the international exchange department, the marketing department and the staffing services department. However, the petitioner did not indicate any employees working in these departments and it did not provide a description of the role these departments have for the U.S. company. In addition, the petitioner submitted several agreements with other companies and individuals to provide certain services for the United States company, but did not adequately explain who will perform the day-to-day services associated with the three departments of the U.S. company. The AAO cannot determine the nature and scope of the services provided by outside contractors or commissioned staff. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, if the position offered to the beneficiary is executive in capacity, the statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* A managerial or

executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the instant matter, the petitioner has not established evidence that the beneficiary is employed in an executive capacity with the U.S. entity.

As discussed above, the beneficiary's job description included non-qualifying duties associated with the petitioner's day-to-day functions, and the petitioner has not identified any other employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate her position to that of an executive or manager as contemplated by the governing statute and regulations.

Based upon evidence submitted, it cannot be concluded that the beneficiary will be performing primarily managerial or executive duties as its general manager. Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 appeal will be dismissed.

ORDER: The appeal is dismissed.