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U.S. Citizenship and Immigration Services

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[redacted]

FILE: SRC 02 172 50146 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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

The petitioner is described as a business that markets and sells custom model aircraft. The petitioner seeks to employ the beneficiary temporarily in the United States as the business development manager of the U.S. company. The director determined that the petitioner had not established that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary manages an essential function of the company and qualifies as a manager or executive. Counsel asserts that the beneficiary qualifies, in the alternative, as an employee who has specialized knowledge. However, the AAO will only review the record of proceeding in which the petitioner filed a petition and indicated on the Form I-129 requesting the change of status from a B-2 to an L-1A. The petitioner cannot simultaneously request either an L-1A or L-1B in one single petition.

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 demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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.
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> (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.
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> (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 United States petitioner states that it is wholly-owned by Craftmate International, located in Pampanga, Philippines. The petitioner stated on the Form I-129 that it was established in 2000 and it employed one person and indicated a gross annual income of $300,000. The petitioner seeks to employ the beneficiary for three years at an annual salary of $40,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed primarily in a managerial or executive capacity.

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

In its petition, the petitioner stated that the beneficiary will be "responsible for establishing and executing company, goals and policies, strategies, and procedures for the different business units established in the company. [The beneficiary] will continue servicing [sic] as the international liaison and will also be responsible for marketing, international shipping, and the financial aspects of the company."

On May 28, 2002, the director issued a request for additional evidence which requested, in pertinent part, the following:

> Submit an organizational chart for the U.S. entity. This must include the names, positions, whether they are full-time or part-time employees, and the date started employment with the U.S. entity.
>
> Submit evidence establishing that the beneficiary is to be employed in an executive or managerial position. This statement must provide the following:
>
> a) Number of subordinate managers, supervisors or other employees who report directly to the beneficiary;
> b) Brief description of their job titles and duties; if the beneficiary does not supervise other employees, specify what essential function within the organization the beneficiary manages.

Counsel for the petitioner responded to the request for evidence. The response included the petitioner's organizational chart which listed the name of the foreign entity and its address and two U.S. entities and their business address. Counsel stated that the U.S. entity is presently staffed by two people, Fred Griffin, the president, and the beneficiary.

In response to the request for evidence the petitioner submitted a letter expanding on the previously provided position description. The petitioner stated:

> [The beneficiary] is now the Chief Financial Officer, Chief Liaison and Communications Representative in the Texas company. Her essential functions within the organization are to rely orders taken around the world to the factor in the Philippines in her language, market the product by attending trade shows, handle all finances of the company here and transfer funds to the company in the Philippines to pay for products sold here, QC in-coming product prior to shipping to customers; coordinate with shipping companies for inbound and outbound shipments, and assist [the president] in keeping all records, and paying bills.

On August 24, 2002, the director issued a notice denying the petition. The director stated that the petitioner had not demonstrated that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization. The director determined that the petitioner had not established that the beneficiary will be involved in the supervision and control of the work of other supervisory, professional or managerial employees who will relieve her from performing the services of the business. In conclusion, the director found that the petitioner had not sufficiently demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity.

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).

It is noted that the petitioner did not provide an organizational chart for the U.S. entity, though one was specifically requested by the director. Instead, the petitioner submitted a page titled "organizational chart" and listed the foreign and U.S. entities names and addresses. This "organizational chart" did not demonstrate

that the beneficiary primarily is employed in a managerial or executive capacity. It did not demonstrate that the beneficiary supervises and controls the work of other supervisory, professional or managerial employees who will relieve her from performing the services of the business or directs the management of the organization or a major component or function of the organization. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

It is noted that the petitioner never effectively clarified whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. In the initial petition, the petitioner used the position titles of executive and specialized knowledge. On appeal, the petitioner asserts that the beneficiary manages a function. Regardless, the petitioner must establish that the beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the two diverse statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

On appeal, counsel states that the petitioner asserts that the beneficiary "manages the functions of the company, specifically, the marketing, communications and financial functions of the company." Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Counsel states that the beneficiary "manages, directs and has wide latitude in decision making of those functions of the company with only general supervision of the owner." Counsel emphasizes that "[c]ontrary to what the [CIS'] denial letter states, [the beneficiary] develops the *process* of building the products rather than performing "the day-to-day operations of the business.'" Counsel asserts that "[the beneficiary's] duties are those of the Executive or Managerial positions of Chief Liaison and Communications Representative." 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).

Upon review, the assertions of counsel are not persuasive. First, the AAO will not consider new duties of the beneficiary, which were described for the first time in response to the director's request for evidence. In its response to the director's request for further evidence, the petitioner expanded the beneficiary's duties, adding the title chief liaison and communication representative. The initial petition stated that the beneficiary would act as the business development manager. In sum, the initial description appeared to have the beneficiary doing one set of duties, while the second iteration of the job actually has the beneficiary doing more non-executive duties. The petitioner's shifting descriptions of the beneficiary's duties does not further its claim that the duties are primarily managerial or executive in nature.

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 Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. 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. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

Based on the record of proceeding, the beneficiary is responsible for the marketing of the products. The petitioner stated the beneficiary's duties include "market the product by attending trade shows" and "will also be responsible for marketing." These duties primarily consist of marketing tasks. Marketing duties, by definition, 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner imports and sells model aircraft. The fact that an individual operates a business does not necessarily establish eligibility for classification in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties will be directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties will be directly performing the operations of the organization, that is, marketing and selling the products, custom model aircraft. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or any other staff who would relieve her from performing nonqualifying duties. The petitioner has not identified the essential function that the beneficiary claims to manage. Counsel vaguely states that the beneficiary "manages the functions of the company." The fact remains that the vague description of the beneficiary's primary duties indicates that they are not in a qualifying managerial or executive capacity. 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). For this reason, the petition may not be approved.

Beyond the decision of the director, the record indicates that the beneficiary is an owner of the petitioning company and the foreign company. 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this case, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. For this additional reason, the petition will be denied.

Although not addressed by the director, a remaining issue to be examined is whether the petitioner has established that a qualifying relationship exists between the U.S. entity and the foreign entity. The Form I-129 states that the U.S. company is wholly owned by the foreign company. However, the petitioner submitted a "certificate of ownership for an unincorporated business or profession" which lists the petitioner as a general partnership with two owners: Fred W. Griffin and the beneficiary. Additionally, the petitioner submitted Federal Tax Return Form 1065 which listed the petitioner as a domestic general partnership as well as Schedule K of Form 1065 for the beneficiary which lists the beneficiary as a domestic partner. The Certificate of Incorporation for the foreign entity was dated July 2, 2002, more than a month after the initial petition was filed. Only one of the partners of the U.S. entity is listed as a share holder of the foreign entity. The foreign entity has five equal shareholders. The petitioner has submitted conflicting evidence. It is

incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petition must be denied for this reason, as well.

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.