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U.S. Citizenship
and Immigration
Services

DATE: **MAY 14 2013** Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting 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 status as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a California corporation, established in 1994, engaged in the wholesale distribution of computer products. The petitioner states that it is a wholly owned subsidiary of [REDACTED] located in China. The beneficiary was previously granted one year as an L-1A nonimmigrant intracompany transferee as the company's President in order to open a "new office" in the United States.¹ The petitioner now seeks to extend the beneficiary's status for an additional three years.

The director denied the petition, concluding that the petitioner had failed to demonstrate that the beneficiary would be employed primarily in a managerial or executive capacity. The director reasoned that the beneficiary's job duties description was insufficient due to its lack of specificity. Further, the director noted that the evidence did not establish that the beneficiary supervised other managerial, supervisory, or professional subordinates or that he was in a position higher than a first-line supervisor of non-professional employees.

On appeal, counsel contends that the director erred in concluding that the beneficiary is not a manager or executive as defined by the Act. Counsel notes the inconsistency on the part USCIS in approving a petition when the petitioner only had two employees and now denying it when it has six employees. Further, counsel maintains that the beneficiary need not have managerial, supervisory or professional subordinates to qualify under the Act, and alternatively asserts that the beneficiary's subordinates each control essential functions of the organization. Counsel asserts that the petitioner has established that the beneficiary has been employed in a managerial and executive capacity because the beneficiary is the only senior manager within the organization.

I. The Law

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.

¹ The petitioner states on the record that it was not conducting business from 2003 through 2011. However, the petitioner proceeded to begin operating again upon the beneficiary's granting of L-1A status in August 2011. As such, the petitioner was treated as a new office as defined by the regulations despite being in existence since 1994. Therefore, the petitioner will now be treated as a new office seeking an extension as specifically defined in the regulations.

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.

Further, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a petitioner seeking an extension of a one year "new office" petition accompany their Form I-129 petition with the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. The Issue on Appeal:

The sole issue on appeal is whether the petitioner has established that the beneficiary is employed in the United States in a primarily executive or managerial capacity as required by 8 C.F.R. § 214.2(l)(3).

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.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the petitioner performs primarily executive or managerial duties with the petitioner as required by the Act.

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 support of the I-129 Petition for a Nonimmigrant Worker, the petitioner explained the beneficiary's previous foreign duties and noted that the beneficiary would perform the same duties with the petitioner, amongst others, as follows:

He is the one who determines business strategies and general direction of development of the company utilizing his experience and knowledge of the business environment in Shanghai, China. He has been responsible for making profit . . . and his daily activities involve calling meetings, hearing or reading various reports, meeting with key stakeholders or customers, developing relationship [sic] with authorities and business partners. His duties have been to direct the entire operations of the business in Shanghai where he sets and adjusts the company policies and business goals and objectives, determines investment and scope of business or services, makes hir[ing] and fir[ing] decisions, . . . reviews company's financial statements and reports to monitor overall operational performance, seeks business opportunities and makes decisions to make further investment; he is also responsible for controlling expenditures and budget to reduce costs and increase profitability of the business.

In the U.S., he will be the head of the U.S. subsidiary and will perform exactly the same duties as in China as shown above. He will make decisions in investment in any new opportunities and new areas based on sound market research and analysis, he will set up company policies covering areas of human resources, long-term and short-term business goals and objectives, hire employees including managers, study local business practices and laws and regulations, make business plans such as to cultivate the market, direct marketing activities, hire professionals to conduct cost accounting on various endeavors, make reports and suggestions to the Board on issues including investment, divestment, hiring key employees, and start major marketing campaigns which requires significant spending.

The director found that the beneficiary's job duties lacked sufficient specificity. In a Request for Evidence (RFE), the director asked petitioner to provide a more detailed description of the beneficiary's duties with the petitioner, including the percentage of the beneficiary's time devoted to each duty. The petitioner provided the following response:

- Determines business strategies and general direction of development of the company utilizing sounds experience and knowledge of the business environment on an international basis, determine investment and scope of business or services; the beneficiary will spend about 20% of the time.
- Responsible for making profit and develop business in the U.S. by setting short-term and long-term goals and objectives in achieving revenue, profit, reduce costs, etc., creates and seeks business opportunities. About 30% of the time.
- Review various financial statements and business reports, call and participate meetings or conferences with key stakeholders or customers, 20% of time.
- Sets and adjusts company policies with regard to management of operations, human resources, recruitment, promotion, salary and incentives. 15% of time.
- Make hire and fire decisions of managers, oversees overall operational performances, 5% of time;
- Responsible for controlling expenditure and budget to reduce cost and increase profitability of the business. About 10% of the time.

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. Portions of the duty description are so overly vague that they provide little or no probative value as to the beneficiary's actual day-to-day activities, such as determining business strategies and investment; being responsible for making profit; setting short-term and long term goals; reviewing finances; calling and participating in meetings; and controlling expenditures. The petitioner has not provided specifics, examples, or supporting documentation regarding any of the aforementioned tasks to give them credibility or probative value. In fact, the duties set forth above could be the duties of any executive with any company and questionably make no reference to the petitioner's specific business. Indeed, it is difficult from the record to discern the goods or services the petitioner has been providing since establishing the new office in the United States due to the lack of detail. In sum, the lack of specificity, and supporting documentation, surrounding these offered duties calls into question their credibility. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

Further, 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).

Counsel asserts on appeal that since the beneficiary was previously approved as an L-1A transferee when the petitioner had only two employees and minimal operations, that it would be logically inconsistent to deny the petition now that the company has six employees and is garnering revenue. First, prior approvals do not preclude USCIS 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). Second, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. At the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). If the business is not sufficiently operational to support a beneficiary performing primarily executive or managerial duties, the petitioner is by regulation ineligible for an extension. As such, counsel's reasoning offered on appeal is not convincing, as the petition was reviewed under a completely different new office standard when originally approved, but is now being adjudicated according to a completely higher level standard requiring that the petitioner show that the beneficiary is primarily performing executive or managerial duties and that the petitioner is capable of supporting the beneficiary's claimed role.

In the instant matter, the petitioner has not established that it has reached a level where it can employ the beneficiary in a predominantly managerial or executive position. The regulations require that the petitioner seeking extension of a new office petition provide sufficient evidence of the company's financial status. See 8 C.F.R. § 214.2(l)(14)(ii)(E). In the present matter, the petitioner submitted a Form 1120 U.S. Corporation Income Tax Return for 2011 reflecting that the petitioner accumulated \$582,680 in gross revenues in 2011, but took a loss of \$87,160 in 2011. The petitioner states that this loss was due to the costs inherent in starting the company. Although the AAO acknowledges costs related to the start-up of the company, the petitioner's stated financials after one year cast material doubt the petitioner's ability to sustain the beneficiary in a managerial or executive position as defined by the Act. In fact, the beneficiary's provided duties highlight the beneficiary's focus on continuing investment in the United States, but the record fails to detail the amount and extent of this investment. Further, this failure is of particular concern given that it is doubtful that the petitioner can continue to employ the beneficiary, and the stated supporting managerial employees, taking the aforementioned losses without specific foreign investment. The petitioner has also provided insufficient evidence regarding its current business operations to confirm whether they are appropriate to sustain the beneficiary. Additionally, the beneficiary's duties mention that the beneficiary was tasked with starting major marketing campaigns requiring significant spending, but the aforementioned Form 1120 U.S. Corporation Income Tax Return for 2011 indicates that the petitioner spent no money on advertising in 2011. 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Counsel also maintains on appeal that a petitioner need not establish that the beneficiary's subordinates are managers, supervisors or professionals; and asserts that since each of the beneficiary's subordinates are in charge of an essential function of the organization that this is sufficient. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3). 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'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

The AAO does not find counsel's assertion that the beneficiary qualifies as a personnel manager convincing. The petitioner states that the beneficiary has six subordinates: (1) a Sales Director; (2) a Senior Sales Manager; (3) a Sales Manager; (4) Warehouse Manager; (5) Warehouse Clerk; (6) and an Accounting

Manager. Therefore, the petitioner asserts that of its total eight employees, seven are managers, casting doubt as to whether the organization has sufficient employees to perform day-to-day operations and whether the offered managers are indeed performing managerial or supervisory duties themselves. In fact, counsel admits on appeal that none of the beneficiary's subordinate "managers" supervise other subordinates. Although a beneficiary may be established as a function manager under the regulations through the managing of an essential function of an organization, the claimed managerial subordinates of a beneficiary are not afforded the same classification. As such, since none of the beneficiary's subordinates supervise other employees, the beneficiary cannot be deemed to qualify as a personnel manager. Although the petitioner notes that some of the beneficiary's subordinates have baccalaureate degrees, the petitioner does assert that these positions require baccalaureate degrees. Further, the petitioner has provided no supporting documentation to establish the claimed educational credentials of his subordinates. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As such, the petitioner has not established with sufficient evidence that the beneficiary qualifies as a personnel manager.

Additionally, the beneficiary has not been established as an executive as defined by the Act. 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.*

The petitioner has not provided sufficient evidence to establish the beneficiary as an executive. As noted, the beneficiary has provided a vague duty description for the beneficiary that lacks credibility and probative value. Therefore, it cannot be determined with any certainty that the beneficiary is primarily focused on directing management and establishing goals and policies. Indeed, the petitioner does not claim that the company has any managers beyond the beneficiary; as such, the organization is not established as having a subordinate level of managers for the beneficiary to direct. In fact, the petitioner organization is questionably top heavy, having little or no employees devoted to daily operational tasks. As noted by the statute, a beneficiary will not be deemed an executive simply because they hold an executive title or because they direct the enterprise, but they must establish with sufficient evidence that the beneficiary operates in an elevated position within a complex organizational hierarchy. However, the petitioner has not met this burden and the record accomplishes little other than establishing that the beneficiary directs the organization as the sole managerial employee. Again, 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In conclusion, the petitioner has not submitted sufficient evidence to establish that the beneficiary primarily acts in a managerial or executive capacity as required to extend the petition. Therefore, the appeal must be dismissed.

III. Conclusion

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.