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U.S. Citizenship
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Services

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File: WAC 04 169 53524 Office: CALIFORNIA SERVICE CENTER Date: JUL 09 2007

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, California Service Center, denied the petition for a nonimmigrant visa and affirmed his decision on a subsequent motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its 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, a California corporation, states that it is engaged in the business of wholesale luggage sales. The petitioner claims that it is the subsidiary of Sun Products Import & Export CC, located in South Africa. The petitioner has employed the beneficiary in L-1A classification since August 2001 and now seeks to extend his status for three additional 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.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial capacity and suggests that the director failed to consider the petitioner's staffing levels in light of the petitioner's reasonable needs and stage of development. Counsel also references an April 23, 2004 U.S. Citizenship and Immigration Services (USCIS) interoffice memorandum which provides guidance to adjudicators reviewing requests for an extension of status. Counsel contends that the director should have given deference to the decision of the adjudicator who approved the petitioner's previous extension request absent a finding of a material error, a substantial change in circumstances, or new material information that adversely impacts the petitioner's or beneficiary's eligibility. Counsel submits a brief and documentary evidence 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 sole issue addressed by the director is whether the petitioner established that the beneficiary would 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), 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 nonimmigrant petition was filed on May 25, 2004. The petitioner stated on Form I-129 that the U.S. company has seven employees, and indicated that it would continue to employ the beneficiary as its president. In a letter dated May 3, 2004, the foreign entity described the beneficiary's duties as follows:

In charge of the overall management of the company. Plan, develop and establish policies and objectives of the company in accordance with the Board directives. Under the general supervision of the Board of Directors, exercises the wide latitude of the discretionary decision-making. Direct the implementation of the business expansion plan and operation policies. Direct the utilization of the financial reports and activity data to determine the strategy and progress of the company's business and designate further business goals and plans. Meets with local business leaders to build up the network for the company. Oversees the management strategies and promotion activities, and approve the management improvement. Has the authority to hire, terminate, evaluate, and promote the managerial personnel based on their job performance, qualification and contributions.

The petitioner submitted an organizational chart for the U.S. company which depicts the beneficiary as president, supervising an accountant, an operation supervisor, a web developer/administrator, and a market research analyst. The chart shows that the operation supervisor supervises a sales specialist and a warehouse employee. The petitioner stated that the accountant, web developer/administrator and market research analyst are all professional and "therefore, the Beneficiary is in no doubt in Managerial capacity." The petitioner submitted its California Form DE-6, Quarterly Wage and Withholding Report, for the first quarter of 2004, which confirms the employment of the individuals named on the organizational chart. The petitioner also provided position descriptions for each of the beneficiary's subordinates.

On January 8, 2004, the director denied the petition, concluding that the petitioner had failed to demonstrate that the beneficiary would be employed in a managerial or executive capacity. The director noted that the job description provided by the petitioner did not clearly indicate how the beneficiary would work with the lower-level employees to exercise his claimed authority in discretionary decision-making. The director also found insufficient evidence to establish that the beneficiary would manage an essential function, or a staff of subordinate managerial, supervisory or professional employees.

The petitioner subsequently filed a motion to re-open on July 2, 2004. On motion, counsel for the petitioner argued that the beneficiary does in fact supervise managers, supervisors, and professionals. Counsel argued that the positions of accountant, market researcher and web developer are clearly professional in nature, while the warehouse manager and operations supervisor are serving in managerial positions. In addition, counsel asserted that as a manager supervising other professionals and managers, the beneficiary "evidently performs job duties substantially all at the managerial level."

The director granted the motion and affirmed his decision to deny the petition on August 9, 2004. The director determined that the petitioner had not sufficiently described the duties performed by the beneficiary and his subordinates, nor provided corroborative payroll documentation contemporaneous with the date the petition was filed. The director also found insufficient evidence to corroborate counsel's claim that the beneficiary's subordinates are employed in managerial, supervisory or professional positions.

On appeal, counsel for the petitioner asserts that the director's conclusions are erroneous. Counsel suggests that the director failed to take into account the reasonable needs of the petitioning organization in light of its overall purpose and stage of development, and cites an unpublished AAO decision in support of this assertion.

Counsel also notes that the beneficiary was previously granted an extension of L-1A status and refers to a 2004 USCIS memorandum to support his assertion that it is USCIS policy that prior approvals should be given deference in matters relating to an extension of nonimmigrant petition validity involving the same parties and the same underlying facts. *See* Memorandum of William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility of Petition Validity* (April 23, 2004)("Yates memorandum.") The memorandum provides that exceptions to this policy should be made 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. *Id.* Counsel asserts that the instant petition involves the same parties and underlying facts and that none of the above-referenced exceptions to USCIS policy apply.

Upon review, counsel's assertions are not persuasive and the decision of the director will be upheld. 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.*

Rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For instance, the petitioner depicted the beneficiary as being "in charge of the overall management" and having responsibility to "plan, develop and establish policies and objectives," work "under the general supervision of the Board," and "exercise the wide latitude of the discretionary decision-making." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to establish the beneficiary's employment in a qualifying managerial or executive capacity. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Ayvr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition to merely paraphrasing the statutory definition of executive capacity, the petitioner has identified such vague and nonspecific duties as "direct the implementation of the business expansion plan and operation policies," and "oversees the management strategies . . . and approve the management improvement." The petitioner did not, however, define the beneficiary's "expansion plan," or clarify what specific duties he

performs to "oversee" management strategies or what is involved in approving "management improvement." 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. at 1108.

While it is noted that the director did not issue a request for a more detailed description of the beneficiary's position prior to issuing his June 8, 2004 decision, the AAO finds that the petitioner has had adequate notice of the deficiencies of the position description and ample opportunity to clarify the beneficiary's actual duties on motion and on appeal. The petitioner has failed to do so. The position description provided falls significantly short of articulating the beneficiary's day-to-day responsibilities, such that they could be classified as managerial or executive in nature. The petitioner cannot rely on vague characterizations and conclusory assertions to establish the beneficiary's employment in a managerial or executive capacity.

Furthermore, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy.

The petitioner has submitted a number of documents, including an organizational chart, position descriptions for the claimed professional and managerial employees, trade show information, invoices and receipts. A number of these documents suggest that the beneficiary is directly involved in performing the routine duties associated with providing the petitioner's product or service. These documents include trade show advertisements which have the beneficiary listed as the contact, contracts filled out and signed by the beneficiary, and order forms to the attention of the beneficiary. The petitioner's position description for the beneficiary notes that he "meets with local business leaders to build up the network for the company." This job responsibility, when considered with the documentary evidence provided, suggests that the beneficiary is directly involved in the sales and marketing tasks of the company.

Such a conclusion is further supported by a review of the petitioner's staffing levels in light of the company's overall purpose and stage of development. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The petitioner is a three-year-old import and wholesale company with gross sales of approximately \$1.8 million in the year preceding the filing of the petition. The petitioner claims to employ a single sales specialist who, in addition to performing sales duties, is responsible for setting up a "company business network," placing orders, arranging and controlling shipping schedules, and collecting payments. None of the other employees' job descriptions include any sales tasks, which seems implausible considering the volume of sales conducted by the petitioning company. The petitioner has not explained how a single sales employee meets the reasonable needs of its wholesale business. The lack of subordinate sales staff therefore raises additional questions regarding the beneficiary's involvement in the day-to-day sales of the company.

Counsel claims that the director erred by concluding that the beneficiary will not supervise a staff of managerial and professional employees. Although the beneficiary is not required to supervise personnel, if it

is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

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 relying solely on the degree held by a 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 claims that the positions of market research analyst, web developer/administrator, and accountant all require bachelor's degrees and are professional positions. However, the petitioner has not shown that the employees who fill these positions actually possess bachelor's degrees in the claimed required fields of study, such that they could be classified as professionals. Absent evidence of the employees' educational qualifications, the petitioner has not provided sufficient evidence to support its claim. 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)).

Counsel further states that its operations supervisor and warehouse manager are managers, and that the beneficiary's supervision of such employees establishes his employment in a managerial capacity. The job description submitted indicates that the warehouse manager performs the day-to-day duties of the warehouse function and does not supervise any employees. The petitioner has not established that the warehouse manager is employed in a managerial or supervisory capacity. The petitioner indicates that the beneficiary's spouse, as operations supervisor, supervises two employees and is responsible for "developing and managing the day-to-day operations." The AAO notes that the petitioner has also submitted the beneficiary's 2003 Form 1140-A, U.S. Individual Income Tax Return, on which the beneficiary's spouse's occupation is identified as "clerk." 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).

As noted above, when examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a

beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. The petitioner has not submitted sufficient evidence to establish that the beneficiary's subordinates are supervisors, managers, or professionals.

On appeal, counsel refers to an unpublished decision in which the AAO reversed the decision of the director. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. The decision referenced by counsel is not an AAO precedent decision. Further, the existence of this or any other decision does not absolve the petitioner of having to satisfy its burden of proof for this nonimmigrant petition. In this case there is a lack of probative evidence with regard to the beneficiary's actual employment capacity and the petitioner relies largely on conclusory statements in asserting that the beneficiary is acting primarily in a managerial or executive capacity. Counsel's cite to the non-precedent decision issued by the AAO is not persuasive.

Counsel asserts that it was improper for the director to deny the petition after previously approving the beneficiary's request for an extension of status with the same petitioner for the same position. Referring to the above-referenced Yates memorandum, counsel claims that the director was required by current USCIS policy to give deference to the subjective determination of prior adjudicators who concluded that the beneficiary is serving in a qualifying managerial or executive capacity.

Counsel's assertion is not persuasive. It must be emphasized that 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, USCIS 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 USCIS 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 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 above, the evidence submitted fails to describe the beneficiary's actual job duties in detail as required by 8 C.F.R. § 214.2(l)(3)(ii) and is insufficient to establish that the beneficiary would be employed in a managerial or executive capacity.

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). USCIS memoranda merely articulate internal guidelines for CIS personnel; they do not establish judicially enforceable rights. An agency's internal 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).

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in a managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.