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U.S. Citizenship
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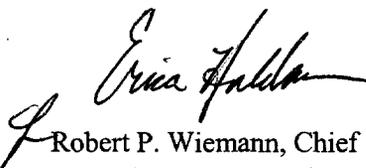
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

The petitioner, a Florida limited liability company, claims to be engaged in the manufacturing and wholesale of wire mesh for the construction industry. The petitioner states that it is an affiliate of Estiradora Mexicana de Alambres SAMI, S.A. de C.V., located in Mexico. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 seeks to employ the beneficiary as its automotive and production manager for a two-year period.

The director denied the petition on June 17, 2006, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company.

Counsel for the petitioner filed the instant appeal on July 19, 2006. On appeal, counsel for the petitioner states that it is evident that the adjudicator did not examine the original petition or the response for additional evidence. Counsel states that the petition is not an L-1 extension of a new office petition, instead the petition is for a standard L-1 extension. Counsel also asserts that the beneficiary is indeed employed in an executive and managerial position. Finally, counsel states that the U.S. entity has hired the services of a "professional employer organization" that is in charge of "paying, on behalf of the petitioner, employee benefits, payroll and workers' compensation." Counsel submits a brief and documentation in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The AAO withdraws the director's statements in her decision dated June 17, 2006, in which she states that the instant petition is an extension of a new office petition and will be analyzed pursuant to the regulations of 8 C.F.R. § 214.2(l)(14)(ii). The beneficiary was granted L-1A classification in order to enter the United States and work for an office that was already established. Therefore, this petition will be decided as an L-1A extension pursuant to 8 C.F.R. § 214.2(l)(1)(14)(i).

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 in the United States.

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 March 15, 2006. The Form I-129 indicates that the beneficiary will be employed in the position of automotive and production manager for the petitioner, which claimed to have approximately 21 employees. In a support letter dated March 8, 2006, the beneficiary's proposed duties in the U.S. are described as the following:

- Provide direct supervision to nonexempt employees (i.e., technicians);
- Responsible for planning of work flow;
- Develop procedures for processes & products;
- Provide direction to employees according to established policies and management guidance;
- Complete failure analysis and recommends process improvements;
- Manage purchasing function as it relates to inventory control, vendor choice, deliveries, pricing; responsible for cost control initiatives;
- Responsible for accuracy of floor stock;
- Provide back up support to the International Operations Officer/CEO;
- Selects, develops and evaluates personnel to ensure the efficient operation of the function;
- Identify process improvements and leads improvement implementation projects;
- Perform manufacturing time studies.
- Maintain the production and test equipment;
- Establish and maintain preventive maintenance programs and procedures;
- Schedules manufacturing activities;

In addition, the petitioner submitted an organizational chart of the U.S. entity. The chart indicates that the international operations officer and CEO, and the human resources manager will supervise the beneficiary as automotive and product manager. The chart also indicates that the international operation officer and CEO will supervise the sales manager, who in turn supervises the logistics and shipment manager. The chart has a second page with two columns: the first column includes a machinery supervisor, a technician, two auxiliary mesh employees, a mechanical employee, a bright employee, a design manager, two wire drawing employees, and one crane/internal operation employee. The second column includes a manufacturing supervisor, a superintendent mesh employee, two auxiliary mesh employees, and one mesh employee. The chart also has a third page with two cleaning employees, one maintenance employee and one maintenance auxiliary employee. The chart is not clear as to which employees, if any, are supervised by the beneficiary.

In addition, the petitioner submitted invoices from Crum Staffing II issued to the U.S. entity indicating a list of individuals and their salaries and wages for the periods from September 2005 until February 2006.

On April 19, 2006, the director determined that the petitioner did not submit sufficient evidence to process the petition. The director requested that the petitioner submit: (1) evidence of the U.S. petitioner's state quarterly wage reports indicating payroll taxes being paid for the first quarter of 2006; (2) copies of Form 941 indicating federal employment taxes reported and paid for the first quarter of 2006; and (3) a copy of the beneficiary's Form W-2, Wage and Tax Statement, for 2005.

In a response to the director's request, dated June 14, 2006, the petitioner submitted a letter from [REDACTED] Inc. issued to the president of the U.S. entity, stating [REDACTED] paid all applicable employer taxes to the appropriate agencies in your behalf for the employees that are paid through [REDACTED]. The letter also states that [REDACTED] is "licensed by the state as a Professional Employer Organization and as a leased client, your information is filed on [REDACTED] tax returns on a consolidated bases, which is under [REDACTED] federal identification number and if necessary the state identification number."

In addition, the petitioner submitted a document from [REDACTED] for the U.S. entity entitled "Quarterly Payroll Report," for the quarter ended on March 31, 2006. The document lists individuals, including the beneficiary, and their wages and salaries for the quarter ended on March 31, 2006. The petitioner also submitted Form W-2 for 2005 issued to the beneficiary from [REDACTED].

The petitioner also submitted its IRS Form 1065, U.S. Return of Partnership Income, for 2005, which shows that the U.S. company paid salaries and wages of \$174,200, and an additional \$752,023 as "cost of labor." This figure appears on the petitioner's 2005 Financial Statements and Accountants Report as "Direct-Labor-leased employees."

The director denied the petition on June 17, 2006 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that the evidence submitted indicated that [REDACTED] and not the petitioner, in fact employs the claimed employees of the U.S. entity, including the beneficiary. In addition, the director stated that it appears that a majority of the beneficiary's time will be spent in providing the services of the U.S. company, rather than supervising a subordinate staff who would perform the non-qualifying tasks.

On appeal, counsel for the petitioner states that it is evident that the adjudicator did not examine the original petition or the response for additional evidence. Counsel states that the petition is not an L-1 extension of a new office, instead the petitioner is for a standard L-1 extension. Counsel also asserts that the beneficiary is indeed employed in an executive and managerial position. Finally, counsel states that the U.S. entity has hired the services of a "professional employer organization" that is in charge of "paying, on behalf of the petitioner, employee benefits, payroll and workers' compensation." Counsel submits a service agreement between [REDACTED] and the U.S. entity. The agreement is blank as to the date it becomes effective. The agreement states that Crum Staffing II will lease employees to the U.S. entity. The agreement was signed in February 2004.

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of

the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

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

The beneficiary's position description is too general and broad to establish that the preponderance of his duties is managerial or executive in nature. The beneficiary's job description includes vague duties such as: "provide direction to employees according to established policies and management guidance"; "manage purchasing function as it relates to inventory control, vendor choice, deliveries, pricing; responsible for cost control initiatives;" and "identify process improvements and leads improvement implementation projects." 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). The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary will be "responsible for planning of work flow"; "complete failure analysis and recommends process improvements"; "responsible for accuracy of floor stock"; "perform manufacturing time studies"; "maintain the production and test equipment"; "establish and maintain preventive maintenance programs and procedures"; and "schedules manufacturing activities." 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).

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 record contains several inconsistencies regarding the staffing of the U.S. entity. The Form I-129 states that the U.S. entity employs approximately 21 employees. The petitioner submitted an organizational chart of the U.S. entity which indicates 24 employees. In addition, in response to the

director's request for evidence, the petitioner submitted a document from [REDACTED] for the U.S. entity entitled "Quarterly Payroll Report," for the quarter ended March 31, 2006 which indicates salary and wages paid to 29 leased employees utilized by the U.S. entity. In reviewing the organizational chart of the U.S. entity, only eight employees out of 24 employees listed on the organizational chart are also listed on the document entitled "quarterly payroll report." Thus, the petitioner has not confirmed that 16 employees listed on the organizational chart are in fact employed by the U.S. entity. In addition, the document entitled "quarterly payroll report" lists several individuals that the petitioner has not indicated their job titles or job duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, the organizational chart submitted by the petitioner is not clear as to whether the beneficiary supervises any subordinate employees. In addition, the beneficiary's job description states that the beneficiary will supervise technicians but the beneficiary has not explained how many technicians the beneficiary will supervise or their duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As noted by the director, it appears that all of the individuals utilized by the U.S. entity are employed by [REDACTED] and are independent contractors. The petitioner has not submitted job titles and job duties for the individuals utilized by the U.S. entity and thus failed to explain how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, the majority of the U.S. entity's staff, including the beneficiary, are independent contractors and are not directly employed by the U.S. entity as required by the regulations under 8 C.F.R. § 214.2(l)(3)(ii). The service agreement between [REDACTED] and the U.S. entity states that [REDACTED] "shall have sufficient authority so as to maintain a right of direction and control over Leased Employees assigned to you, and shall retain authority to hire, terminate, discipline and reassign Leased Employees." Although counsel asserts that [REDACTED] is responsible for paying, on behalf of the petitioner, employee benefits, payroll and worker's compensation, the terms of the service agreement suggest that [REDACTED] maintains a measure of control over the leased employees beyond that of a mere service provider. Further, the petitioner's Form 1065 for 2005 indicates that the company did in fact employ regular payroll employees, as the company paid salaries and wages in the amount of \$174,200. The petitioner has not explained why the beneficiary, who is claimed to be a senior member of its staff, would not be paid as a regular payroll employee. If the beneficiary is not actually employed by the U.S. entity, the petitioner may not file a petition for L-1A classification on behalf of the beneficiary.

As discussed above, the beneficiary's job description included primarily non-qualifying duties associated with the petitioner's day-to-day functions, and the petitioner has not identified nor submitted evidence of sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over a department

within the business is insufficient to elevate his position to that of an executive or manager as contemplated by the governing statute and regulations.

Based upon the lack of a comprehensive job description, the beneficiary's apparent performance of many non-managerial duties, and the lack of evidence of the company's staffing levels, it cannot be concluded that the beneficiary will be employed by the U.S. entity in a managerial or executive capacity. Therefore, the appeal will be dismissed.

Counsel for the petitioner noted that CIS approved a petition that had been previously filed on behalf of the beneficiary for the same position. The prior approval does 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). 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.