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File: SRC 05 038 50135 Office: TEXAS SERVICE CENTER Date: **OCT 11 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

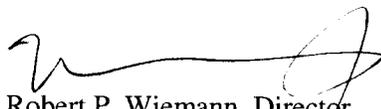
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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, Texas Service Center, denied the petition for a nonimmigrant visa. 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 employment of its president 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 corporation organized in the State of Texas that claims to be engaged in the provision of accounting, business advisement, and management consulting services. The petitioner claims that it is the subsidiary of ██████████ located in Santo Domingo, Dominican Republic. The beneficiary was initially granted a one-year period of stay in the United States in order to open a new office, and the petitioner now seeks to employ the beneficiary for an additional period of three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's decision is unsupported by and contrary to the evidence submitted by the petitioner. Counsel contends that the beneficiary will be strictly engaged in managing the U.S. company and supervising professional employees. Counsel submits a brief in support of the appeal.

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.

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 (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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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.

The petition was submitted on November 25, 2004. In a November 16, 2004 letter, the foreign entity provided the following description of the beneficiary's duties:

As a President and branch manager, [the beneficiary] will continue being responsible for the arrangement of logistic matters to direct the new company branch including develop an administrative and marketing strategies for the company in Florida. He will direct all administrative and management activities including hiring and training personnel. He will also negotiate contracts with clients and business firms establishes [sic] in Florida. He will control and supervise the employees staff in expediting correspondence, bill requests, marketing information, management and accounting procedures. In addition, [the beneficiary] will continue traveling to contact and meet with new HLB affiliate members in countries of [Latin America.] He will use his vesting experience as a President and Executive Partnership in [the foreign entity] and he will continue using his knowledge of business, accounting and finance management to do business in the Florida's market.

The foreign entity stated that the petitioner had hired four additional employees who "are part of the professional staff in accounting, management and business advisement," and provided a list of fourteen clients acquired during the previous year. The petitioner submitted its Texas Form UCT-6, Employer's Quarterly Report, for the third quarter of 2004, confirming employment of the beneficiary and four additional employees.

On December 7, 2004, the director requested additional evidence, in part instructing the petitioner to provide: (1) an organizational chart for the U.S. company, including names and job titles; (2) a description of the duties and educational background of the company's employees, including evaluations of foreign educational credentials, if applicable; and (3) an explanation as to how the beneficiary will not be engaged in the day-to-

day operations of the business. The director specifically requested evidence that the beneficiary is managing other managers and professionals and would not be engaged in the day-to-day operations of the business. The director noted that the petitioner must establish that the beneficiary will primarily be engaged in managerial or executive duties.

In a response dated December 16, 2004, the petitioner provided an organizational chart depicting the beneficiary as president overseeing two consultants, who in turn each supervise one assistant. The petitioner submitted evidence that the beneficiary has achieved the equivalent of a bachelor's degree in accounting and a master of business administration awarded by an accredited university in the United States. Counsel provided the following information regarding the beneficiary's responsibilities:

He has been engaged in negotiations with other US corporations as well as supervise and control staff, administrative assistants in carrying out their individual tasks, whether they are expediting correspondence, bill requests, marketing information research management and accounting procedures.[sic] These employees have provided administrative support and logistics activities as [the beneficiary] is [sic] has devoted a large part of his time to operational and business management while keeping some overseeing [sic] the foreign company.

* * *

[The beneficiary's] main duties concentrate in the acquisition of new firm clients, in hiring and managing office staff, plus considering new additional 4-6 employees within the next 12-16 months and continue developing, managing, administrative and financial matters concerning the US operational basis of [the petitioner].

Moreover, [the beneficiary] will continue to be partially responsible to implement marketing strategies establishing links and meeting with potential clients in order to negotiate new contracts for services in accounting consulting, administrative and implementation of management information system with potential clients located in Florida and the affiliated members of HLB International located in Central and South America and Caribbean Countries. And as part of his duties as Company's Board of Partner, [the beneficiary] will continue supervising and control the duties of foreign Company's staff personnel.

Counsel indicated that the petitioner's two consultants perform the following duties:

- Meting [sic] client's consulting needs.
- Discuss clients' needs with the work partner.
- Prepare budget of time.
- Request information to the clients via internet.
- Send information via internet to assistants with the purpose to organize.
- Provide instructions via internet about how work has to be organized.
- Review the realized work by the assistants, and analyses such as information.
- Document weaknesses of processes analysis and corrections of them.

- Discuss suggestions with the partner in charged [sic].
- Send draft report to the client with the findings and suggestions.
- Obtain the final approval of client's report.
- Issue the final report to the client
- Manage the payments of works with the clients

The duties of the two administrative assistants were described as follows:

- Assist to the consultants in the reviewing and organization of received information from clients.
- Receive incoming and outgoing calls from customer.
- Organize invoices and accounting documentation collectable from customer.
- Prepare deposits slips.
- Organize General Manage [sic] agenda.
- Prepare and control office supplies.
- Reviews and answers correspondence.
- Assist to Branch Manager in any matter requested.
- May compile, store, and retrieve management data, using computer.
- Plan and schedule meetings and appointments.
- Organize and maintain paper and electronic files, manage projects, conduct research, and provide information by using the telephone, postal mail, and e-mail.
- They also may handle travel arrangements.

The petitioner submitted resumes for each of its employees, but did not provide copies of the employees' degree certificates or evaluations of their foreign educational credentials. All four of the beneficiary's subordinates indicated on their resumes that they completed bachelor's degrees in accounting at universities located in the Dominican Republic.

The director denied the petition on January 10, 2005 concluding that the beneficiary would not be employed in a managerial or executive capacity. The director observed that the beneficiary is not managing other managers, supervisors or professionals, and would likely have to engage in the company's day-to-day business activities given the current structure of the company.

On appeal, counsel claims that director's basis for denial is unsupported and contrary to the evidence submitted by the petitioner. Counsel emphasizes that the beneficiary had already acquired a number of new clients during the first year of operations and is strictly engaged in employee supervision and company management. Counsel asserts that the beneficiary supervises two professional accountants and two clerks who provide administrative and logistics support while the beneficiary's time is devoted to acquiring new clients and meeting some of their special needs, implementing marketing strategies, negotiating new contracts, hiring and managing office staff, and developing and managing the administrative and financial matters of the company.

Counsel's statements are not persuasive. Upon review of the petition and the evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity under the extended

petition. 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). The petitioner's description of the job duties 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.* In addition, 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 show 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).

The petitioner claims that the beneficiary qualifies as a manager or executive because he occupies the highest-level position within the company, manages its employees, and is responsible for expansion of the business. However, the fact that an individual has an executive job title and exercises discretion over a company's operations does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The actual duties themselves reveal the true nature of the employment. *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).

The record does not establish that a majority of the beneficiary's time has been or will be primarily directing the management of the organization. The petitioner failed to provide a breakdown of the time the beneficiary allocates to his various responsibilities. However, the petitioner's statements emphasize that the beneficiary "is devoted to a large extend [sic] in the operational and business management of acquiring new corporate clients and meeting some of their special needs." The petitioner states that he will continue to implement marketing strategies, meeting with potential clients in order to negotiate contracts, and travel to contact and meet with HLB affiliate members in Latin America. The AAO notes that none of the beneficiary's subordinates are responsible for assisting the beneficiary with these sales and marketing tasks. Accordingly, based on the petitioner's representations, the beneficiary is solely responsible for marketing and selling the petitioner's services. 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).

Other portions of the beneficiary's job description are vague and provide little understanding of what duties he performs on a day-to-day basis. For example, duties such as "directs all administrative and management activities," "arrang[e] all logistic matters," and "uses...knowledge of business, accounting and finance management to do business in the Florida's market," are inadequate to establish that the beneficiary is primarily engaged in managerial or executive duties. 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. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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. at 1103.

Finally, the invoices submitted by the petitioner suggest that the beneficiary devotes some portion of his time to directly providing consulting services on behalf of the company. Seven of the fourteen invoices issued by the company during its first year of operations were issued to HLB branch companies in Latin America for services related to the introduction of new HLB International technologies and methodologies. As the petitioner indicates that the beneficiary travels to Latin American "HLB affiliates" on a regular basis, and as the petitioner's lower level employees have no prior experience with the HLB International group, it is reasonable to assume that the beneficiary has been primarily responsible for performing these services.

Based on the limited job description provided, it is evident that the beneficiary performs a combination of marketing, sales, and consulting tasks, and some supervisory or managerial responsibilities. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because, as discussed above, several of the beneficiary's responsibilities do not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. On appeal, counsel asserts that the beneficiary supervises professional employees.

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: "The 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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

The beneficiary supervises two consultants and two administrative assistants. On appeal, counsel refers to the two consultants as professional accountants; however, the petitioner has not shown that it requires a bachelor's degree for the position, or that the employees have actually completed bachelor's degrees. The director specifically requested copies of educational credentials for all of the petitioner's employees. The petitioner, without providing any explanation regarding the availability of the educational documents, submitted only resumes for the beneficiary's subordinates. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, the job description provided for the petitioner's consultant position does not clearly describe the actual duties or the type of work performed. For example, the consultants' duties are described in ambiguous terms such as: "meeting client's consulting needs," "requesting information to the clients via internet," "realize diagnostic and evaluations of work to be realized via internet," "send information via internet to assistants with the purpose to organize," "document weaknesses of processes analysis and corrections of them," and "review the realized work by the assistants, and analyses such as information." The AAO cannot determine what actual duties the beneficiary's subordinates perform or the types of services they provide, and therefore cannot conclude that they are performing in professional positions. The duties performed by the administrative assistants are primarily clerical and are likewise not professional in nature.

Finally, the petitioner has not shown that the consultants are supervisory or managerial employees. Although the consultants are placed at a higher level on the petitioner's organizational chart, the AAO notes that all of the beneficiary's subordinates are paid the same \$900 monthly salary. When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions. See section 101(a)(44)(A)(iv) of the Act.

The petitioner claims that the U.S. company expects to hire an additional four to six employees in the future. The AAO is not required to consider evidence of speculative future activity. 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, 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 support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. While the beneficiary may have achieved significant accomplishments toward establishing

the petitioner's operations in the United States, the petitioner has not shown that it has reached the point that he will be employed in a primarily managerial or executive capacity as of the date this petition was filed. For this reason the appeal will be dismissed.

Beyond the decision of the director, the record reflects that the U.S. entity has been operating out of a 125 square foot office in a residence located in Greenacres, Florida, and has been licensed as a "home occupation." The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. In the present matter, either the petitioner did not comply with this requirement, misrepresented that they had complied, or the director committed gross error in approving the petition without evidence of adequate physical premises for the petitioner's business. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(l)(9)(iii). It is further noted that the petitioner submitted copies of two lease agreements, including its new lease agreement for a 125 square foot office in Miami, Florida. The terms of this agreement are identical to those of the previous agreement, including at Article 7.2 a provision under which the landlord is required to tear down walls between "rooms 1 and 2" and "rooms 3 and 4." The fact that the petitioner utilized exactly the same agreement for two different office spaces raises questions regarding the validity of both lease agreements. 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). Due to this unexplained inconsistency, the submitted evidence is not probative and causes the AAO to question whether any physical premises have been acquired for the petitioner's business operations. For this additional reason the appeal will be dismissed and the petition will be denied.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 decision of the director will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.