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**U.S. Department of Homeland Security**  
U.S. Citizenship and Immigration Services  
*Office of Administrative Appeals*, MS 2090  
Washington, DC 20529-2090



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

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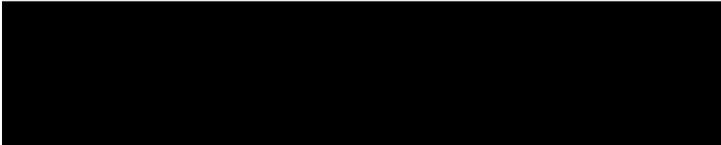
**APR 07 2010**

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)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center denied the nonimmigrant visa petition. 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 beneficiary's employment 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, operates a chain of fast food restaurants. The petitioner indicates that it is a subsidiary of [REDACTED], located in Pasig City, Philippines. The petitioner's affiliate has employed the beneficiary in L-1A status since April 2000. The petitioner filed the instant petition to request an amendment and extension of the beneficiary's status pursuant to an upcoming merger between the petitioner and the beneficiary's current U.S. employer. The petitioner seeks to employ the beneficiary in the position of Operations Manager (Store operations and Training) for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would 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, counsel for the petitioner indicates that the director placed undue emphasis on the number of subordinate employees supervised by the beneficiary without taking into consideration the duties she performs in coordination with other departments of the company. Counsel indicated on the Form I-290B Notice of Appeal, that she would submit a brief and/or additional evidence to the AAO within 30 days. As of this date, nothing further has been received from the petitioner or counsel and the record will be considered complete.

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 will be employed in the United States 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 the Form I-129, Petition for a Nonimmigrant Worker, on December 30, 2003. The petitioner stated that the beneficiary will serve in the position of "Operations Manager (Store Operations and Training)." In a letter dated December 23, 2003, the petitioner described the beneficiary's duties as the following:

Formulates administrative and operational policies and procedures for [the petitioning company]. Directs and coordinates, through subordinate managerial personnel such as the store managers, activities of each [company] store to obtain optimum use of equipment, supplies and manpower. Reviews and analyzes expenditures, financial and operations reports from each store to determine requirements for increasing profits, such as productivity, costs and profitability. Prepares recommendations on findings for management evaluation. Recommends capital expenditures for acquisition of new equipment which would increase productivity and efficiency of services for [company] stores. Adopt and implement [company] training courses for key managers with the end of improving human resource practices and strengthening corporate cultures. Implement motivational programs to be adopted by store managers and personnel. Develop and implement training programs for other store personnel.

On March 1, 2004, the director requested additional evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. Specifically, the director instructed the petitioner to submit: (1) a more detailed description of the beneficiary's duties, indicating exactly who the beneficiary directs including their job title and position description; (2) the percentage of time the beneficiary spends on each of her listed duties; and (3) an organizational chart for the U.S. company which clearly depicts the company's management hierarchy, the beneficiary's current position, and all employees under the beneficiary's supervision.

In a letter dated April 15, 2004, the petitioner indicated that the beneficiary will be employed in the position of "Systems Development Manager" performing the following duties:

1. Create and develop systems for restaurant planning and subsequent restaurant opening procedures bearing in mind the unique [company] restaurant menu to include restaurant layout planning and efficient space utilization thus effectively reducing overall restaurant space requirements resulting to substantial savings on operating expense. (15%)
2. Identify, test and standardize specific restaurant equipment and tools that will meet the requirements of the unique [company] food products with emphasis on cost and investment analysis to maximize return on investment. (10%)

3. Identify, test and standardize specific restaurant point of access systems with emphasis on the drive thru system to increase overall speed of service in this segment and achieve sales objectives. (10%)
4. Create and develop restaurant operations systems to include food, service and cleanliness quality management that include checking for compliance to set quality standards. Create and develop tracking system for all units in their ability to comply with set quality goals. Develop and implement recognition programs for restaurants that meet and achieve food, service and cleanliness quality objectives. (20%)
5. Create and develop systems for cash control and management to reduce risk of loss and improve control of operating expense. (10%)
6. Develop, standardize and make continuous improvement on the [company's] franchise program to encompass the creation of the franchisee development program manual and the tools necessary to implement the franchise training thus insuring his successful operation of the [company] restaurant. (20%)
7. Identify continuous improvement opportunities in the above-mentioned areas and actively manage manual documentation of these processes. (15%)

The petitioner stated that the beneficiary will report directly to the company president/general manager, and will "coordinate with other company managers in the implementation of her assigned tasks." The petitioner submitted an organizational chart for the U.S. entity which identifies the beneficiary as system development manager, reporting to the company's president, with no subordinate employees.

The director denied the petition on June 14, 2004, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director noted that the beneficiary appears to be the only employee assigned to the "system development" department, and as such is performing non-qualifying duties associated with this company function, rather than primarily managing the function. The director determined that the position is comparable to a specialist or management analyst, rather than a function manager, personnel manager or executive within the company.

Counsel for the petitioner submits the following statement on the Form I-290B, Notice of Appeal:

The Service erred in holding that the beneficiary will not be employed primarily in an executive or managerial capacity. In denying the instant petition, the Service relied heavily on the organizational chart of the company and noted that there were no people directly under her. However, the Service failed to consider that the beneficiary will be performing her duties in coordination with other departments of the company which has a workforce of more than 200 employees. Contrary to the findings of the Service, the duties of the beneficiary are executive or managerial in nature and they just do not relate to the performance of a specific

product or service. In fact, the beneficiary will be given a wide latitude or discretion in the performance of her duties.

Upon review, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.* The AAO will then consider this information in light of the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

At the outset, the AAO notes that the petitioner changed the beneficiary's job title subsequent to the filing of the petition, yet provided no explanation for this change. In addition, while there are some similarities between the two job descriptions provided, there are also key differences with respect to the beneficiary's claimed job duties and level of authority. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner initially stated that the beneficiary will serve as "operations manager (store operations and training)" responsible for formulating "administrative and operational policies and procedures" for the company, and directing and coordinating "through subordinate managerial personnel such as store managers," the activities of each restaurant. While these duties suggest that the beneficiary has the appropriate level of authority over policy and personnel, such duties were absent from the job description submitted in response to the RFE, and the petitioner and counsel now concede that the beneficiary does not directly supervise subordinate personnel.

The petitioner initially stated that the beneficiary "recommends capital expenditures for acquisition of new equipment," and in response to the RFE, stated that the beneficiary will devote 20 percent of her time to "identify, test and standardize restaurant equipment, tools, and point-of-access systems," thus suggesting that her duties with respect to acquisition of new equipment are in fact technical in nature. The petitioner also stated in response to the RFE that the beneficiary devotes 15% of her time to creating "systems for restaurant planning," another duty that appears to be more technical than managerial, and which was not included in the job description submitted at the time of filing.

In addition, the petitioner indicated at the time of filing that the beneficiary will "adopt and implement . . . training courses for key managers," and "develop and implement training programs for other store personnel." In response to the RFE, these duties were omitted and the petitioner instead indicated that the beneficiary will "create the franchisee development program manual and the tools necessary to implement the franchise training." Again, there was no mention of any franchise-related responsibilities in the initial description of the

beneficiary's duties, and no mention of any management training responsibilities in the latter job description. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Here, the information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description.

Finally, the AAO notes that some of the duties listed in both position descriptions are simply too vague to be categorized as managerial or executive in nature. For example, the petitioner stated that the beneficiary "reviews and analyzes expenditures, financial and operations reports from each store to determine requirements for increasing profits" and "prepares recommendations on findings for management evaluation." Absent additional explanation, this duty reflects a level of responsibility more akin to that of a management analyst than a manager charged with exercising discretion over day-to-day operations of a function or a department. Similarly, the petitioner did not explain the specific managerial tasks the beneficiary would perform to "create and develop restaurant operations systems," a "tracking system," or "systems for cash control and management." The inconsistencies and lack of specificity in the position descriptions provided are more significant considering that the petitioner indicates that the beneficiary has held the same position since her transfer to the United States in 2000, and her role within the company should reasonably be clearly defined. 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 her 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 beneficiary's "control," management or direction over a company or a function cannot be assumed or considered "inherent" to her position merely on the basis of the beneficiary's job titles, placement on a general organizational chart or broadly-cast business responsibilities. The petitioner's inconsistent descriptions of the beneficiary's duties are insufficient to establish that the beneficiary would be performing primarily managerial or executive duties.

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 statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Here, despite the petitioner's initial statement that the beneficiary directs and coordinates subordinate managerial

personnel, the petitioner's organizational chart shows that the beneficiary has no direct or indirect subordinates, and counsel concedes on appeal that the beneficiary does not supervise any staff, but rather "performs her duties in coordination with other departments of the company." Therefore, the petitioner has not established that the beneficiary qualifies as a personnel manager.

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, 8 U.S.C. § 1101(a)(44)(A)(ii). 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 position description 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. 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).

Here, the petitioner has not clearly articulated a claim that the beneficiary manages an essential function of the petitioning company, nor has it clearly defined her position title or description. Absent a clear and credible breakdown of the actual duties the beneficiary performs and the time spent by the beneficiary performing specific duties, the AAO cannot determine what proportion of her duties will be managerial, nor can it deduce whether the beneficiary will primarily perform 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). In the case of a function manager, where no subordinates are directly supervised, USCIS may consider such factors as the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages. Even if the beneficiary does not directly supervise employees, it is the petitioner's burden to establish that someone other than the beneficiary performs the day-to-day non-managerial tasks of the function managed.

While counsel emphasizes on appeal that the petitioning company has over 200 employees, and that the beneficiary "will be performing her duties in coordination with other departments of the company," the evidence of record does not clearly establish that the beneficiary manages an essential function of the company, how she performs her duties "in coordination" with other departments, who performs non-qualifying duties associated with the beneficiary's broad responsibilities, or how the beneficiary exercises "a wide latitude of discretion in the performance of her 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)). The AAO will not assume that the beneficiary is a manager simply because she has been given various managerial job titles and works for a company with 200 employees. The

petitioner has not explained how the company's other employees support the beneficiary in the performance of her duties or otherwise relieve her from performing non-managerial duties.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-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 was acting primarily in an executive capacity. The job descriptions provided for the beneficiary are so vague and inconsistent that the AAO cannot deduce what the beneficiary does on a day-to-day basis. Nor does the evidence submitted support a conclusion that the beneficiary devotes the majority of her time to the broad policies and goals of the company. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In sum, the petitioner's arguments primarily fail on an evidentiary basis. The lack of a detailed, credible and consistent description of the beneficiary's actual duties precludes a finding that the beneficiary would be performing primarily managerial or executive duties.

While USCIS previously approved two petitions for L-1A status 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). Furthermore, the AAO notes that the most recent prior petition was filed by the petitioner's affiliate and predecessor company, and the instant petition was filed as a change in previously approved employment.

If the previous nonimmigrant petitions were approved based on the same contradictory and 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 amend and 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), includes numerous unresolved inconsistencies with respect to the beneficiary's duties and job title, 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 USCIS 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 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. 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.