

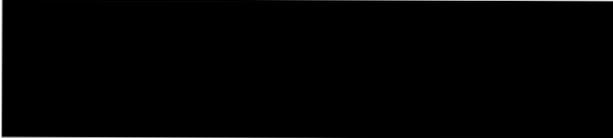
**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**



07

FILE: WAC 04 216 50703 Office: CALIFORNIA SERVICE CENTER Date: **SEP 26 2006**

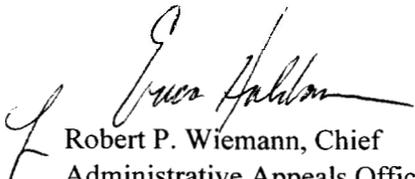
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:  
[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, 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 appeal will be dismissed.

The petitioner, a California corporation claims to be in the venetian blinds manufacturing/installation business. The petitioner claims that it is a subsidiary of Sam Chil Company, Ltd. located in Korea. Accordingly, the United States entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act as an executive or manager for two years. The beneficiary has been employed by the petitioner in L-1A status since October 2001, and the petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of chief executive officer.

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 specifically noted since the beneficiary is the only employee of the U.S. entity, it appears that the beneficiary will perform all the day-to-day duties of the petitioning company and is thus not performing duties that are primarily executive or managerial.

On appeal, counsel for the petitioner states that the service denied the application incorrectly since the beneficiary is the chief executive officer in the United States and supervises eleven commissioned employees "who will become a permanent [sic] employees in salary-basis soon." Counsel for the petitioner also states that the denial was improper and in violation of the applicable regulatory provisions since the Service "in essence re-adjudicated the underlying petition rather than acting on the application to extend [the beneficiary's] stay." Counsel for the petitioner asserts that the Service should have adhered the regulations under 8 C.F.R. § 214.2(l)(9)(iii)(A) whereby a notice of intent to revoke the petition shall be sent to the petitioner. Counsel submits a brief 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.

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 July 29, 2004. The Form I-129 indicates that the beneficiary will be employed in the position of chief executive officer for the petitioner. The beneficiary's proposed duties in the U.S. are described as the following, "supervising manufacture, sales and installation through section managers." The petitioner did not submit supporting documentation with the petition.

On October 12, 2004, 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 copy of the U.S. entity's organizational chart including the job duties, educational level and job title for each employee; Form 941, Quarterly Wage Report for all employees for the last eight quarters; copies of the U.S. entity's payroll summary and W-2's and W-3's; a copy of the California Development Department Form DE-6, Quarterly Wage Report for the last eight quarters; a list of the specific discretionary decisions that the beneficiary has exercised over the last six months; evidence that a higher level executive, the board of directors, or stockholders of the organization require only general supervision of the beneficiary; and a specific day-to-day description of the duties the beneficiary has performed over the last six months. In the response dated December 29, 2004, the petitioner failed to submit all of the requested evidence.

In response to the director's request, the petitioner submitted an organizational chart of the U.S. company indicating in which department each employee works. The organizational chart for the U.S. company indicates that the beneficiary will supervise the executive officer who supervises the operation department, the maintenance department and the marketing department. The operation department supervises employees identified as "guest" and "finance", the maintenance department supervises contract and renovation employees and the marketing department supervises advertisement and sales employees. It appears that three individuals, in addition to the beneficiary, fill all nine positions listed on the organizational chart. The beneficiary is identified as being responsible for finance and renovation.

In addition, the petitioner submitted a job description for the position offered to the beneficiary as the following:

Directs and coordinates formulation of financial programs to provide funding for new sales operations in U.S. and South American region. Final determination on volume of sales in U.S. based on the productivity in main factory in Korea. Plans and develop[s] the new designs initiated by the customer's specifications and the final drawing will [sic] send to factory for the productive adjustment.

The response submitted by the petitioner failed to indicate the job duties, educational level and job title for each employee and the petitioner did not submit the requested copies of the U.S. entity's payroll summary and W-2's and W-3's for each employee. Furthermore, the petitioner submitted a brief and vague job description for the position offered to the beneficiary, and the petitioner did not provide the information requested by the director including a list of the specific discretionary decisions that the beneficiary has exercised over the last six months, evidence that the higher level executive, the board of directors, or stockholders of the organization

require only general supervision of the beneficiary, and a specific day-to-day description of the duties the beneficiary has performed over the last six months.

The director denied the petition on March 25, 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 went on to observe that since the beneficiary is the only employee for the U.S. entity, "it is obvious that the beneficiary has to perform all the day-to-day duties of the petitioning company; therefore, he is not performing duties that are primarily executive or managerial."

On appeal, counsel for the petitioner concedes that the beneficiary is the sole employee as confirmed on the federal and state quarterly wage reports, Form 941 and Form DE-6 but asserts the following:

[B]eneficiary is Chief Executive Officer controlling 11 employees who are paid by commission on the sales volume until the company stands a financially secured [sic]. These 11 employees are sales person, but each has job title [sic] like operations, maintenance, marketing, finance, contract, renovation, advertisement, and sales.

In addition, on appeal, counsel provides the following job duty in addition to the job description initially submitted:

Direct and coordinates formulation of financial programs to provide funding for new sales operations...translates that the Chief Executive Officer make every possible effort to get the loan and fund from the bank to carry out the business operations successfully in U.S. This is the key policy making decision of Chief Executive Officer.

Counsel's assertions are not persuasive. 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(1)(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).

The beneficiary's proposed job description includes vague duties such as the beneficiary will "direct and coordinate formulation of financial programs to provide funding for new sales operation in U.S. and South America region." The petitioner does not explain how the beneficiary will perform these requirements and what exactly are the goals and policies of the petitioner and the funding programs. 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 will "plan and develop the new designs initiated by the customer's specification and the final drawing will send [sic] to factory for the productive adjustment," and "make every possible effort to get the loan and fund from the bank to carry out the business operation successfully in U.S." However, as discussed further below, there is no evidence that the U.S. company has hired employees to perform the marketing, promotion, purchasing, finances, and sales tasks that are necessary to produce or provide services. It appears that the beneficiary will be 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).

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will spend on various duties. The petitioner has not provided a breakdown of the percentage of time the beneficiary will spend on various duties as requested by the director, and the petitioner has not articulated whether each duty is managerial or executive. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties are managerial in nature, and what proportion are actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

In addition, 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.* Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily executive capacity.

Counsel for the petitioner states on appeal that the petitioner has hired eleven employees who are paid by commission. However, the petitioner has neither presented evidence to document the existence of these employees nor identified the specific services these individuals provide. 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 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). In addition, the organizational chart for the U.S. entity only indicates three employees in addition to the beneficiary, which is inconsistent with the appeal whereby counsel for the petitioner states that the beneficiary supervises eleven employees. 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). The AAO notes that the petitioner's 2004 income statement and 2003 Form 1120-A U.S. Corporation Short-Form Income Tax Return reflect no payments to commissioned or contract workers.

Furthermore, as noted above, the director specifically requested that the petitioner submit an organizational chart showing the beneficiary and all employees, indicating their educational level, job title and duties and salary, and copies of Form 941 for 2003 and 2004 and W-2 and W-3 forms for each employee. In response, the petitioner submitted the Form 941 for 2003 and 2004 which indicated that the company had one employee, the beneficiary, during that time. The petitioner did not submit documentation to evidence that the other employees listed on the organizational chart are in fact employed by the petitioner, and the petitioner did not indicate the job duties and job titles for the employees. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Thus, even if the petitioner does utilize the services of independently contracted employees, the record does not reflect that the employees are professional, maintain supervisory positions, work on a full-time basis, or that they take direction from the beneficiary in performing their duties. There is no evidence of formal agreements or contracts entered into by the petitioner that explains the usage of outside sources. The petitioner has failed to submit job descriptions or duties performed by the claimed independent contractors. There is no evidence on record to show that the claimed independent contractors would engage in the day-to-day operations of the business or that they would relieve the beneficiary from performing other routine, non-qualifying tasks associated with the business' daily marketing, sales, purchasing, administrative, clerical and financial functions. 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 record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has not demonstrated that the U.S. company has hired additional employees who would relieve the beneficiary from performing primarily non-qualifying duties associated with operating a custom blind manufacture and installation business. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Based upon evidence submitted, it appears that the beneficiary has been and will be performing the services of the U.S. entity rather than performing primarily managerial or executive duties as its chief executive

officer. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. 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.

Finally, on appeal, counsel for the petitioner asserts that the denial was “improper and in violation of the applicable regulatory provisions. The CSC in essence re-adjudicated the underlying petition rather than acting on the application to extend [the beneficiary’s] stay. This was improper. Where a director believes that continued eligibility is questionable, his actions are guided by 8 CFR 214.2(l)(9)(iii)(A).” Counsel’s assertions are not correct. Counsel for the petitioner cited a regulation that governs revocation of the approval of a previously approved petition. In the instant matter, the director reviewed a new petition requesting the extension of a previously approved petition.

The prior approval of two nonimmigrant petitions filed by the petitioner on behalf of this beneficiary does not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner’s or beneficiary’s qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals 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).

In addition, 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). Based upon the lack of required evidence in the current record, and due to the petitioner’s failure to submit requested evidence, the AAO finds that the director was justified in departing from the previous petition approvals and denying the instant request for an extension of the beneficiary’s status.

The petitioner 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.