



U.S. Citizenship
and Immigration
Services

...is intended to
**prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

D7



File: SRC-03-117-51565 Office: TEXAS SERVICE CENTER Date: **SEP 05 2006**

IN RE: Petitioner:
Beneficiary:



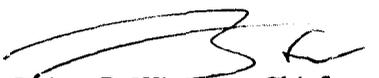
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 vice 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 under the laws of the state of Texas and is engaged in the construction business. The petitioner claims that it is the subsidiary of [REDACTED] in Karachi, Pakistan. The beneficiary was initially granted a one-year period of stay 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 subsequently filed a motion to reopen with the service center. In the motion counsel asserted that the petitioner was qualified for the benefit sought and submitted additional evidence.

The director subsequently denied the motion finding that the beneficiary had not established that beneficiary would be employed in a managerial or executive capacity and that petitioner had not been doing business as it is defined by 8 C.F.R. §214.2(l)(1)(ii)(G)(2).

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.

To establish eligibility for an extension the L-1 nonimmigrant visa classification for a new office, 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) that evidence for individual petitions 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.

As required by 8 C.F.R. 214.2(l)(3)(v), if the petition indicates that the beneficiary initially came to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in this matter is whether the petitioner established that the beneficiary had been and will be employed primarily in a managerial or executive capacity. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), 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 the initial petition, the petitioner did not substantively describe the beneficiary's job duties, nor did the petitioner submit any supporting evidence, despite the fact that basic initial evidence is required by 8 C.F.R. § 214.2(l)(3) and 8 C.F.R. § 214.2(l)(14).

On June 2, 2003 the director requested additional evidence. Specifically, the director requested, inter alia, documentary evidence that the petitioner had been doing business for the last year, documentary evidence of the ownership and control of petitioner by foreign qualifying organization and a definitive statement of the beneficiary's duties including a percentage of time spent on each duty, the number of employees that report directly to the beneficiary, a description of their job titles and duties with educational backgrounds, or a specification of what essential function was managed by beneficiary.

In response, counsel for petitioner submitted brief responses to the director's queries and some additional evidence.

On September 5, 2003, 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 and that there was not a qualifying relationship with a foreign qualifying organization. Further, the director pointed out serious inconsistencies in the record and counsel's assertions as well as not having shown proof that beneficiary and the petitioner's only other employees had registered with Citizenship and Immigration Services as required under the NSEERS regulations.

The petitioner subsequently filed a motion to reopen and reconsider on October 23, 2003. Petitioner made vague conclusory assertions and described the beneficiary's duties in unspecific terms. The AAO would also note that the inconsistencies and deficiencies noted in the first denial went unaddressed by counsel and no percentage breakdown of the beneficiary's managerial or executive duties was ever provided.

On January 26, 2004, the director denied the motion. The director determined that the beneficiary would not be employed primarily in a managerial or executive capacity. The petitioner subsequently appealed and the matter is now before the AAO.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Upon review, counsel's assertions are not persuasive and the decision of the director will be upheld. 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, and in detailed manner, describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner may not claim that the beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant case petitioner stated that the beneficiary was its vice president but did not clearly state whether beneficiary's employment would be in a primarily managerial or executive capacity. Documentation throughout the record alternatively paraphrases text from the statutory definition of each capacity without ever clearly specifying that the beneficiary met each of the four criteria for both capacities as would be required of a petitioner claiming hybrid manager/executive capacity for a beneficiary.

On appeal counsel makes numerous assertions that are not supported by documentary evidence and fails to address the inconsistencies contained in the record.¹ Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner has never provided a detailed, specific description of beneficiary's 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? 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). 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. *Id.*

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. An individual whose primary duties are those of a

¹ E.g., on appeal counsel states "[a]lthough the record may seem somewhat confusing, we advise that the [b]eneficiary is managing the overall operations of LFM. The . . . documents stipulate that Abdul Karim Tai [not beneficiary] is designated as managing the organization. However, this is not business reality."

first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary and the only other employee perform the actual day-to-day tasks of operating third party organizations. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. 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.

In determining 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).

In the instant case petitioner has not submitted any probative evidence that the beneficiary manages professional or managerial employees. In fact, counsel simply makes the assertion that contracts with third party organizations provide the basis for a acting in a managerial capacity. However, the petitioner failed to substantiate that such projects have actually occurred. 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)). Without probative supporting documentary evidence the AAO is unable to determine that the alleged sub-contractors beneficiary "manages" qualifies as professionals or managerial employees, or that the beneficiary's interaction with the contractors rises above a first-line supervisor capacity. Thus, the sub-contractors (which are not employees of petitioner) "managed" by beneficiary are not professionals and any duties pertaining to management of this or other non-professional employees as a first-line supervisor do not qualify as executive or managerial in capacity.²

The petitioner also claims that beneficiary is a functional manager. An analysis of being a functional manager rests on a finding that beneficiary performs in a primarily managerial or executive capacity. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. Here, the petitioner has failed to carry the burden that beneficiary's duties would be primarily managerial functions. The petitioner lists the

² The AAO also notes that petitioner attempts to cite Department of Labor materials in support of their argument for this CIS proceeding. The Department of Labor is a separate federal agency operating under different congressional mandates and petitioner has failed to explain how Department of Labor materials carry any weight in these proceedings.

beneficiary's duties as managerial, but it fails to describe in detail what the duties entail on a day-to-day basis. This failure of documentation is important because several of the beneficiary's daily tasks, such as "on-site management" and "transferring business management responsibilities for business convenience" do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Thus, the counsel is not persuasive in demonstrating, and the record does not support, that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has provided a vague, nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. On appeal counsel states that the beneficiary's duties include "on-site management of operations conducted by the construction aspect of the company" and "making management decisions with respect to projects, timelines, costs and productivity". 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 as petitioner has done in the instant case. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* In the instant case petitioner has not detailed exactly what the daily duties of the beneficiary are on a day-to-day basis and illustrating how they are managerial or executive in nature versus the performance of tasks necessary to provide a product or service.

The second issue in this matter is the lack of evidence that petitioner is doing business. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). The petitioner has not submitted any further evidence that existed at the time of filing from the normal course of business upon the successful completion or even implementation of such projects. Much of the "evidence" provided by counsel are summaries put together by petitioner long after they were requested by the director. *See* Summary of work done in 2002 and 2003, petitioner, undated, attached hereto as petitioner's appeal exhibit 5. Summaries of work compiled by the petitioner are insufficient to demonstrate the conduct of business as the underlying presumption that the work is actually occurring is not supported by any evidentiary submissions. 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). Evidence that is created after the director has given notice of a deficiency is not sufficiently independent or objective. Submitting a summary which relies on presumption of the fact summarized is not sufficient. The petitioner must submit independent and objective evidence demonstrating eligibility at the time the petition was filed.

In the Request for Evidence the director asked petitioner to provide documentary support demonstrating that it has been doing business during 2002-2003. The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii).

Counsel has submitted several contracts as evidence of doing business but then admits that these are "*examples* of the work petitioner was conducting . . . between 2002 – 2003." All of the agreements submitted are contingent on "funding dates" which are not given anywhere. In short, the contracts have not been performed and are merely executory. There is also, as mentioned by the director, no subsequent evidence that the projects were ever funded or ever took place. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Other documents submitted as evidence of doing business are summaries compiled by petitioner of factual assertions without documentary support for the underlying assertion.

Failure to submit all evidence requested by the director is grounds for denial based on abandonment. 8 C.F.R. § 103.2(b)(13). It is noted that the required initial evidence for a new office extension was never submitted, another ground for denial based on abandonment. 8 C.F.R. § 103.2(b)(13). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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. Consequently, the appeal will be dismissed and the petition is hereby denied.

ORDER: The appeal is dismissed.