

D7

U.S. Department of Homeland Security  
20 Mass, Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**



FILE: LIN 01 203 56091 Office: NEBRASKA SERVICE CENTER

Date: APR 12 2004

IN RE: Petitioner:  
Beneficiary:



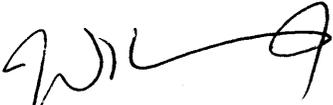
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska 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 [REDACTED] avers that it is an affiliate of a South African company, Alakara Construction and Consulting. The petitioner plans to construct log structures. The U.S. entity was incorporated in the State of Idaho on May 18, 2001. The petitioner now seeks to hire the beneficiary as a new employee to open its U.S. office. Consequently, in June 2001, the U.S. entity petitioned to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) for three years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's chief executive officer at an annual salary of \$37,440.

The director concluded that the petitioner had failed to demonstrate a qualifying relationship between the U.S. and South African entities. Additionally, the director determined that, during the three years prior to the beneficiary's application for admission into the United States, the beneficiary did not work in a qualifying managerial or executive capacity for one continuous year. Consequently, on November 15, 2001, the director denied the petition.

On December 14, 2001, the petitioner submitted a motion to reopen and reconsider. On March 22, the director granted the motion to reopen. After evaluating the new evidence, the director again concluded that the petitioner had not established a qualifying relationship and that, during the three years prior to the beneficiary's application for admission into the United States, the beneficiary did not work in a qualifying managerial or executive capacity for one continuous year. The director, therefore, affirmed the previous denial.

On appeal, the petitioner's counsel asserts that: (1) a qualifying relationship between the U.S. and South African companies exists; (2) the beneficiary's overseas duties and proposed United States duties are primarily managerial and executive; and (3) the United States operation will support a managerial position within one year.

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.

Under 8 C.F.R. § 214.2(l)(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 (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.

Pursuant to 8 C.F.R. § 214.2(l)(3)(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 of the new operation; and

(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 paragraph (l)(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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The first issue the AAO will address is whether the petitioner has a qualifying relationship with the South African entity. On appeal, counsel claims the petitioner is an affiliate of the South African company. The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define a "qualifying organization" and related terms as:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
- (J) *Branch* means an operation division or office of the same organization housed in a different location.
- (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
- (L) *Affiliate* means
  - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
  - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 595 (Comm. 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International, supra*.

The Form I-129 depicted the stock ownership of the South African and United States entities as:

<u>Alakara Construction and Consulting</u>		
<u>Share Owner</u>		<u>Percent of Shares Owned</u>
Beneficiary		50
SanMari Woithe <sup>1</sup>		50
 <u>Petitioner</u>		
<u>Share Owner</u>		<u>Percent of Shares Owned</u>
Beneficiary		50
Brian L. Schafer <sup>2</sup>		50

<sup>1</sup> SanMari Woithe is the beneficiary's spouse.

<sup>2</sup> An organizational chart indicates that Brian L. Schafer is president of Edgewood Fine Log Structures ("Edgewood") located in Ceour d'Alene, Idaho. An April 19, 2001 letter from the South African company's costing engineer states that the petitioner and Edgewood have entered into a joint venture.

A June 5, 2001 letter submitted in support of the Form I-129 stated that the beneficiary owns 50 percent of the petitioner's shares and 50 percent of the South African entity's shares. The letter further reported that the beneficiary's spouse owned the remaining 50 percent of the South African entity's shares. The letter, however, did not identify who owned the remaining 50 percent of the petitioner's shares.

In response to the director's July 18, 2001 request for evidence, the petitioner submitted its articles of incorporation. The document authorized the petitioner to issue 10,000 shares of stock, all of one class, at \$1.00 par value. Additionally, the petitioner submitted minutes of the petitioner's first board meeting. At the meeting, which occurred on June 6, 2001, the board issued 100 shares of stock for \$100.00 to the beneficiary and his spouse. Stock certificate number one, which is also dated June 6, 2001, indicates that the petitioner issued the stock jointly to the beneficiary and his spouse. Finally, the petitioner provided a copy of the South African company's founding statement. The statement averred that the beneficiary and his spouse each own 50 percent of the South African entity.

On motion, counsel proffered a copy of a stock ledger page purporting to identify the beneficiary and his spouse as the original owners of the petitioner's 100 shares of stock.

The charts above indicate that the beneficiary owns 50 percent of the South African company and 50 percent of the United States company. However, the charts further reveal that different people own the remaining 50 percent of each company. Specifically, SanMari Woithe owns the remaining 50 percent of the South African entity, while Brian L. Schafer owns the remaining 50 percent of the U.S. company. Thus, the director concluded that the petitioner is not one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

On appeal, counsel disputes the director's conclusion that the petitioner is not one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. In particular, counsel asserts:

Petitioner's Form I-129 Supplement L stated that Brian L. Schafer owned 50 [percent] of its shares in accordance with the June 5, 2001, letter submitted in support of the petition; however, in response to [Citizenship and Immigration Services' (CIS)] Request for Evidence, petitioner submitted a *corrected* letter [dated October 8, 2001], indicating instead that Brian L. Schafer is president of Edgewood Log Structures, a copy of stock certificate number 1 issued June 6, 2001, to [the beneficiary] and SanMari Woithe, husband and wife, sole shareholders of petitioner, and copies of the organizational minutes of the corporation . . . . Since Idaho is a community property state, it is a common practice, especially in husband and wife corporations, to issue only one stock certificate to the couple, as husband and wife, which is de facto 50/50 ownership. In this instance, since they were issued 100 shares, [the beneficiary] holds 50 [percent] and SanMari Woithe holds remaining 50 [percent]. Therefore, the two legal entities are "owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity."

(Emphasis in original.) The October 8, 2001 letter makes no references to any corrections; instead, the document appears to serve only as a cover letter. Furthermore, the letter does not explain the discrepancies in

the record. Specifically, the Form I-129 and June 5, 2001 letter represent the beneficiary as the two entities' only common owner, while the minutes of the first board meeting and the stock certificate suggest that the beneficiary and his spouse own equal shares in the two entities. The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. 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, 591-2 (BIA 1988).

Moreover, the record provides no support for counsel's assertion that, under Idaho's community property laws, a jointly issued stock certificate demonstrates that the beneficiary and his spouse each own 50 percent of the petitioner's stock. For example, counsel supplied no citations to pertinent Idaho statutes, published court decisions, or legal treatises to document his assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, the AAO notes that the beneficiary and his spouse may have executed marital property agreements that permissibly supersede Idaho's community property laws. The agreements could affect the division of shares between the beneficiary and his spouse. Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In sum, the petitioner has failed to establish a qualifying relationship between it and the South African company.

The AAO now turns to the questions of whether the beneficiary's overseas duties and proposed United States duties are primarily managerial and executive and whether the United States operation will support a managerial position within one year. When examining the executive or managerial capacity of the beneficiary, the AAO looks 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 proffered 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.* Additionally, during the first year of operation, a beneficiary may perform some duties which are not normally managerial or executive. See 8 C.F.R. §§ 214.2(l)(3)(v)(C)(1), (2), and (3). However, the petitioner must demonstrate that the U.S. office will support the beneficiary's managerial or executive position within one year of the petition's approval.

Initially, the petitioner described the beneficiary's duties abroad in a June 5, 2001 letter attached to Form I-129: "[The beneficiary] has been responsible for projects being undertaken in [South Africa] including manufacturing of log wall packages, project management, consulting work on other projects, quality control and wood preservation."

On September 1, 2001, the petitioner submitted a letter that provided additional information about the beneficiary's overseas responsibilities:

Facilitator – [The beneficiary] clears the way for employees to effectively perform their duties.

Negotiator – [The beneficiary] secures new contracts with clients to ensure continued business for the company.

Visionary – [The beneficiary] maps the road that we follow in building our company.

Additionally, the letter presented the overseas operation's organizational chart. The chart indicates that the beneficiary supervises the office and project staffs.

The claimed duties are too broad and nonspecific to convey an understanding of the beneficiary's duties in South Africa. The letters failed to define numerous terms. For example, the June 5 letter fails to identify the number and type of the projects, consulting assignments, and quality control tasks for which the beneficiary has been responsible. Additionally, the June 5 letter does not define the "manufacturing of log wall packages" and "wood preservation" responsibilities. The September 1 letter refers to "clear[ing] the way for employees to effectively perform their duties"; however, the letter does not list the employees' names or duties. Similarly, the September 1 indicates that the petitioner "secures new contracts"; despite this claim, the letter does not list any potential new or established contracts.

Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS, supra* (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, specifics are 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The organizational chart also fails to clarify the beneficiary's overseas responsibilities. In particular, the chart does not clearly delineate the office and project staffs' lines of authority. For instance, the chart suggests that, despite equal titles, three of the four handcrafters each supervises one subordinate handcrafter. This inconsistency casts doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho, supra*. Furthermore, although the chart lists 16 employees' titles and eight employees' names, the chart provides no job descriptions. These very limited descriptions preclude CIS from determining whether the beneficiary supervises a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act.

The overseas job duties demonstrate that the beneficiary devotes a sizable portion of his time to performing tasks necessary to produce a product or provide a service. As illustrations, the beneficiary directly manages log wall package manufacturing, consulting work, quality control, and wood preservation. Additionally, a portion of his duties involve marketing. For example, the beneficiary secures new contracts with clients for the overseas company. Marketing duties, by definition, qualify as performing tasks necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or 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).

Finally, the September 1, 2001 letter also describes the beneficiary's duties on the Drifters Adventours Project. This project ended in April 1998; however, as noted earlier, the U.S. entity petitioned the director in June 2001 to classify the beneficiary as a nonimmigrant intracompany transferee. Thus, given that these duties occurred more than three years preceding the beneficiary's application for admission into the United States, they cannot establish eligibility for this classification. *See* 8 C.F.R. § 214.2(l)(3)(iii).

In sum, the beneficiary's vaguely defined responsibilities, production-oriented and marketing duties, and lack of verifiable subordinate professional, managerial, or supervisory personnel preclude CIS from classifying the beneficiary as an executive or manager at the overseas company.

The AAO will now review the petitioner's claims that the proposed United States duties are primarily managerial and executive and the United States operation will support a managerial position within one year. The proposed duties are too broad and nonspecific to convey an understanding of the beneficiary's duties during the first year of operation. Furthermore, the lack of specificity prevents the petitioner from demonstrating that it will be able to support a manager or executive after the first year of operation.

The June 6, 2001 letter and business plan's human resources section present similar descriptions of the proposed duties. The June 6 letter provides a more detailed description than the business plan's human resource plan; therefore, the AAO will recount the proposed duties as enumerated in the June 6 letter:

[The beneficiary] will implement and manage log wall production, quality control at [the] mill, project management scheduling, productivity management at [the] mills and handcrafting [at] the facility.

\* \* \*

[The beneficiary] will be responsible for overseeing and implementing shop drawing procedures, milling procedures and tolerance specifications, as well as log yard pre-assembly. Initially, his responsibilities will be numerous as this is a construction medium unfamiliar to log professionals in America.

After [the beneficiary] completes the training of both the Computer Aided Design operators and log yard employees, his focus will move to on-site re-assembly, and work with American sub-contractors to teach installation of plumbing, electrical, doors, windows, etc. into the unique vertical wall logs.

A December 11, 2001 letter from Brian Schafer, president of Edgewood Log Structures, stated that the beneficiary will perform four functions for the petitioner:

- a. Manage the organization or department.
- b. Supervise and control the work of other professional employees and manage an essential function with the organization or department.
- c. Have the authority to hire and fire and recommend, those as well as other personnel actions, or if no other employees exist yet, function at a senior level within the organizational hierarchy.
- d. Exercise discretion over the day-to-day operations of the activity or function for which the employee has authority.

The AAO acknowledges that, during first year of operation, a beneficiary may perform some non-executive and non-managerial duties. However, in this instance, the petitioner did not differentiate between the beneficiary's first and later years' duties. Additionally, the June 5 and September 1 letters not only failed to state when the beneficiary would train employees and subcontractors, but whether the trained employees and

contractors would after the first year of operation be able to relieve the beneficiary from performing nonqualifying duties. See section 101(a)(44)(A)(ii) of the Act. Consequently, the AAO cannot determine whether the beneficiary will perform nonqualifying duties after the first year of operation.

Furthermore, the June 5 and September 1 letters' descriptions fail to define or quantify such words and phrases as, "implement," "quality control," "project management scheduling," "productivity management," "overseeing," "milling procedures," "tolerance specifications," or "log yard pre-assembly." Similarly, the petitioner has stated when or how many computer aided design operators and log yard employees will begin work. As pointed out earlier, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*; *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*.

Additionally, the proposed duties recited in the December 11 letter generally paraphrase the statutory definitions of "managerial" and "executive" capacity. See sections 101(a)(44)(A)(i), (iv) and 101(a)(44)(B)(iii) of the Act. For instance, the planned tasks include "hiring and firing authority," "full decision-making authority," and "function at senior level within the organizational hierarchy," and "exercise discretion over the day-to-day operations of the activity or function for which the employee has authority." The petitioner has, therefore, not established that the beneficiary will serve as a manager or executive during or after the first year of operation. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.