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File: EAC 07 015 52110 Office: VERMONT SERVICE CENTER Date: **AUG 18 2008**

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

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 claims to be an international freight forwarding company and seeks to extend the employment of its vice president in the United States as an 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 Texas limited liability company, claims to be the subsidiary of Advemar, S.C., located in Juarez, Mexico. The beneficiary was initially granted a two-year period of stay, and the petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition, finding that the petitioner had not demonstrated that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted that based on the evidence submitted, the beneficiary would not function at a senior level within the petitioner's organizational hierarchy.

On appeal, the petitioner, through counsel, asserts that the beneficiary will be in fact acting in a primarily executive capacity, and that the director misconstrued the definitions of managerial and executive capacity when assessing the beneficiary's eligibility. In support of these contentions, counsel 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.

This primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, on October 23, 2006. In the petition, the petitioner indicated that it was established in 1998 and currently employed 13 persons. The petitioner claimed that the petitioner would serve as its vice president and chief executive officer. In support of the

beneficiary's eligibility for the benefit sought, the petitioner submitted the following overview of the beneficiary's duties and responsibilities written by [REDACTED]

1. **ACTIVITIES AND [RESPONSIBILITES] DETAILS**

- a. Sales Promotion
- b. Control and supervision of Import and Export tax reports
- c. Control of reception of [merchandise] and forwarded after cover customs formultis [sic] to final destination
- d. Collection of [receivables] from customers and payments to Governmental, utilities and Services Suppliers
- e. Customer Services for Import and Export Traffic

2. [Percentage] of the time applied to the different activities are variables soon as the traffic [volume] of Import and Export operation, but as an average. We may say that Import is the 70% of the operations in [comparison] with the 30% of Export activities.

3. **The number of the [Employees under] his [direction] and supervision are**

Administrative	1 person
Traffic	1 person
Warehouse	4 persons
Reception	1 person

4. Description of his duties and responsibilities of the employees under His direction and supervision

5. His [Authority] is at second level just under the [Authority] of the President

6. The service provide by the corporation are in first term of importance. The Custom Formalities in front of the Mexican [Authorities] under the License Of the Principal and Director of the entity.

A second list of duties entitled "Chief [Executive] Office" provided the following description of duties:

Will work directly with the Board of Directors of the International Companies in order to improve its business service. Will implement the corporate business plan for expansion of international trade. Has full authority to hire and fire all employees. To negotiate contracts and to consult with corporate attorneys, financial advisors, accountants and all other [professional] advisors.

The petitioner also submitted an organizational chart, indicating that the beneficiary, as vice-president, oversees the administration department, which in turn employed two persons, namely, [REDACTED] and [REDACTED] z. Additionally, the petitioner submitted its Form 941, Employer's Quarterly Federal Tax Return, and Texas Form C-3, Employer's Quarterly Report, for the quarter ending March 31,

2003. The Form C-3 indicated that the petitioner employed only one person during that period, [REDACTED]. The petitioner did not submit evidence documenting its employment of the workers identified on the organizational chart.

The director found this evidence insufficient to warrant approval of the petition and consequently issued a request for evidence on November 1, 2006. The director requested evidence that the petitioner was doing business and was able to support the beneficiary in a primarily managerial and executive capacity. Furthermore, the director requested an overview of the petitioner's staffing levels, including a list of all current employees, their position titles, and a complete description of each employee's position. The director also requested documentary evidence proving that the petitioner actually employed such persons, including but not limited to Forms 941, Forms W-2 and/or Forms 1099 for the years 2005 and 2006.

In response, the petitioner submitted a letter dated December 14, 2006 which provided an overview of the petitioner's employees, their job titles, and their associated duties. The letter listed the following seven employees: (1) the beneficiary; (2) [REDACTED], Accounting; (3) [REDACTED] Warehouse Employee; (4) [REDACTED], Warehouse Employee; (5) [REDACTED] Traffic Department; (6) [REDACTED] Customs Supervisor; and (7) [REDACTED] Transport. Additionally, the petitioner submitted Forms W-2 for 2005 for the following persons:

- [REDACTED]
- **Beneficiary**

The persons named in bold type are not listed on the petitioner's current employee roster.

The petitioner also submitted its Forms 941 for the first three quarters of 2006. The first quarter, ending March 31, 2006, lists seven employees; the second quarter, ending June 30, 2006, lists eleven employees; and the third quarter, ending September 30, 2006, lists eleven employees.

On January 3, 2007, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. Specifically, the director noted that the beneficiary would not be supervising managerial, supervisory, or professional employees based on the job titles and position descriptions of the petitioner's other six employees. Moreover, the director concluded that some of the duties listed in the beneficiary's position description included non-managerial and non-executive tasks.

On appeal, counsel for the petitioner alleges that the director's decision was erroneous, and contends that the beneficiary is in fact working in a qualifying capacity. Counsel also asserts that the beneficiary is an executive employee, and thus the director erred by evaluating his qualifications as a manager when

adjudicating the petition. Counsel claims in his appeal brief that the beneficiary is the vice president, the chief executive officer, and the chief financial officer of the company. Counsel further claims that several of the beneficiary's duties that the director deemed to be disqualifying, such as signing bills of lading, were duties reserved for the executive in charge of the company and thus were executive in nature. Counsel submits additional details regarding the petitioner's other employees and their positions in support of the appeal.

The AAO, upon review of the record of proceeding, concurs with the director's finding.

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). In this case, the petitioner vaguely described the beneficiary's duties but failed to provide a specific overview of how he will refrain from performing non-qualifying tasks. The document submitted by [REDACTED] provides a generic and at times an incomprehensive overview of the beneficiary's job duties, and lists tasks such as "sales promotion," "collection of receivables," and "customer services for import and export traffic." The AAO notes that the statements provided give no insight on the nature of the beneficiary's daily tasks or his day-to-day duties. 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 answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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).

Moreover, in response to the request for evidence dated December 14, 2006, the petitioner lists the beneficiary's duties as:

Supervisor of all Employees, Administrative, Bank Accounts & Customer service.
[Verify] all documents and Signatures before present to the Mexican Custom
Give Pedimentos to the Mexican Drivers
Dispatch Reds of Imports & Exports (in Mexican Customs)

Again, this overview is not entirely clear in its description of the beneficiary's tasks. However, it can be concluded that tasks such as "give pedimentos to Mexican drivers" and verifying documents and signatures are not typically the tasks of someone employed in a primarily executive capacity, as alleged by counsel. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

On appeal, counsel for the petitioner attempts to provide further clarification with regard to the beneficiary's duties, and provides a detailed statement prepared on the petitioner's letterhead which outlines the beneficiary's duties as well as those of his subordinate employees. This evidence, however, will not be considered by the AAO.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted this detailed description of duties in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the descriptions of the beneficiary's duties submitted prior to adjudication will be relied upon for purposes of this appeal.

An issue not directly addressed by the director is whether the beneficiary is primarily a manager or an executive. More specifically, although the petitioner does clarify that the beneficiary is claiming to be primarily engaged in executive duties under section 101(a)(44)(B) of the Act, both counsel and the petitioner lists numerous managerial tasks under the beneficiary's description of duties. 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 chooses to represent 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. *See* sections 101(a)(44)(A) and (B) of the Act.

In this matter, counsel's specific assertion on appeal that the beneficiary is an executive is noted. However, it was still claimed that a major part of the beneficiary's duties included overseeing staff. The statement by [REDACTED], the statement entitled "Chief [Executive] Officer," and the letter dated December 14, 2006 all claim that the beneficiary is supervising employees. Although the beneficiary is not required to supervise personnel, if it is claimed that his qualifying duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial for the purpose of determining whether he meets the alternative requirement for a managerial capacity position. *See* § 101(a)(44)(A)(ii) of the Act.

The petitioner did not provide the level of education required to perform the duties of the beneficiary's subordinates, such as the warehouse workers, the traffic department employee, the accounting person, the customs person, and the transport employee. Thus, the AAO is unable to determine whether these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or

she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. Given the size and nature of the vaguely described freight forwarding business, it is more likely than not that the beneficiary and his proposed subordinate employees will all primarily perform the tasks necessary to the operation of the business. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006). Therefore, it appears that the beneficiary will be, at most, a first-line supervisor of non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *See* 101(a)(44) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitutes significant components of the duties performed by the beneficiary on a day-to-day basis. For this reason, the petition may not be approved.

It is noted that CIS approved a petition that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval 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. at 597. 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 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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.