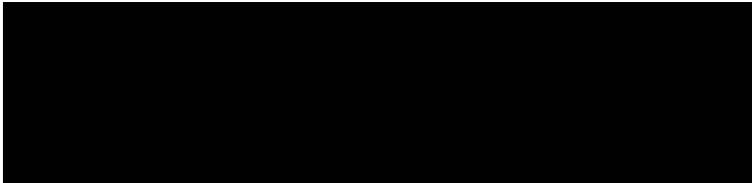




U.S. Citizenship  
and Immigration  
Services

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File: SRC 04 125 50440 Office: TEXAS SERVICE CENTER Date: **MAY 11 2006**

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, 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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president/executive 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 Florida corporation that claims to be engaged in “investments.” It operates a digital printing and design studio. The petitioner claims that it is the affiliate of Tecflow Group, C.A., located in Caracas, Venezuela. The beneficiary was granted a one-year period of L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend her stay.<sup>1</sup>

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 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, the petitioner asserts that the beneficiary is employed in a qualifying capacity, regardless of the size of the company, and claims that the petitioner utilizes contractors to perform many functions of the business. The petitioner submits a short statement and additional evidence in support of the appeal.

Upon review, and for the reasons discussed herein, counsel’s assertions are not persuasive. 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

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<sup>1</sup> The petitioner stated on the L classification supplement to Form I-129 that the beneficiary is coming to the United States to open a new office. The beneficiary was previously granted L-1A status in order to open a new office for the instant petitioner (SRC 03 067 52474) with validity dates from March 31, 2003 to March 30, 2004. Under the governing regulations at 8 C.F.R. § 214.2(l)(3)(v), a U.S. petitioner that has been doing business for less than one year may petition for a manager or executive if it can be expected that the new office will, within one year, support a managerial or executive position. After one year, the regulations require the petitioner to file for an extension with supporting documentation evidencing that it is staffed and has been “doing business” in a regular, systematic and continuous matter for the previous year. *See generally*, 8 C.F.R. § 214.2(l)(14)(ii). The director appropriately adjudicated the petition under the governing regulations for a petition requesting extension of a petition that involved a “new office.” Citizenship and Immigration Services (CIS) will not grant a second petition under the “new office” provisions. Any request for an extension of a petition that was originally approved as a new office must be evaluated under the criteria set forth at 8 C.F.R. § 214.2(l)(14)(ii).

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

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 nonimmigrant petition was filed on March 30, 2004. In a March 15, 2004 letter, the petitioner provided the following job description for the beneficiary's role as president/executive of the U.S. entity:

[The beneficiary] . . . is responsible for acting as a liaison between the Board of Directors of the affiliated company in Venezuela and the company in the United States. She is directly responsible for delegating the responsibility of implementing marketing strategies as desired by [the foreign entity's] Board of Directors. She is responsible for the evaluation of financial statements, and based on her experience and expertise, she also contribute [sic] in the marketing of new products, as desired by the parent company's Board of Directors.

On the Form I-129 petition, the petitioner stated its number of employees as “None,” its gross annual income as “Star[t]-up.” The petitioner identified its type of business as “investments” and submitted an occupational license indicating that it operates a “printing/lithograph” business. The petitioner also submitted its IRS Form 940, Employer’s Annual Federal Unemployment Tax Return for 2003, indicating total payments to employees in the amount of \$30,600, and its last two IRS Forms 941, Employer’s Quarterly Federal Tax Return, showing two employees during the last two quarters of 2003.

On April 16, 2004, the director issued a request for evidence instructing the petitioner to submit an organizational chart for the United States entity, showing each position in relation to the other positions, position titles, position descriptions, the names of each individual filling the positions, and their duration of employment.

In a response received on May 12, 2004, the petitioner indicated that the United States company employs the beneficiary as president and a sales employee who joined the company when it started operations in December 2002. The petitioner noted that “mayor [sic] decisions are discussed and made” by the foreign entity’s management staff. The petitioner described the beneficiary’s position as:

In charge of the entire company branch in Miami, FL. Link between Caracas and Miami branches, make minor decisions, direct, coordinate, supervise and monitor the daily work. Administrative Management, monitor profit and loss, supervise sales and customer services. Receive and control purchase orders and payments. Represent the voice and communicate the decisions of the Caracas office management staff. Report the company state and movement to Caracas office.

The petitioner stated that the sales employee is “in charge of sales work” and is responsible for the following duties: “Find and maintain clients and/or potential clients. Coordinate out house jobs and suppliers. Coordinate and control the sales, purchase orders, production and delivery of the material required.” The petitioner submitted a resume for the sales employee, which indicates that she performs the following duties as the company’s “sales coordinator”:

Controlled the inside sales process. Create all purchase orders for vendors. Interfaced with outside sales representatives for inventory’s present and future needs. Administered inside and outside sales. Monitored service technicians. Acted as dispatcher, setting up pickups and deliveries & updated inventory. Performed sales calls for current and potential customers. Handled sales quotes.

The petitioner indicated the U.S. company has a vice president and a treasurer located in the foreign entity’s Caracas, Venezuela office, and stated that these individuals are “investor[s].”

The director denied the petition on October 7, 2004, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director determined that the evidence submitted shows that the beneficiary is functioning as a first-line

supervisor over three individuals, and found that the petitioner was not able to support a managerial or executive position at the time of filing.

In an appeal filed on November 8, 2004, the petitioner states:

The beneficiary is the Marketing manager for the company in Caracas, Venezuela and President for the USA as it show [sic] in the company chart, regarding the quantity of personal [sic] in the company ion [sic] the USA the business itself doesn't required [sic] to have a lot of personal [sic] in house, because the company is doing all the design and are using other company to do the printing and delivery of the material. (enclosed invoices and canceled checks).

In support of the appeal, the petitioner submits a complete copy of its initial filing and response to the director's request for evidence. The documentation includes the petitioner's monthly bank statements, journal transactions, and copies of canceled checks, but no invoices from outside service providers.

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.*

The job descriptions submitted by the petitioner are brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the petitioner initially indicated that the beneficiary liaises with the foreign entity's board of directors, delegates responsibility for implementing the foreign entity's marketing plan, reviews financial statements, and contributes to the marketing of new products. The petitioner did not, however, explain how the beneficiary contributes to marketing, clarify who prepares financial statements or otherwise performs the petitioner's day-to-day finance and bookkeeping-related tasks, identify to whom the beneficiary delegates responsibilities, or explain the nature or purpose of the beneficiary's interaction with the foreign entity's board of directors. The job description was insufficient to establish that the beneficiary would primarily perform 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's initial description failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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 petitioner's response to the director's request for additional information regarding the petitioner's staffing levels and each employee's job duties supports a conclusion that the beneficiary would act, at most, as a first-line supervisor of one non-professional employee.<sup>2</sup> The petitioner indicated that the beneficiary coordinates,

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<sup>2</sup> The AAO notes that the director concluded that the beneficiary would supervise three employees, and assumes that she included the vice president and treasurer, who are identified on the organizational chart, among the beneficiary's subordinates. However, the petitioner has indicated that these employees are merely

supervises and monitors the daily work of the business, supervises sales and customer services, receives and controls purchase orders, and makes "minor decisions" regarding the business. All of these duties suggest that the beneficiary is directly involved in the day-to-day operations of the business, and that her level of authority is more akin to a supervisory employee, regardless of her executive job title. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

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 a 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, the petitioner has not, in fact, established that a baccalaureate degree is actually necessary to perform routine sales duties and coordinate order fulfillment and delivery, which are the responsibilities of the sales coordinator, the beneficiary's sole subordinate. Thus, the petitioner has not established that this employee could be classified as a professional. Nor has the petitioner shown that the beneficiary's subordinate supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that she could be classified a manager or supervisor. Thus, the petitioner has not shown that the beneficiary's subordinate employee is employed in a supervisory, professional, or managerial position, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner suggests on appeal that the director placed undue emphasis on the petitioner's personnel size in determining that the beneficiary would not be employed in a primarily managerial or executive capacity. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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

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investors, and are located in the foreign entity's office. There is no evidence in the record to establish that they provide services to the petitioning company or are supervised by the beneficiary.

period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

The petitioner has provided little descriptive information regarding the nature of its business. The petitioner's advertisements indicate that the company operates a design studio and digital print shop specializing in producing advertising materials for businesses. Thus, it is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive tasks such as performing the graphic design and printing services, marketing, sales and customer service duties, purchasing supplies, delivering finished products to customers, and performing routine banking and bookkeeping tasks. The petitioner initially implied that some of these tasks were performed "out house," but did not clarify who performed the actual design and printing services of the company. On appeal, the petitioner explains that the petitioner "is doing all the design" and utilizes other companies "to do the printing and delivery of material." The petitioner did not submit sufficient documentary evidence to substantiate this claim. While the record does include copies of canceled checks paid to courier companies and print shops, the petitioner did not provide invoices or other evidence identifying the actual services provided by these outside companies. 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)).

Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of a president who performs primarily managerial or executive duties and a sales coordinator. The petitioner does not claim to have any employees who would perform its claimed primary function of providing graphic design services, nor does it claim to outsource this function. It is therefore reasonable to assume, and has not been shown otherwise, that either the beneficiary or her subordinate actually performs these services. The petitioner has submitted resumes for the beneficiary and her subordinate. The AAO notes that, of the petitioner's two employees, the beneficiary has a bachelor's degree in graphic design and professional experience in this field, while the sales coordinator has no professional or academic background in the field. Thus, the reasonable needs of the petitioner suggest that the beneficiary herself must spend a significant amount of time performing the tasks necessary to provide 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 "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988)

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 test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties related to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

In this matter, although the petitioner places the beneficiary at a senior level on the organizational chart, the record does not substantiate that the beneficiary primarily performs duties associated with the high-level responsibilities identified in the statutory definitions. Rather, it is evident based on the totality of the record that the beneficiary would be required to spend the majority of her time performing first-line supervisory duties and performing the daily operational tasks required to provide the petitioner's services. Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity under the extended petition. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it maintains a qualifying relationship with the foreign entity, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The petitioner states that it is an affiliate of the beneficiary's foreign employer based on common majority ownership by the beneficiary. The petitioner did not provide any documentary evidence to establish its actual ownership and control and therefore has failed to substantiate the claimed affiliate relationship. 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. Furthermore, the evidence submitted with respect to the foreign entity's ownership, including the minutes of a February 2001 meeting of the general assembly and the company's audited financial statement for 2002, indicates that the foreign entity has four individual shareholders, none of whom hold a majority interest in the company. Although the petitioner indicated that the beneficiary is the majority shareholder of the foreign entity, the submitted evidence does not list her among the company's shareholders. 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. 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). For this additional reason, 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.

**ORDER:** The appeal is dismissed.