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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

[Redacted]

DEC 23 2003

FILE: WAC 02 056 52873 Office: CALIFORNIA SERVICE CENTER Date:

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:
[Redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, AT Construction and Development, Inc., claims to be a subsidiary of Bantec, located in Germany. The petitioner is engaged in the project management and construction business and seeks to extend the beneficiary's stay temporarily in the United States. The petitioner intends to employ the beneficiary as its president for a period of two years at a salary of \$44,000 per year. The petitioner was incorporated in the State of California on April 28, 2000 and claims to have one employee.

Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). On June 27, 2002, the director denied the petition and determined that the petitioner had not established that the beneficiary will be performing primarily executive or managerial duties for the U.S. entity.

On appeal, the petitioner's counsel asserts that the beneficiary is employed as an executive and has duties and responsibilities normally performed by an individual in an executive capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.

Pursuant to 8 C.F.R. § 214.2(1)(3), 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 (1)(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 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.

(v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or

(C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

Further, if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation at 8 C.F.R. § 214.2(1)(14)(i)&(ii) requires that:

(i) *Individual Petition.* The petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L). Except for those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition may be filed only if the validity of the original petition has not expired.

(ii) *New offices.* A visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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.

The issue in this proceeding is whether the beneficiary will be primarily performing managerial or executive duties for the United States entity. 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.

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). Moreover, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner 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.* Therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of either capacity.

On December 4, 2001, the petitioner filed Form I-129 for L-1A classification to extend the beneficiary's stay. Counsel, on behalf of the petitioner, described the beneficiary's proposed U.S. duties as:

Plan, formulate, and implement administrative and operational policies and procedures. Direct and coordinate activities and operation of the corporation. Approve purchase of viable properties and oversee the development of the same. Negotiate

with prospective clients, property owners Hire, fire, promote and take other personnel action with respect to the employees of the company. Establish and implement its goals, strategies, policies, and procedures. Use independent discretion and authority in identifying and cultivating new projects. Approve purchase, rehabilitation/ construction and sale of real estate properties. Oversee and monitor progress of projects. Negotiate with clients, property owners, contractors, and confer with government and private entities.

On January 9, 2002, the director requested that the petitioner submit additional evidence to assist in determining whether the beneficiary will be employed in a qualifying managerial or executive capacity. In particular, the director requested that the petitioner submit the U.S. entity's organizational chart, a list of all employees, a more detailed description of the beneficiary's duties in the United States, and a list of the employees that the beneficiary directs along with their job duties.

On May 28, 2002, the petitioner responded to the director's request by submitting an organizational chart describing the duties of each position. However, there were no names provided for these positions. The petitioner claimed:

[T]o fill management and personnel gaps, the company availed itself of the services of Ingle Group, Inc. for administrative works, and on various independent contractors, licensed contractors and architects and consultants, partly using their own licenses to perform the requested works. This became necessary as the company still awaits the release to the company of all its own required license.

The petitioner stated, "the company has no other employees at this time but for [the beneficiary]. . . . However, the proposed personnel complement which [the beneficiary] will be required to supervise, along with the respective duties and responsibilities is shown in Exhibit 2." Exhibit two lists the proposed position and describes the duties for the position. In addition, the petitioner submitted a more detailed description of the beneficiary's duties and the percentages of time the beneficiary devotes to each of the

described duties. The petitioner also stated that, although the U.S. entity was incorporated in April 2000, formal operations did not start until the beneficiary could actively manage and direct the company's operations when the beneficiary's L1-A visa was granted in December 2000.

On June 27, 2002, the director determined that the record was insufficient to demonstrate that the beneficiary will be employed primarily in an executive or managerial capacity. The director stated that the U.S. entity was established in 2000, with one employee, and "had sufficient time to be conducting business in a manner that would require the services of an individual primarily engaged in a managerial position." The director also found that the petitioner had restated portions of the definitions of managerial and executive capacity without further elaboration.

On appeal, counsel, on behalf of the petitioner, asserts that the beneficiary will be acting in an executive capacity. Counsel asserts:

[T]he U.S. entity requires certain licenses in order to fully function. . . . To fill initial management and personnel gaps, the company relied on the services of licensed professionals and other independent contractors. Total fees paid to these individuals exceeded \$64,000 for the year 2001. . . . He has been authorized and exercises wide latitude of discretionary decision-making powers He consults, negotiates and enters into contracts with various individuals and agencies involved in the company's projects. . . . Once the licenses are released, the company will focus on fully pursuing its main objectives. Plans are under way to hire additional personnel. Mr. Arian will concentrate on directing and controlling the management of the company, and setting its goals and objectives.

Upon review, the beneficiary's title and duties are described utilizing phrases such as "establish and implement its goals, strategies, policies, and procedures" These phrases are vague and general. The petitioner fails to elaborate what goals, strategies, policies and procedures the beneficiary will establish and implement. The petitioner also fails to enumerate any concrete policies

that the beneficiary will establish or implement. In addition, the petitioner claims that the beneficiary has "utilized his knowledge in engineering and marketing to make these projects viable." However, it fails to identify how the beneficiary will specifically draw upon his knowledge.

Further, it appears that a significant portion of the beneficiary's duties will be directly providing the services of the United States entity as indicated in the record that the beneficiary is "cultivating new projects" and "negotiating with clients." These duties primarily appear to comprise marketing tasks. Since marketing duties qualify as performing a task necessary to provide a service or product, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition, the beneficiary appears to be primarily involved in the daily operations of the United States entity. The petitioner asserted that "the U.S. entity requires certain licenses in order to fully function" and the beneficiary is involved in approving the purchases of viable properties and overseeing the development. This assertion indicates that the preponderance of the beneficiary's duties will be directly performing the non-managerial day-to-day operations in an effort to procure business. However, it must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities are managerial or executive in nature. Since the beneficiary is responsible for daily activities then it appears, at most, the beneficiary performs operational rather than managerial or executive duties. Also, the description of the beneficiary's duties does not persuasively demonstrate that the beneficiary has managerial control and authority over a function, department, subdivision, or component of the company.

Moreover, the proposed position of the beneficiary is president of a project management and construction business consisting only of the beneficiary. The petitioner claims that once the licenses are released, the company will focus on fully pursuing its main objectives and plans are under way to hire additional personnel. Although the U.S. entity has no other employees at this time but for the

beneficiary, the petitioner submitted a description of the employees the entity proposes to hire. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Further, the petitioner claims that it has "filled the initial management and personnel gaps by relying on the services of licensed professionals and other independent contractors and has paid more than \$64,000 for the year 2001." However, the statement for profit and losses, for the twelve month period ending December 31, 2000, does not indicate that salaries were paid to these licensed professionals or independent contractors as part of an operating expense of the U.S. entity. Moreover, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. The petitioner has not explained how the services of the alleged contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. As a result of this discrepancy, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Since the beneficiary relies on services of licensed professionals and independent contractors, the AAO concludes that the beneficiary is performing as a first-line supervisor of non-professional employees, rather than as a manager or executive. As stated in the Act, "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. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve the beneficiary from performing nonqualifying duties. Therefore, after careful consideration of the evidence, the AAO must conclude that the beneficiary will not be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record contains no documentation to persuade the AAO that the beneficiary has been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). As previously stated to establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign entity employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. See *id.* As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

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.