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FILE: WAC 02 089 50551 Office: CALIFORNIA SERVICE CENTER Date: FEB 23 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

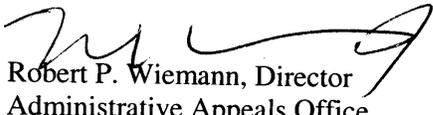
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED], endeavors to classify the beneficiary as a 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). The petitioner is an affiliate of [REDACTED] located in South Africa and is engaged in the business of producing videos. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's president. The petitioner was incorporated in the State of Hawaii in November 1996 and claims to have three employees.

On May 28, 2002, the director denied the petition. The director determined that the beneficiary will not be employed in a primarily managerial or executive capacity.

On appeal, the petitioner states that the beneficiary will direct and manage the company.

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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(14)(3) state 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.

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

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

The issue in this proceeding is whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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.

On January 15, 2002, the petitioner filed Form I-129. On Form I-129, the petitioner described the beneficiary’s U.S. duties as “president-sets policy, hires staff; exercises full operating authority.”

Additionally, the petitioner described the beneficiary’s U.S. duties in a January 8, 2002 supporting letter as:

[The beneficiary] is responsible for the day-to-day direction of the management of the company and video production projects by negotiating financing and contracts, hiring and firing employees, and generally setting procedures and goals to operate the business. He has complete day[-]to[-]day discretion over the business.

On February 7, 2002, the director requested additional evidence. In particular, the director requested: 1) a copy of the U.S. business's organizational chart; 2) a detailed description of the beneficiary's U.S. duties; 3) the beneficiary's subordinates' job titles and position descriptions; and, 4) the percentage of time spent in each of the listed duties.

In response to the request for additional evidence, the petitioner submitted an April 20, 2002 letter reiterating the beneficiary's duties. The letter also stated, "Within [the] final 3 -year period [the beneficiary] will be appointing a management team to handle affairs when he returns to South Africa. Also, he will be setting up and training a mainland USA team in Florida."

On May 28, 2002, the director denied the petition. The director found that the petitioner had not submitted a comprehensive description of the beneficiary's daily activities that established the beneficiary would be primarily engaged in managing or directing the management of a function, department, subdivision, or component of the company.

On appeal, the petitioner claims that the beneficiary manages the company. The petitioner describes the beneficiary's U.S. duties as:

The Beneficiary:

- Manages the company and production contracts by negotiating financing.
- Contracts and hiring people and companies to produce and distribute movies.
- Directs and coordinates through the subordinate product and sales managers the activities in developing potential production videos, in engaging photographs and people to be in the video, in contacting companies to distribute the videos.
- Reviews and analyzes reports, records and directives and confers with subordinates to obtain information required for planning activities such as new commitments for production, advertising, product distribution, status of sales in progress and problems encountered.
- Assigns or delegates responsibility for specified work or functional activities and disseminates policy to subordinate managers.
- Gives work direction to managers, resolves problems, prepares schedules and sets deadlines to ensure timely completion of work.
- Coordinates activities of production and marketing with related activities to ensure efficiency and economy.

- Monitors and analyzes cost and budget.
- Initiates or authorizes employee hire, promotion, discharge or transfer.
- Uses independent contractors, either companies or individuals for production and marketing.

Additionally, the petitioner describes the sales manager and production manager's duties as:

Sales Manager:

- Negotiates video distribution contracts;
- Develops marketing channels for video production; and
- Performs marketing studies, analyzes sales data, and resolves marketing issues.

Production Manager:

- Locates the production people such as camera and actors;
- Establishes the shooting location;
- Creates production schedule and budget; and
- Contracts for packaging and graphics as well as magazine advertising.

In 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(1)(3)(ii). On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to establish what the beneficiary does on a day-to-day basis. For example, the beneficiary's duties are described as "giving work direction to managers, exercising full operating authority, setting procedures and goals to operate the business, and disseminating policy to subordinate managers." The petitioner did not, however, define the beneficiary's goals, policies, or procedures. 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).

In addition, the petitioner describes the beneficiary's U.S. duties as "negotiating financing and contracts, coordinating production activities, and marketing." Since the beneficiary actually negotiates the contracts, he is 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).

Further, the beneficiary is described as having “complete day-to-day discretion over the business.” However, the petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. The petitioner submitted no information, as requested by the director, to establish the percentage of time the beneficiary actually performs the claimed managerial duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The petitioner bears the burden of documenting what portion of the beneficiary’s duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

Moreover, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel. On appeal, the petitioner states, “[The beneficiary] gives work direction to managers.” The U.S. organizational chart indicates that the beneficiary’s subordinates include a sales manager and production manager. Although the petitioner claims that the organizational chart excludes subcontractors as camera operators or 3-D designers and part-time students, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Again, without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N at 190.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” 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. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). There is no evidence that the sales manager and production manager positions require college graduates. The petitioner has not established that the two employees are professional employees within the statutory and regulatory definitions. Therefore, the description of the beneficiary’s job duties and the job duties of the beneficiary’s subordinates lead the AAO to conclude 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.

After careful consideration of the evidence, the AAO concludes that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO notes some discrepancies in the record concerning the qualifying relationship between the petitioner and foreign entity. On Form I-129, the

petitioner claims that the U.S. entity is an affiliate of the foreign company. The petitioner claims that the beneficiary and his wife each own 50 percent of the shares of both companies. However, the 2000 U.S. Corporation Income Tax Form 1120, Schedule K shows that there is only one foreign person that owns, directly or indirectly at least 25 percent of the voting power of all classes of stock or the total value of all classes of stock of the corporation and that this foreign person owned 100 percent of the U.S. company. However, the 2000 Corporation Income Tax Form 1120, Schedule E shows that the beneficiary does not own any percentage of common or preferred stock of the corporation. In addition, the petitioner submitted stock certificates showing that the beneficiary owns 50 shares of the U.S. company, the beneficiary's wife owns 25 shares of the U.S. company, and that [REDACTED] owns 25 shares of the U.S. company. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the record indicates that the petitioning enterprise does not maintain a qualifying "affiliate" relationship with the overseas company. The evidence is insufficient to determine who owns the petitioner and foreign entity. Accordingly, it is unclear whether the two entities are "owned and controlled by the *same group of individuals*, each individual owning controlling approximately the same share or proportion of each entity" 8 C.F.R. § 214.2(l)(1)(ii)(L)(2)(emphasis added). In addition, there is no parent entity with ownership and control of both companies that would qualify the two as affiliates. Although the petitioner claims on Form I-129 that the petitioning company and the overseas company are majority owned by the husband and wife due to the spousal relationship, this familial relationship does not constitute a qualifying relationship under the regulations.

Moreover, on February 7, 2002, the director requested additional evidence concerning the qualifying relationship. The director requested evidence such as an annual report, minutes of the foreign company's meeting, a list of owners, and the foreign entity's articles of incorporation. In response to the request for additional evidence, the petitioner submitted an April 20, 2002 supporting letter claiming that the beneficiary owns 50 percent of the foreign entity; his wife owns 25 percent of the foreign entity; and [REDACTED] owns 25 percent of the foreign entity. The petitioner also submitted a copy of the minutes of the foreign entity; however, the minutes do not list the stock shareholders or the number and percentage of shares owned. 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 at 190. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. Thus, the companies are not affiliates as it is unclear whether both companies are owned and controlled by the same individuals. Based on the contradictory and minimal documentation submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in

the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.