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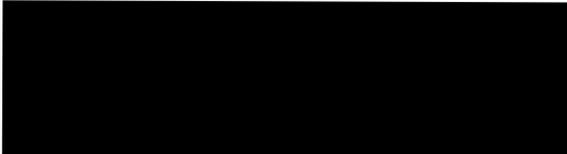
FILE: SRC 04 191 51720 OFFICE: TEXAS SERVICE CENTER Date: SEP 05 2006

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)

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

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**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Texas Service Center. 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 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, a Florida corporation, states that it is engaged in the provision of web-based technology design and construction services. It claims to be an affiliate of [REDACTED] located in Kilmarnock, United Kingdom. The beneficiary was initially granted a one-year period in L-1A status in order to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for a three-year period.

The director denied the petition concluding that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity; or (2) that the U.S. company has been doing business for the previous year.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director erred in finding that the beneficiary would not be employed in a qualifying capacity. Counsel emphasizes that the beneficiary occupies the highest position within the hierarchy of the business, and does not engage in the actual performance of services provided by the company. Counsel submits a brief and additional evidence 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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in this proceeding is whether the petitioner established that the beneficiary would be employed 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), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The nonimmigrant visa petition was filed on July 1, 2004. In an appended letter dated June 27, 2004, the petitioner submitted the following description of the beneficiary's duties as president:

- Setting up, developing and managing start up operations
- Developing and creating new business markets
- Interviewing, selecting and supervising sub-contractors for the business including site supervisors, painters, carpenters, etc.
- Creating, implementing and overseeing all internal company policies per US standard guidelines
- Developing marketing strategies for the business
- Developing and overseeing all internal human relations policies for the business per US labor laws
- Obtaining competent legal and accounting firms for the business enterprise
- Insuring that all local and federal taxed [sic] and licensing fees are paid in a timely fashion
- Developing advertising strategies and customer service policies for the business

[The beneficiary] supervises one site supervisor who is employed as an individual contractor. The site supervisor oversees one painter, one dry wall installer, one mason, two carpenters and one general maintenance worker, all of whom are employed by the business as independent contractors.

The petitioner attached a separate statement listing all independent contractors by name and job title, and provided a brief job description for each worker. The petitioner submitted letters from five of the seven contractors, each of whom confirmed providing contracting services for the petitioning company.

The director issued a request for additional evidence on July 17, 2004, in part instructing the petitioner to submit the following: (1) a definitive statement describing the beneficiary's employment including a list of all duties and the percentage of time spent on each duty; (2) a list of employees supervised by the beneficiary and a brief description of their job titles, educational background and duties; (3) an explanation of who provides the product sales/services or produces the product of the business; (4) an organizational chart for the U.S. entity; (5) copies of the U.S. company's quarterly tax returns for the past four quarters; and (6) copies of IRS Forms 1099 for all contract employees, along with receipts, bills and other documentation to establish salaries being paid to contract employees, the number of hours they work, and their job titles.

In an October 15, 2004 response, the petitioner indicated that the beneficiary allocates approximately 25 percent of his time to "working on the infrastructure" for the petitioner's proposed information technology services business and the remaining 75 percent of his time to overseeing the operations of the company's "remodeling and home improvements division." The petitioner provided the following detailed account of the beneficiary's duties:

- Developing and creating new business markets, including soliciting new business and maintaining contacts with existing customers. [The beneficiary] spends approximately 30% of his time on these duties.
- Interviewing, selecting and supervising sub contractors [sic] for the business including site supervisors, painters, carpenters, etc. [The beneficiary] spends approximately 15% of his time with these duties.
- Creating, implementing and overseeing all internal company policies per US guidelines. [The beneficiary] spends approximately 5% of his time on these duties.
- Developing marketing strategies for the business enterprise including seeking out new advertising venues, etc. [The beneficiary] spends approximately 10% of his time with these duties.
- Developing and overseeing all internal human resources policies for the business per US labor laws, including meeting with accountants to determine rate of pay, working with insurance agents to insure that all projects and workers are insured, etc. [The beneficiary] spends approximately 15% of his time on these duties.
- Obtaining competent legal and accounting firms for the business enterprise. [The beneficiary] spends approximately 1% of his time on these duties.
- Insuring that all federal, state and local taxes are paid in a timely fashion. [The beneficiary] spends approximately 9% of his time with these duties.
- Developing customer service policies for the business enterprise including follow up calls to insure that all jobs are completed properly and in a timely fashion as well as receiving feedback from customers to determine what areas may need improvement. [The beneficiary] spends approximately 15% of his time on these duties.

The petitioner provided an organizational chart identifying the beneficiary as president over a subcontracted site supervisor, who in turn supervises six contracted workers who provide general maintenance, carpentry,

aluminum installation, masonry, concrete finishing, painting, drywall and interior decorating services. The petitioner submitted copies of IRS Forms 1099 issued to six subcontractors in 2003. The petitioner also submitted an income statement indicating that the company had paid \$18,539.56 to subcontractors during the first nine months of 2004.

The director denied the petition on December 15, 2004, concluding the beneficiary would not be employed in a primarily managerial or executive capacity under the extended petition. The director referenced the beneficiary's job description, and concluded that the listed duties did not establish that he will perform the high-level duties contemplated by the statutory definitions of managerial and executive capacity. The director acknowledged the petitioner's use of subcontracted workers but observed that the petitioner did not employ any subordinate staff members who would perform the day-to-day, non-managerial operations of the company on a full-time basis. The director found that the sub-contracted personnel are not employed in professional positions, and further noted that the petitioner had not submitted evidence to substantiate that the petitioner maintains control over the outside employees' job performance, or that the U.S. company maintains formal agreements or contracts with the subcontractors to manage the functions of the business.

On appeal, counsel for the petitioner asserts that the director's denial is erroneous because the beneficiary: "occupies the highest position within the hierarchy of the US business;" manages its staff, including the site supervisor; exercises overall discretion in the day-to-day operations of the business; and "does not engage in the actual performance of the services offered by the company." Counsel further notes that the beneficiary served at the highest level of the foreign organization, and receives the highest salary within the U.S. organization, and asserts therefore, the beneficiary "obviously qualifies as a manager."

Counsel further describes the beneficiary's role as follows:

He manages the overall operations of the business enterprise including all aspects of advertising, purchasing of supplies, and creating financial goals and budgets for the business enterprise. . . . [The beneficiary] currently supervises the site supervisor, whose job it is to inspect and supervise the work being done on the various projects that the company has ongoing at any given time. The site supervisor is responsible for daily inspections of the work being done and reports directly to [the beneficiary] at least two times daily. . . . The site supervisor has the authority to make minor changes on the job site, such as relocating an electrical outlet, etc., however all major decisions concerning each job are made by [the beneficiary].

Counsel asserts that the petitioner submitted sufficient evidence to establish the employment of independent contractors and the beneficiary's control over such employees, and indicates that the petitioner recently hired an "aluminum manager" and another aluminum installer as independent contractors. The petitioner submits an updated organizational chart showing a total of nine employees under the beneficiary's supervision.

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

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 in either an executive or a managerial capacity. *Id.*

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 are related to operational or policy management, not to the supervision of lower-level employees or the performance of the duties of another type of non-managerial or non-executive position.

The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of “manager” or “executive”). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner’s day-to-day operations and has the appropriate level of authority, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary’s time.

For example, the petitioner stated that the beneficiary devotes at least 25 percent of his time to developing the infrastructure necessary for the petitioner to move forward with its plans to operate an information technology services business in addition to its existing home remodeling services. The petitioner has provided no description of what specific efforts the beneficiary will take to “develop the infrastructure,” nor has it indicated that any other employees are involved in this aspect of the petitioner’s business, such that they would relieve the beneficiary from performing non-qualifying duties related to these activities. The AAO cannot conclude that the beneficiary’s duties associated with infrastructure development would be managerial or executive in nature. 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)).

The petitioner further indicated that the beneficiary allocates an additional 30 percent of his time to “developing and creating new business markets and maintaining contacts with existing customers,” 10 percent of his time to “developing marketing strategies for the business. . . including seeking out new advertising venues,” and 15 percent of his time “developing customer service policies,” which includes follow up calls with customers and receiving feedback from customers. While these duties are described in vaguely managerial terms, the petitioner has not described the specific managerial or executive duties the beneficiary will perform with respect to the petitioner’s sales, marketing, advertising and customer service functions, nor has it identified any lower-level employees who would perform non-managerial duties associated with these areas of the petitioner’s business. 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).

Further, the AAO notes that the duties of the contracted employees are limited to providing general contracting and remodeling services. Therefore, it is reasonable to assume, and has not been shown otherwise, that the beneficiary, as the petitioner's sole full-time employee, would be responsible for directly marketing and selling the company's services, devising marketing plans, contacting advertisers, and performing any customer service tasks, as well as performing other administrative tasks inherent in operating the business.

Therefore, while the lower-level employees may perform the day-to-day duties associated with providing home remodeling services, the petitioner's focus on this one particular type of task is misplaced. Job duties performed in connection with a business' sales, marketing, purchasing, finances and general administration may be deemed non-qualifying if they involve the actual performance of the function. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. 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).

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. The petitioner claims that the beneficiary supervises one managerial or supervisory employee, namely the site supervisor, who appears to be employed on an "as needed" contract basis. While this employee may have supervisory authority over other contractors, the petitioner has indicated that the beneficiary devotes only approximately 15 percent of his time to supervising subordinates. Therefore, the small portion of his time devoted to supervising the "site supervisor" may be considered managerial in nature; however, the petitioner is still required to demonstrate that the beneficiary's duties as a whole are primarily managerial or executive. The fact that the beneficiary supervises one part-time supervisory employee is insufficient to establish that the beneficiary will be primarily performing managerial or executive duties.

The AAO acknowledges that the petitioner claims to have hired an "aluminum manager" and an additional "aluminum installer" on a contract basis. However, 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). The petitioner has not established that the beneficiary regularly or primarily supervised managerial or supervisory employees at the end of the company's first year of operations.

Despite the petitioner's inability to show that the beneficiary primarily supervises managerial, supervisory or professional employees, the petitioner can still establish the beneficiary's eligibility by providing evidence that the beneficiary is a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must provide a detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function.

8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

In this matter, the petitioner and counsel have emphasized that the beneficiary does not perform any construction or home remodeling duties and, therefore, assert that the beneficiary is relieved from performing non-qualifying functions. However, merely establishing that the beneficiary does not perform the petitioner's most essential function does not mean that the beneficiary is relieved from performing many of the other types of non-qualifying functions associated with the petitioner's business. At the end of the one-year period granted for the beneficiary to open the new office, the petitioner employed only the beneficiary as president, and utilized the services of an accountant for tax matters. As discussed above, the beneficiary himself would necessarily have performed all other duties associated with operating the petitioner's home remodeling and general contracting business, other than the actual remodeling services. The beneficiary's duties must have included selling and marketing the petitioner's services, communicating and negotiating with vendors and suppliers, addressing all customer-service related issues, and performing the company's day-to-day administrative and financial functions. While these duties may be crucial to the proper functioning of the petitioner's business, they are also the daily operational tasks and cannot be deemed managerial or executive in nature.

On review, the evidence of record in this case does not establish that the beneficiary would be employed in a primarily managerial or executive capacity. While the AAO does not dispute the heightened degree of authority imparted upon the beneficiary as president and majority shareholder in the U.S. company, 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). Although counsel places great emphasis on the fact that the petitioner has hired a number of independent sub-contractors to carry out one of its essential functions, the fact remains that the beneficiary continued to perform other daily operational tasks, which are equally as non-qualifying as the actual provision of services.

The regulation at 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 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner established that the U.S. entity has been doing business for the previous year, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The regulation at 8 C.F.R. 214.2(l)(1)(ii)(H) defines "doing business" 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.

The beneficiary was initially granted a one-year period in L-1A status beginning on July 8, 2003 and ending on July 7, 2004. In support of the instant petition, the petitioner submitted copies of advertisements, business licenses, its financial statement for the fiscal year ended on March 31, 2004 showing over \$81,000 in turnover, and copies of four invoices for services rendered, dated in February, March, April and May 2004.

In her July 17, 2004 request for evidence, the director requested that the petitioner submit evidence that the company has been doing business for one year, including copies of bank statements, payroll records, invoices, sales records, bills of sale, shipping receipts, and orders for goods or services.

In response, the petitioner re-submitted the above-referenced invoices, along with copies of ten service contracts dated in July and August 2004, along with copies of IRS Forms 1099 issued to its contractors for the 2003 year, and an income statement for the first nine months of 2004 showing total income of \$63,281.

The director denied the petition on December 17, 2004, concluding that the petitioner had not established that the U.S. company was doing business for the previous year.

On appeal, counsel asserts that the petitioner "previously submitted extensive documentation showing that the US entity has been doing business." The petitioner submits new and previously submitted evidence in support of the appeal, including: the above-referenced invoices dated February 2004 through May 2004; service contracts dated November 2004 through January 2005; monthly bank statements dated from July 2003 through December 2004; receipts for purchases dated June through December 2004; advertisements for the petitioner's business dated September 2003 and April 2004; and a letter from a local Florida newspaper confirming that the petitioner has advertised with its publication since July 2003.

Upon review, the AAO finds sufficient evidence to establish that petitioner has been doing business as required by the regulations. Although the record does not contain sales contracts from 2003, the petitioner has submitted Forms 1099 for the 2003 year evidencing payments to contractors for services rendered during that year, bank statements showing monthly deposits consistent with the income reported on the company's 2003 financial statements, and evidence that it has been actively advertising the company's services since the initial petition was approved. The petitioner's invoices and service contracts suggests a steady increase in the level of business over the first year of operations. The director's decision with respect to this issue will be withdrawn.

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.