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U.S. Citizenship
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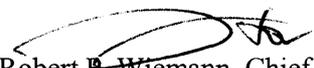
IN RE: Petitioner:
Beneficiary:

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, Chief
Administrative Appeals Office

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

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as its president 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 limited partnership organized under the laws of the State of Delaware and is a public relations agency. The beneficiary was initially granted a one-year period of stay (November 28, 2000 until December 27, 2001) to open a new office in the United States. The beneficiary's stay was subsequently extended for two years until December 27, 2003. Thereafter, the beneficiary changed status to E-2 classification and continued working for the petitioner pursuant to that status. The petitioner now seeks to again employ the beneficiary as its president as an L-1A nonimmigrant for a period of three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager. The petitioner further asserts that, in view of the prior approval of L-1A visa petitions for the beneficiary, the director erred in failing to follow the guidance set forth in a 2004 interoffice memorandum by William R. Yates, Associate Director of Operations for United States Citizenship and Immigration Services (CIS). Memo. From William R. Yates, Associate Director for Operations, to Service Center Directors, *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* (April 23, 2004) (the "Yates Memorandum"). In support of this assertion, the petitioner 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 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 does not clarify in the initial petition whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner described the duties of the beneficiary in a letter from the foreign entity dated May 17, 2005 appended to the initial petition. As this letter is in the record, the job description will not be repeated here verbatim. Generally, the beneficiary is described as having discretion in managing the United States operation; managing the day-to-day provision of services by the petitioner; establishing goals and policies; managing one employed "creative professional" with a bachelor's degree, the office staff, and several independent contractors also described as "creative professionals;" and overseeing project-based work performed in Europe by foreign employees.

The petitioner also provided a breakdown of the beneficiary's duties as follows:

[The beneficiary] spends 5% of her time in executive responsibilities related to running the U.S. office and collaborating with the international executive team of [the foreign entity]. The majority of her time – 65% - is spent as a functional manager, managing, serving, and growing critical accounts for our company as described above. This work includes identifying and securing new business along with managing existing clients. [The beneficiary] spends 20% of her time as a personnel manager, working with professional staff (both contractors and W-2 employees) and managing staff including U.S.-based personnel and global personnel supporting U.S.-based clients. The remaining 10% of her time is divided somewhat evenly between the above three areas, although in any given day and week, more time will be spent in one area, less in another. **[The beneficiary] spends no time – 0% - on non-supervisory, non-managerial, or non-executive duties.**

On July 15, 2005, the director requested additional evidence. The director requested, *inter alia*, evidence establishing that the beneficiary will be employed primarily in an executive or managerial capacity. The director requested an organizational chart for the United States operation, a description of all subordinate employees, a detailed description of the beneficiary's job duties, and copies of the petitioner's United States and California quarterly wage reports.

In response, the petitioner provided an organizational chart portraying the beneficiary as supervising three United States-based staff members. One of these staff members, a "senior account executive," is identified as an employee. The other two staff members, a "finance manager" and an "account supervisor," are described as independent contractors. The chart also portrays the beneficiary as supervising a variety of staff members based in the United Kingdom. The petitioner did not provide any wage reports or other documentation

describing the subordinate staff members or payments to independent contractors even though this information was specifically requested by the director in the Request for Evidence. Moreover, the petitioner did not explain the omission of several independent contractors described in the letter dated May 17, 2005 from the organizational chart.

On October 31, 2005, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties are primarily those of an executive or manager. The petitioner further asserts that, in view of the prior approval of L-1A visa petitions for the beneficiary, the director erred in failing to follow the guidance set forth in the Yates Memorandum. The petitioner also provided additional evidence including a materially different organizational chart, a different job description for the beneficiary, and further information regarding subordinate employees and independent contractors.

Upon review, the petitioner'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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

As a threshold issue, the AAO notes that the petitioner has provided substantial additional evidence on appeal including an organizational chart, a job description for the beneficiary, and information regarding the petitioner's subordinate staff members. However, the director specifically requested this information in the Request for Evidence, and the petitioner was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit this requested evidence and now submits it on appeal. The AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary "directs all aspects of the U.S. operation," sets goals and policies, and "manages" accounts. The petitioner did not, however, specifically define these goals and policies, nor did it explain what, exactly, the beneficiary does in managing, serving, and growing "critical accounts." The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description, which includes lofty duties, does not establish that the beneficiary will actually perform 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Also, the vaguely described job duties ascribed to the beneficiary appear to include non-qualifying operational or administrative tasks. For example, as explained above, the beneficiary is described as spending 65% of her time managing, serving, and growing "critical accounts." The petitioner explained that "[t]his work includes identifying and securing new business." As marketing and sales tasks, when performed by a beneficiary, do not rise to the level of managerial duties, it appears that the primary duty ascribed to the beneficiary includes the performance of non-qualifying operational or administrative marketing tasks. The significance of these non-qualifying characteristics is magnified by the fact that the petitioner has but one employee which it describes vaguely as a "creative professional" and a few vaguely described and intermittently employed independent contractors. Given the lack of a subordinate staff which could relieve the beneficiary of the need to perform the non-qualifying tasks inherent in her vaguely described duties, it must be concluded that the beneficiary is performing these tasks and is not "primarily" engaged in performing managerial duties. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, the petitioner asserts that the beneficiary spends a significant amount of time managing projects overseas. As correctly noted by the director, the regulations define an intracompany transferee as one who renders services to a United States operation. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A). Therefore, the management of staff or projects overseas cannot be used to qualify a beneficiary as one employed primarily in a managerial or executive capacity in the United States.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory or managerial employees. As explained in the organizational chart and vague position descriptions, the beneficiary appears to manage one employee. While the petitioner claims to also employ independent contractors and "freelancers," the petitioner failed to provide wage or employment documentation confirming the contractors' compensation or level of commitment to the petitioner even though this evidence was specifically requested by the director. 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). Regardless, the petitioner has not established that the subordinate employee or independent contractors are primarily engaged in performing supervisory or managerial duties. To the contrary, the subordinate staff members appear to be engaged in performing tasks related to providing a service or producing a product. In view of the above, the beneficiary would appear to be a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. A managerial 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. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

The petitioner has also not established that the beneficiary will manage professional employees. 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 has not, in fact, established that a bachelor's degree is actually necessary to perform the duties of any of the subordinate staff members. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

Finally, the petitioner has not established that the beneficiary will manage an essential function of the organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the petitioner lacks a subordinate staff which could relieve the beneficiary of the need to perform those tasks related to her function. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties would be managerial, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" 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. 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 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-day 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary does on a day-to-day basis. Moreover, as explained above, the beneficiary appears to be employed as a first-line supervisor or is performing the tasks necessary to her function. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

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).

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ.*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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, 8 U.S.C. § 1361.¹

¹In addition to those issues addressed above, counsel to the petitioner also argues on appeal that the director failed to follow the Yates Memorandum. This memorandum provided guidance on the process by which an adjudicator, during the adjudication of a subsequent request for petition extension, may question another adjudicator's prior approval of a nonimmigrant petition where there has been no material change in the underlying facts. Specifically, this memorandum states that adjudicators should give deference to prior approvals involving the same underlying facts except where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. Memo. From William R. Yates, Associate Director for Operations, to Service Center Directors, *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* (April 23, 2004). The memorandum also states that the adjudicator should clearly articulate the material error, changed circumstances, or new material information in his or her decision. *Id.*

The memorandum does not apply to this matter in that the petitioner failed to provide much of the documentary evidence requested by the director. Before the petitioner could argue that the director erred in not deferring to an interpretation of evidence provided in support of a prior approved petition, it would need to first provide the evidence appropriately requested by the director in this matter. *See* 8 C.F.R. §

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

214.2(l)(14)(i). It must be emphasized that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d).

Furthermore, this Memorandum limits its authority on Page 4 of the Memorandum:

This memorandum is intended solely for guiding USCIS personnel in performance of their professional duties. It is not intended to be, and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or matter.

Id.

Courts have consistently supported this position. *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that CIS memoranda merely articulate internal guidelines for INS 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"); *see also Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to INS district directors regarding voluntary extended departure determinations to be "general statements of policy"); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing an INS Operating Policies and Procedures Memorandum (OPPM) as an "internal agency memorandum," "doubtful" of conferring substantive legal benefits upon aliens or binding the INS); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an "internal directive not having the force and effect of law"); *Ponce-Gonzalez v. INS*, 775 F.2d 1342, 1346-47 (5th Cir. 1985) (finding that OIs are "only internal guidelines" for INS personnel, and that an apparent INS violation of an OI requiring investigation of an alien's eligibility for statutory relief from deportation was at worst "inaction not misconduct").

Therefore, the Yates Memorandum does not create any substantive rights in the petitioner, and a director's failure to follow the guidance in the memorandum would not be grounds for a withdrawal of the decision.

Regardless, if CIS had based its approval of the earlier L-1A petitions on the same job description for the beneficiary and the same description of the petitioner's subordinate staff submitted in this matter, such approvals would have constituted "material error" as described in the Yates Memorandum, and the director's denial of the instant petition was proper.