

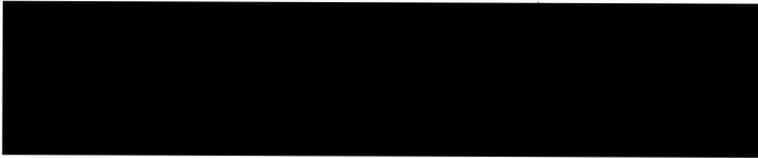
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U.S. Citizenship
and Immigration
Services

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FILE: SRC 05 021 50364 Office: TEXAS SERVICE CENTER Date: JUL 14 2006

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, Chief
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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its real estate broker for foreign sales and investments 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, a Florida corporation, claims to be the subsidiary of Classic Homes International, located in Derby, United Kingdom. The petitioner is a property management company. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

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

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was erroneous, and that the beneficiary in fact is a qualified manager and executive. Specifically, counsel alleges that the director did not understand the nature of the petitioner's real estate business when rendering its decision.

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)(14)(ii) 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 managerial or executive

capacity; and

- (e) Evidence of the financial status of the United States operation.

The primary issue in this 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.

In a letter dated October 7, 2004, counsel for the petitioner stated that the beneficiary is acting in both a managerial and executive capacity. Specifically, counsel stated that the beneficiary is the petitioner's

president, but functions under the capacity of a real estate broker. Counsel further stated that the petitioner employed five full time employees and seven part time employees. A specific list of employees was provided, which showed the following:

Date Start	Name	Position	Form	Status
1-Mar		f/time cleaning supervisor	w4	employed
27-May		p/time cleaner	w4	employed
29-Mar		p/time cleaner	w9	independent contractor
5-Apr		p/time cleaner	w4	employed
2-Mar		p/time cleaner	w4	employed
22-Jun		p/time cleaner	w4	employed
2-Mar		f/time real estate broker	w4	employed
21-Mar		f/time real estate salesperson	w9	independent contractor
6-May		p/time bookkeeper/payroll asst	w4	employed
14-Jul		p/time office assistant	w4	employed
27-May		f/t pool servicer	w4	employed
21-Apr		f/time pool servicer	w4	employed

A brief description of the beneficiary's duties, was provided on Form I-129. This description stated that the beneficiary was:

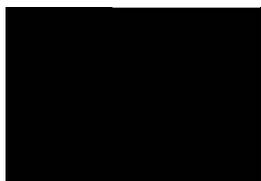
[r]esponsible for the expansion of the US corporation to support the UK company's efforts for expansion in the US; [e]xpand sales of investment homes to foreign buyers; [m]eet potential buyers who are referred to US from the UK business and provide a smooth and complete service to them to ensure they buy a property through the US business; [p]rovide a complete after sale service such as arranging for pool care, interior and interior cleaning of homes, maintenance of rental units, etc.

A copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return for the year 2003, indicated that no salaries or wages were paid during that year. In addition, no gross receipts or sales were reported.

On November 10, 2004, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit a more detailed description of the beneficiary's duties, including the percentage of time devoted to each duty; a list of all subordinates of the beneficiary, with a description of each person's position title, their duties, and their educational backgrounds; and copies of its quarterly tax returns for the past year.

In a response dated November 17, 2004, the petitioner, through counsel, responded to the director's request. The petitioner submitted its quarterly tax returns for the quarters ending September 30, 2004 and June 30,

2004 with attachments listing employees on the payroll. The return for the quarter ending March 31, 2004 did not include the attachment listing employees. Upon review of the most recent quarterly return, filed on September 30, 2004, the petitioner employed the following persons:



- real estate broker
- p/time office assistant
- p/time bookkeeper/payroll asst
- f/time cleaning supervisor

With regard to the director's request for a more specific description of duties, the following statements were provided:

Manage advertising budget to promote sales of property in the USA to foreign buyers and oversee advertising budget in the UK	15%
Design and produce brochures, flyers and posters in connection with the above:	10%
Meet with clients in the USA in order to solicit new accounts/contracts:	25%
Liase [sic] with mortgage brokers, airlines, car hire, and insurance agencies to co-ordinate trips to the USA as a pre and after sales service for clients:	5%
Liase [sic] and meet with potential buyers of USA property in the USA on arrival and for as many times necessary to confirm the sale in order to expand sales to foreign buyers:	10%
Contact clients while still in the UK after UK office has referred them on to ensure client is comfortable with me (Agent in the UK makes Appointment):	5%
Meet with clients in the USA after they have purchased a property and guide them through options over property management, mortgages, and the buying process:	10%
Hire and fire staff in the USA:	5%
Manage staff in the USA:	15%

On December 7, 2004, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary would function at a senior level within the organization or that the beneficiary had sufficient subordinate staff to relieve her from performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that the beneficiary, by virtue of her brokerage license, is, by definition, a professional. Counsel further contends that the other staff positions are likewise professional, thereby concluding that the petitioner has thus satisfied the regulatory requirements. The AAO disagrees.

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.* A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a vague overview of the nature of her duties; namely, that she would function as a real estate broker providing all necessary customer service to potential clients. As previously stated, the initial evidence submitted was insufficient to warrant approval, and consequently, the director requested more specific information, including a more specific description of the beneficiary's duties. The petitioner responded to this request, and in addition to describing the beneficiary's duties in further detail, the petitioner provided a breakdown of the percentage of time the beneficiary devoted to each of her stated duties.

Upon review, it appears that the beneficiary is a real estate broker/sales agent, who is directly responsible for obtaining clients, closing sales, and following up on customer service. The duties described in the response to the request for evidence indicate that the majority of the beneficiary's time is devoted to meeting with clients to solicit new accounts or contracts (25%); and managing the advertising budget (15%). These duties do not fall directly under traditional managerial duties as defined in the statute. In addition, the beneficiary also claims that she manages staff in the United States (15%). Although the beneficiary is not required to supervise personnel, if it is claimed that her 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.

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).

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. In the instant case, counsel for the petitioner contends that Florida state laws recognize sales associates, brokers, appraisers, bookkeepers, and office administrator positions as professional positions. However, the petitioner in this matter has failed to show that an advanced degree is necessary to perform the duties of these positions.

At the time of filing, according to the most recent quarterly tax return filed on September 30, 2004, the petitioner employed the following persons: [REDACTED], a part time office assistant; [REDACTED] a part time bookkeeper and payroll assistant, and [REDACTED] a fulltime cleaning supervisor. According to the statement provided in response to the request for evidence, none of these positions require an advanced degree. For example, the position of bookkeeper requires a high school diploma and five years of accounting experience. The office assistant position also requires a high school diploma and five years of customer care experience. Finally, the cleaning position requires one year of supervisory experience and two years of cleaning experience. The petitioner, therefore, has affirmatively established that a bachelor's degree is not actually necessary, for example, to perform the cleaning services provided by Ms. [REDACTED] or the bookkeeping services provided by Mr. [REDACTED]. Additionally, the petitioner has not shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. While the AAO notes that a vast number of employees are listed on the organizational charts, there is no documentary evidence to establish that these persons were actually on the petitioner's payroll at the time of the petition's filing. 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)). Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

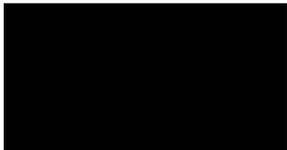
The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. The beneficiary is a real estate broker, and clearly contends that she is directly responsible for generating the sales of the business, for handling advertising and marketing, for closing sales and finding buyers, and generally acting in an active sales position. This position, while perhaps "professional" as recognized by Florida state law, does not satisfy the regulatory definitions of either managerial or executive capacity. 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).

For this reason, the petition may not be approved.

Beyond the decision of the director, the minimal documentation of the petitioner's ownership raises the issue of whether there is a qualifying relationship between the U.S. entity and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation 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 visa classification. *Matter of Church Scientology International*, 19 I&N

Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). 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*, 19 I&N Dec. at 595.

In this matter, the petitioner claims that it is an affiliate of the foreign entity, with the following owners owning the same percentages in each of the two companies:

	50%
	25%
	25%

No documentary evidence to support this ownership claim has been submitted. As previously stated, 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. at 165. In fact, Schedule K, line 5 directly contracts the percentages of ownership claimed, because this line, which asks whether any individual owns 50% or more of the entity, is answered in the negative. This statement, therefore, directly contradicts the claim that Anne Jones owns 50% of the petitioner. As general evidence of a petitioner's claimed qualifying relationship, stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. For this additional reason, the petition may not be approved.

Another issue in this proceeding, also not raised by the director, is whether the employment offered to the beneficiary is temporary. Generally, the petitioner for an L-1 nonimmigrant classification need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Iovic*, 18 I&N Dec. 361 (Comm. 1982); see also 8 C.F.R. § 214.2(l)(3)(vii). The record indicates that the beneficiary owns 25% of both the petitioner and the foreign entity. In this matter, 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 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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.