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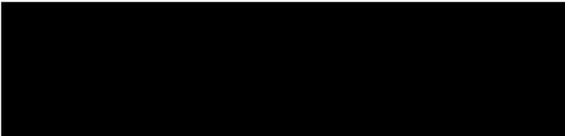
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FILE: EAC 07 107 52616 Office: VERMONT SERVICE CENTER Date: DEC 21 2007

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

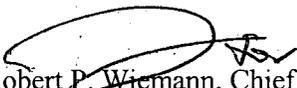
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Vermont 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 employ the beneficiary 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 limited liability company, intends to engage in the installation of hurricane shutters and other home and garden services. The petitioner states that it is an affiliate of [REDACTED], located in Blagnac, France. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States for a one-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity within one year.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner disputes the director's decision and asserts that the beneficiary will be employed as an "executive manager." Counsel further argues that the U.S. company has the potential to grow into one which will support a managerial position, as well as subordinate supervisors and professionals. 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 three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming 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;
- (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 sole issue addressed by the director is whether the petitioner established that the United States operation, within one year of the approval of the petition, will support an executive or managerial position, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

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 one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* The regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition.

The nonimmigrant petition was filed on March 5, 2007. On the Form I-129, the petitioner indicated that the beneficiary would serve as general manager of the new U.S. company with the following responsibilities:

Direct and coordinate activities of businesses or departments concerned with the production, pricing, sales, or distribution of products. Review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement.

The petitioner also attached an "employment proposition" for the beneficiary, which indicated his proposed duties as follows:

Sale of doors, windows and shutters
Installation of wood floors
External and internal painting
Garden and lawn maintenance
Sale of furniture

The petitioner did not submit a business plan or describe the petitioner's proposed staffing levels for the first year of operations. Accordingly, the director issued a request for additional evidence on March 19, 2007. The director instructed the petitioner to submit the following: (1) a breakdown of the number of hours to be devoted to each of the beneficiary's proposed duties on a weekly basis; (2) an organizational chart for the U.S. entity and complete position descriptions for all proposed employees; (3) a business plan providing specific dates for each proposed action during the first year of operations; and (4) evidence to show how the U.S. company will grow to be of sufficient size to support a managerial or executive position.

In a response received on April 19, 2007, the petitioner provided the following description of the beneficiary's proposed duties:

Training of the salesmen:	6 hours
Briefing and checking the work of employees:	6 hours
Prospection [sic] to find new customers:	12 hours
Filing proposals and sales:	6 hours
Control of each file:	2 hours
Orders to suppliers:	3 hours
Schedule of the installations:	1 hour
Control the installations at customers' houses:	6 hours
Financial duties:	2 hours
Preparation of all documents for the C.P.A.:	2 hours

The petitioner further explained the beneficiary's proposed role as follows:

[The beneficiary] has to hire some employees, teach them to the firm's policy and manage them day-to-day. He needs a visa to work because he must show to the employees how to work: the better example is to show to the employees how to do their job. Also, he has to be in direct contact with the suppliers each week. And he also needs to find self-employed fitters

who have good experience and reputation to make the installations. He has to schedule the installations with the customers. Therefore, he needs to meet the customers and to control the quality of the installations in their houses.

In a separate statement, the petitioner indicated that the beneficiary would spend 70% of his time on executive/managerial duties and 30% of his time to other, non-executive functions.

The petitioner indicated that the beneficiary would hire two salesmen to find prospective customers, make proposals and sign sales contracts, as well as two fitters to perform installations and maintenance work at customers' houses. The petitioner stated that these employees would be paid on a commission basis and would be able to work autonomously by the end of the first year of operations, thus relieving the beneficiary from performing sales and installation work. The petitioner's organizational chart also depicts a C.P.A. working under the beneficiary's supervision.

The petitioner submitted a description of the proposed business, noting that initially, the petitioner would concentrate on the sale and installation of roll-down hurricane shutters, but would also offer secondary products and services such as painting and installation of flooring, doors, etc. The petitioner noted that the company would market its products and services by using door-to-door and telephone prospecting, flyers and advertisements, and exhibitions in shopping malls and commercial areas.

Finally, the petitioner submitted a one-page business plan for the year October 2006 through October 2007. The plan indicates that as of October 2007, the company would employ the beneficiary, two salesmen and two fitters.

The director denied the petition on April 27, 2007, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year. The director noted that, despite the beneficiary's job title, he would be working at a level no higher than that of a first-line supervisor of non-professional employees. The director found upon review of the totality of the evidence that there would be limited growth for the business, leaving the beneficiary to perform the company's marketing, advertising, purchasing, bookkeeping and other non-managerial level tasks at the end of the first-year of operations.

On appeal, counsel asserts that the beneficiary's title "is of an Executive Manager which is a managerial or executive capacity, as defined in Section 101(a)(44)(a)(b) [sic]." Counsel contends that the petitioner "has the potential growth to accommodate a managerial staff, supervisors and professional level employees, prior to the end of it's [sic] first year of operation." Counsel emphasizes that shutters are a growing necessity in Florida, and therefore, such businesses are well-known to be profitable in the state. Counsel also notes a factual error in the director's decision with respect to the date of establishment of the U.S. company.¹

¹ The AAO notes that the director incorrectly indicated that the U.S. company was established on November 20, 2007. The correct date is October 26, 2006. This error, while regrettable, did not impact the director's analysis of the substantive issue of whether the beneficiary would be employed in a managerial or executive capacity within one year.

In an attached statement, the petitioner states that it feels the beneficiary's proposed role was "badly expressed" due to cultural and/or language differences. The petitioner states that in France, it is understood that the owner of the company will manage all employees and activities, but will delegate tasks to subordinate supervisors who actually manage the lower-level workers who perform routine duties. The petitioner submits various press releases and articles regarding the hurricane shutter industry in Florida to support its claims that the U.S. company will engage in a high-growth industry and thus will quickly expand to the point where it can support the beneficiary in a primarily managerial or executive capacity.

With respect to the U.S. company's staffing structure, the petitioner states the following:

As planned in the business plan we provided, a first salesman will be hired and trained by the beneficiary. This salesman No 1 will become around July 2007 the SALES MANAGER and will manage the first fitter and the second salesman. In the same way, the first fitter will become the TECHNICAL MANAGER and will manage the second fitter. After that, around October 2007, the technical manager will manage a second fitter and the second salesman will become LEADER SELLER and will manage three new salesmen. Also, the beneficiary manages the C.P.A. who himself manages a clerical officer. These individuals will relieved [sic] the beneficiary from the non-managerial tasks.

The petitioner's statement includes proposed organizational charts showing six employees under the beneficiary's supervision as of July 2007, and eleven employees by October 2007.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity within one year.

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 petitioner's initial description of the beneficiary's proposed duties suggested that he would directly provide the sales and services of the organization rather than performing any managerial or executive duties. The petitioner indicated that he would sell doors, windows and shutters, install wood floors, sell furniture, paint, and perform garden and lawn maintenance 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). However, the AAO notes that the initial description of the beneficiary's duties was essentially the same as the initial description of the petitioner's business and appeared to provide more of an overview of the services to be provided by the new company rather than a description of the beneficiary's actual proposed duties.

Accordingly, the director requested that the petitioner clarify the beneficiary's duties and the amount of time he would devote to them. As noted by the director, the petitioner's response suggested that the beneficiary would primarily perform a combination of operational and first-line supervisory duties, rather than

performing the high-level managerial or executive responsibilities set forth in the statute. For example, the petitioner indicated that the beneficiary would devote the largest portion of his time, 12 hours per week, to "prospection [sic] to find new customers," a duty which could reasonably involve market research, advertising and soliciting sales, all of which are non-qualifying duties. Therefore, while the petitioner stated that the two sales employees would relieve the beneficiary from direct involvement in sales within one year, the beneficiary's job description indicates otherwise.

The beneficiary would devote an additional 12 hours per week to "checking the work of the employees," and controlling the quality of installations at customer's houses. These duties suggest that the beneficiary will act as a first-line supervisor to the petitioner's commissioned sales people and installation workers. As the petitioner has not offered any evidence that any of the beneficiary's proposed subordinates would be professionals, these supervisory duties must also be deemed non-managerial in nature. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

Furthermore, the beneficiary's responsibilities for "filling proposals and sales," "control of each file," "orders to suppliers," "financial duties," and "schedule of installations," which account for an additional 14 hours of the beneficiary's time, are operational and administrative tasks required to provide the petitioner's services and have not been shown to be managerial in nature. The petitioner does not indicate that any of the beneficiary's proposed subordinates will relieve the beneficiary from performing these tasks. Overall, based on the petitioner's representations, the beneficiary's duties will primarily be composed of non-managerial and non-executive functions. Again, 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. at 604.

The definitions of executive and managerial capacity have two separate requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove 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 AAO does not doubt that the beneficiary would exercise authority over the U.S. company as its general manager and owner; however, the fact that the beneficiary owns and 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 (Feb. 26, 1987). Again, 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).

On appeal, the petitioner seeks to revise its proposed staffing structure in an effort to establish that the beneficiary would manage a subordinate staff of supervisors, professionals or managers. As noted above, the petitioner submits a new proposed organizational chart indicating that the beneficiary would supervise three tiers of lower-level employees including a sales manager, technical manager, lead seller, two fitters and three salespeople by October 2007. The petitioner implies that there was some misunderstanding because the

petitioner previously described the beneficiary's role according to French conventions and believed it was understood that the beneficiary would delegate all non-managerial tasks to lower-level supervisors and employees. The petitioner's assertions are not persuasive. There was no ambiguity in the petitioner's business plan or previous statements indicating that the petitioner intended to hire exactly four non-supervisory, non-professional employees, two sales people and two fitters, during the first year of operations. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The organizational chart submitted on appeal will not be considered.

The AAO acknowledges the evidence submitted on appeal regarding the increasing demand for hurricane shutters in Florida. However, the fact that the petitioner seeks to start a business in a high-growth industry has little bearing on whether the U.S. company will grow to a point where it will support the beneficiary in a primarily managerial or executive position within one year. Such a determination, as required by the regulations, must be based upon the petitioner's evidence related to the beneficiary's job duties, the proposed nature and scope of the office, its organizational structure and financial goals, and the size of the United States investment, rather than on external industry factors. As noted by the director, the totality of the evidence does not support a finding that the U.S. company will achieve the required growth.

Although not specifically referenced by the director, another factor supporting this conclusion is the lack of evidence of the size of the investment in the United States entity. When filing a petition for a beneficiary who is to be employed in a new office, the petitioner is required to submit evidence to establish the size of the United States investment and the financial ability to commence doing business in the United States. *See* 8 C.F.R. § 214.2(l)(v)(C)(2).

The petitioner indicated that the beneficiary transferred \$2,500 from the foreign entity's account. However, the petitioner has not identified its anticipated start-up costs or capital requirements, and it does not appear that these funds would be sufficient for the purposes of commencing operations in the United States. 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)). While it is true that the regulations do not establish a minimum investment amount, the AAO cannot find that the company has sufficient funds to commence business operations in the United States.

Overall, the minimal evidence submitted with this petition does not demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. Based on the foregoing discussion, the petitioner has not established that the U.S. entity would support the beneficiary in a managerial or executive capacity within one year of the approval of the petition. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the record does not establish that the petitioner has secured sufficient physical premises to house the new office. At the time of filing on March 5, 2007, the petitioner indicated that the beneficiary's worksite would be located at 34650 U.S. Highway 19 North, Suite 108, in Palm Harbor, Florida. The petitioner provided a letter from Peck & Jenkins C.P.A., P.A., dated February 1, 2007, stating that for a monthly fee of \$150, Peck & Jenkins would receive the petitioner's incoming mail and deliveries, provide bookkeeping services using documents provided by the petitioner, and provide an empty office for the petitioner's use in meeting with clients. Based on this evidence, the petitioner had not secured physical premises for the day-to-day operation of its business. Rather, it had contracted for mail service and the option to use an office for client meetings if so desired.

The director subsequently requested evidence to establish that the petitioner has secured sufficient physical premises to house the new office, including photographs of the interior and exterior of all premises secured. In response, the petitioner submitted a copy of a lease agreement for an 180 square foot office located at 10204 Ridgeway Drive, Port Richey, Florida. The lease agreement was signed on March 2, 2007, prior to the filing of the petition, so it is unclear why the petitioner did not initially submit this agreement, and instead indicated that the beneficiary would work at a different address. Doubt cast on any aspect of the petitioner's proof may undermine 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). The photographs submitted do not clearly identify the location or size of the office. Furthermore, even if the AAO accepted the lease agreement, the petitioner does not appear to have secured sufficient space for its proposed staff of five employees, nor does it have storage space for the shutters and other materials it intends to sell and install. For this additional reason, the petition cannot 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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.