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File: WAC 04 219 51315 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 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)

IN 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, Director  
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 general manager 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 international trade. The petitioner claims that it is the subsidiary of [REDACTED] Co., Limited, located in Shenzhen, China. The petitioner has employed the beneficiary in L-1A status since October 2001 and now seeks to extend her status for a two-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed 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 beneficiary is employed in a managerial and executive capacity, and claims that the petitioner's organizational chart demonstrates that she supervises managerial and professional personnel. Counsel asserts that the petitioner provided a comprehensive job description that establishes the beneficiary's performance of primarily managerial or executive duties. Counsel further references two unpublished AAO decisions to stand for the proposition that the nature and level of sophistication of a petitioner's business and the scope of the beneficiary's authority are key factors in analyzing whether a beneficiary is employed in a managerial or executive capacity. Counsel submits a brief 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 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 petitioner filed the I-129 petition on August 5, 2004. In a July 26, 2004 letter, the petitioner described the beneficiary's proposed duties as general manager as follows:

1. She assists the president in planning, developing and establishing policies and objectives of the company's business in international trade.
2. She submits long-term and short-term business plans to [the] president. She directs the subordinates to establish their own responsibilities.
3. She reviews marketing reports and financial reports to ensure that the company's objectives are achieved.
4. She directs market research and finalizes marketing plans.
5. She directs to establish quality assurance system and reviews quality reports.
6. She attends major business negotiations to establish strategic relationship with U.S. manufacturers and suppliers.
7. She analyzes operations to evaluate company's performance and to determine areas of cost reduction and program improvement.
8. She directs financial and budget activities to fund operations and increase efficiency.
9. She submits reports to the president concerning company's performance and business opportunities.

The petitioner indicated on Form I-129 that it has six employees, and submitted an organizational chart depicting its organizational structure. The chart shows that the beneficiary reports to the petitioner's president and supervises a quality control engineer, a secretary and a sales manager, who in turn supervises a salesperson. The petitioner also submitted its California Form DE-6, Quarterly Wage and Withholding Report, for the second quarter of 2004, which confirmed the employment of the individuals identified in the petitioner's organizational chart.

The director requested additional evidence on August 19, 2004, advising the petitioner that the description of the beneficiary's duties submitted with the initial petition was not sufficiently detailed. However, the director did not specifically instruct the petitioner to submit a more detailed job description. The petitioner responded to the director's specific requests for documents to establish the viability of the U.S. entity on September 10, 2004, but did not address the beneficiary's job duties in its response.

The director issued a second request for evidence on December 27, 2004, instructing the petitioner to submit evidence that the beneficiary will be performing the duties of a manager or executive with the U.S. company. Specifically, the director requested a more detailed organizational chart clearly identifying the beneficiary's position and a list of all employees under the beneficiary's supervision by name and job title. The director also requested a brief description of job duties, educational level, and annual salaries/wages for all employees under the beneficiary's supervision.

In a response dated January 7, 2005, the petitioner submitted a copy of the organizational chart provided in support of the initial petition. Regarding the duties and qualifications of the beneficiary's subordinates, counsel stated: (1) the sales manager is a high school graduate and "manages [the] company's sales activities"; (2) the secretary is a high school graduate and "schedules appointments, answers telephone calls,

and performs other clerical work”; (3) the quality control engineer is a college graduate and “plans and directs activities concerned with product application and quality”; and (4) the sales person is a high school graduate and “sells China-made auto oil filter and nameplate[s] to U.S. customers.” The petitioner indicated that all four of the beneficiary’s subordinates receive the same annual salary of \$18,000.

In addition to the information requested by the director, counsel stated that the instant petition was filed as a continuation of previously approved employment without change, and noted that under the circumstances, deference should be given to CIS’ prior determination that the beneficiary is qualified for the benefit sought. Counsel submitted a copy of an April 23, 2004 CIS policy memorandum in support of this assertion. See Memorandum of [REDACTED] Associate Director for Operations U.S. Citizenship and Immigration Services, to Service Center Directors, et al, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (April 23, 2004) ([REDACTED] memo”).

The director denied the petition on February 17, 2005 concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity under the extended petition. The director observed that although the petitioner indicated that the beneficiary would have management responsibility for market research, market plans, financial reports and business plans, the petitioner did not identify any subordinate employees who would prepare such plans, analyses and reports. The director determined that the beneficiary herself would be required to perform non-qualifying duties associated with the petitioner’s financial and marketing functions. The director also addressed the petitioner’s staffing structure and determined that none of the beneficiary’s subordinates had been demonstrated to be managers, supervisors or professionals. The director concluded that there was insufficient evidence to establish that the beneficiary would perform primarily managerial or executive duties.

The director acknowledged counsel’s assertion that the Yates memo requires CIS to give deference to previously approved petitions when there is no material change in the underlying facts. The director emphasized that the Yates memo provides that deference to prior approvals should not be given in cases where it is determined that there has been a material error in approving a previous petition, a substantial change in circumstances, or new material information that adversely impacts the petitioner’s or the beneficiary’s eligibility. The director further noted that the record of proceeding does not contain the supporting evidence submitted in support of the previous petition, and therefore it is impossible for CIS to determine whether the facts are identical or whether the prior petition was approved in error. However, the director found that if the previous petition was approved based on evidence similar to that contained in the current record, the prior approval might have been erroneous.

On appeal, counsel for the petitioner asserts that the beneficiary is employed in a managerial or executive capacity. Counsel contends that the organizational chart shows that the beneficiary “supervises and controls the work of both managerial and professional employees. This complies with the regulatory definition of managerial capacity.” Counsel asserts that the petitioner provided the required detailed job description in support of the petition, re-states the job description, and claims: “Evidently, as General Manager of the company, the beneficiary is performing primarily the duties and that are characteristics of duties performed by a manager or executive.”

Counsel also refers to two unpublished AAO decisions, noting that in at least two cases, the AAO has approved L-1A petitions for one-person offices. Counsel asserts that the unpublished decisions demonstrate that the nature and level of sophistication of a petitioner's business and the scope of the beneficiary's authority are key factors in analyzing which petitions are approvable.

Upon review, 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.*

Further, 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 show 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).

The petitioner has provided a vague and general description of the beneficiary's duties that fails to convey what tasks she will actually perform on a day-to-day basis. For example, the petitioner states that the beneficiary "assists the president in planning, developing and establishing policies," "submits long-term and short-term business plans to [the] president," and "submits reports to the president concerning company's performance and business opportunities." The petitioner did not, however, specify what type of assistance the beneficiary provides to the president, or indicate whether the beneficiary personally researches and prepares "plans" and "reports" or whether she directs others to do so. Without additional information regarding how and with what frequency the beneficiary performs these duties, it cannot be concluded that these tasks qualify as managerial or executive. Similarly, the petitioner stated that the beneficiary "attends major business negotiations to establish strategic relationship[s] with U.S. manufacturers and suppliers," but failed to qualify what constitutes a "major business negotiation" or otherwise indicate who on its staff would be responsible for routine or "non-major" negotiations for purchase of goods from the petitioner's suppliers, if not the beneficiary. 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).

In addition, the petitioner indicated that the beneficiary "reviews marketing reports and financial reports," "directs market research and finalizes marketing plans," "directs to establish quality assurance system and reviews quality reports," and "directs financial and budget activities." As observed by the director, there is no mention in the record of any employees responsible for performing market research and analysis, preparing marketing plans or quality reports, or performing any duties related to the company's financial operations. Thus, either the beneficiary herself is performing these functions, or she does not actually "direct" these functions as claimed by the petitioner. If the beneficiary is performing non-qualifying tasks associated with the petitioner's marketing and financial functions, the AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a

managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Although the director clearly noted this specific deficiency in his decision and reached the same conclusion regarding the beneficiary's performance of non-qualifying duties, counsel does not address the director's findings on appeal or otherwise attempt to clarify who would relieve the beneficiary from researching, preparing and analyzing various business, marketing and financial reports. Instead, counsel repeats the same job description and concludes that it is sufficient to establish that the beneficiary performs duties characteristic of a manager or executive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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).

Collectively, the lack of specifics in the beneficiary's job description and the absence of subordinates to perform many of the duties that the beneficiary will purportedly "direct" or "review" brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the petitioner's job description does not demonstrate that the beneficiary will function primarily as a manager or executive.

On appeal, counsel asserts that the petitioner's organizational chart demonstrates that the beneficiary "supervises and controls the work of both managerial and professional employees." Although the beneficiary is not required to supervise personnel, if it is claimed that her 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.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner indicates that one of the beneficiary's subordinates has a

college-level education, but does not specify whether he completed a bachelor's degree or identify whether his studies were in engineering or a different specialty. Regardless, as noted by the director, the description of his duties, considered in light of the nature of the petitioner's business as an importer and exporter of goods, does not establish that he would be performing the duties of a professional engineer. The remainder of the beneficiary's subordinates have a high school education and appear to be performing sales and clerical duties. The petitioner has not established that any of the beneficiary's subordinates 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. Although the petitioner identifies two of its employees as "sales manager" and "sales representative," respectively, the AAO notes that the employees receive identical salaries. The very brief job descriptions provided by the petitioner do not establish that the sales manager actually supervises the sales representative, or otherwise distinguish his duties from those of the sales representative. 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)). 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.

Counsel further refers to two unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel further asserts that previous AAO decisions indicate that the nature and level of sophistication of the petitioner's business and the scope of the beneficiary's authority are key factors in analyzing whether a beneficiary is employed in a managerial or executive capacity. It appears counsel is attempting to argue that the director did not take into consideration the reasonable needs of the petitioning entity in making his determination on this issue. 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. However, it is appropriate for CIS 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 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). Counsel seems to suggest that the nature of the petitioner's import/export business is so complex that it reasonably requires the services of a general manager who performs primarily managerial or executive duties. However, counsel does not submit any additional documentation or evidence to support this claim. Again, the unsupported statements of counsel on appeal or in a motion are not evidence

and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. at 188-89; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 503.

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)(A) and (B). As discussed above, the petitioner has not established this essential element of eligibility.

Based on the evidence of record, it cannot be found 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.

Although the appeal will be dismissed, the AAO acknowledges counsel's assertion that the [REDACTED] memo regarding the re-adjudication of petitions is applicable to the instant petition to extend the beneficiary's L-1A status. The director correctly noted that the [REDACTED] memo states that a prior determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification should be given deference. The director also noted that the [REDACTED] memo specifies that deference should not be given when it is determined that there was a material error with regarding to the previous petition approval, when there is a substantial change in circumstances, or when there is new material information that adversely impacts the petitioner's or the beneficiary's eligibility.

CIS previously approved a request for an extension of status submitted by the petitioner on behalf of the beneficiary in October 2002. The record of proceeding does not contain copies of the prior extension petition that was approved. Each nonimmigrant petition is a separate record of proceeding with a separate burden of proof; each individual petition must stand on its own individual merits. *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). 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). Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the prior approval would constitute material and gross error on the part of the director. Due to the lack of required 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 extension petition.

The AAO notes for the record that the information contained in the current record of proceeding suggests that the petitioner's U.S. operations were downsized subsequent to the approval of the previous L-1 extension granted to the beneficiary. The petitioner submitted its 2002 and 2003 IRS Forms 1120, U.S. Corporation Income Tax Return, in support of the petition. For the 2003 tax year, the petitioner reported gross receipts of \$685,853 and paid \$140,700 in salaries and compensation to officers. For the 2002 tax year, the year in which the previous petition was filed, the petitioner reported gross receipts of \$1,995,390 and paid \$221,700 in salaries. The petitioner's Forms DE-6, Quarterly Wage and Withholding Reports, show that the petitioner employed 11 employees during the first six months of 2003, but has employed a staff of only six since July 2003. In a small company, this decrease in staffing represents a substantial change in the petitioner's business that would necessarily affect the amount of time the company's general manager would need to devote to

non-qualifying duties, and warranted a thorough review of the beneficiary's continued eligibility as an L-1A manager or executive.

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).

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 appeal will be dismissed.

**ORDER:** The appeal is dismissed.