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File: SRC 05 800 29499 Office: TEXAS SERVICE CENTER Date: JUL 06 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)

IN 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 visa petition seeking to employ the beneficiary as its "planning and development manager" 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 Florida and alleges that it is an import and export consulting services company.

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 director erred, that the beneficiary's duties are primarily those of an executive, and that the beneficiary will manage "managers." The petitioner also argues that the director improperly ignored its use of independent contractors in rendering her decision. In support of this assertion, the petitioner submits a brief and additional evidence.

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 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.

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 petitioner does not clarify in the initial petition whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. On appeal, the petitioner asserts that the beneficiary will be employed as an executive even though his position is described as "planning and development manager." A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for

executive and the statutory definition for manager.

The petitioner briefly described the beneficiary's proposed job duties in the Form I-129 and in a letter dated June 10, 2005. As these descriptions are clearly marked in the record, they will not be repeated here. The petitioner also described the beneficiary's proposed duties in a "job offer" dated March 2005, and in a "job description" dated January 2005, as follows:

- Negotiate with the General Manager to set his or her expectations in relation to the desired results from the Planning and Development Division, in the short, mid, and long range terms;
- Establishes the policies and initiatives required to ensure that the Planning and Development Division will operate as an only team, all working together toward the desired results, as negotiated with the General Manager and the Board of Directors;
- Establishes the goals needed to reach the objectives of the Planning and Development Division and to accomplish the expectations of the General Manager and the Board of Directors;
- Coordinates the development and the implementation of the plans, programs, and strategies for generating resources, revenues, and profits for the Planning and Development Division, ensuring the reaching of the established goals and objectives of the business division;
- Directs the management, coordinating the activities of the different areas of the Planning and Development Division, ensuring that the work is done under the established policies, and focused on the desired and programmed results;
- Reviews and presents activity reports and financial statements to determine and to show the progress and status in attaining goals and objectives, in accordance to what was planned for the current conditions;
- Represents the Planning and Development Division before the managers, employees, contractors, Clients, potential Clients, prospects, suppliers, partners, Authorities, community leaders, civic groups, students, and the community in general.

The petitioner also provided a breakdown of how much time the beneficiary will devote to his various duties. This breakdown indicates that the beneficiary will spend over 50% of his time in "meetings with management."

On July 2, 2005, the director requested additional evidence. The director requested, *inter alia*, an organizational chart for the United States entity, job descriptions for the beneficiary's subordinate employees, and a more detailed description of the beneficiary's proposed duties in the United States.

In response, the petitioner provided an organizational chart and associated job descriptions. The chart indicates that the beneficiary will be one of three "managers" reporting to a "general manager." The beneficiary is portrayed as supervising one employee described as the "business planning manager," and one independent contractor described as the "suppliers development manager." The job description for the "suppliers development manager" indicates that this contractor is actually an employee of [REDACTED] and that she works primarily with vendors of materials, equipment, and supplies. The "business planning manager" is described as developing business plans and programs for the petitioner.

The petitioner also submitted an affidavit dated September 15, 2005 in which the president of the petitioner further describes the beneficiary's proposed day-to-day duties and provides a breakdown of how much time the beneficiary will devote to each duty. As this affidavit is in the record, the description will not be repeated here. Generally, this description portrays the beneficiary as spending most of his time meeting with other employees and contractors, analyzing and preparing reports, overseeing the selection of suppliers and the development of agreements, and meeting with suppliers and clients.

On October 24, 2005, the director issued a Notice of Intent to Deny requesting that the petitioner provide wage reports and employment documentation for the petitioner's employees and independent contractors.

In response, the petitioner provided copies of wage reports contemporaneous to the filing of the petition indicating that the petitioner has four employees. The petitioner also provided Forms 1099-MISC indicating that it paid nonemployee compensation in 2004 to seven independent contractors including the "suppliers development manager." The petitioner does not explain why a Form 1099-MISC was issued to the "suppliers development manager," and not to her employer [REDACTED].

On January 3, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, the petitioner asserts that the director erred, that the beneficiary's duties are primarily those of an executive, and that the beneficiary will manage "managers." The petitioner also argues that the director improperly ignored its use of independent contractors in rendering her decision.

Upon review, the petitioner's assertions are not persuasive.

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 must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific

description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary establishes policies, goals, and initiatives; coordinates the development and the implementation of plans, programs, and strategies; reviews and presents reports; directs the management of his division; and represents his division. However, the petitioner never defines with any specificity those policies, goals, initiatives, plans, programs, and strategies which the beneficiary allegedly establishes and develops. While the petitioner did provide a breakdown of how much time the beneficiary devotes to each of his various duties, this breakdown is equally vague. All that can be gleaned from this breakdown of duties is that the beneficiary will spend most of his time meeting with employees, contractors, vendors, and customers. The petitioner failed to provide any substantive details regarding what, exactly, the beneficiary will do on a day-to-day basis. The fact that the beneficiary has been given a managerial title and has been ascribed job duties which include vague, lofty-sounding functions does not establish that the beneficiary will actually perform managerial duties. 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Moreover, many of the duties ascribed to the beneficiary appear to be non-qualifying administrative or operational tasks that do not rise to the level of being managerial duties. For example, the petitioner is described as "coordinating the activities of the different areas of the Planning and Development Division, ensuring that the work is done under the established policies, and focused on the desired and programmed results." However, given that none of the subordinate employees has been established to be managerial, supervisory, or professional in a nature (*see infra*), this lofty-sounding duty is more akin to the supervision of employees who are performing the tasks necessary to provide a service, i.e., acting as a first-line supervisor. Moreover, the beneficiary is described as representing his "division" before suppliers and customers. While vague, this function appears related to marketing and sales tasks, which are not managerial in nature when performed by the beneficiary. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart, wage reports, and job descriptions for the subordinate staff members, the beneficiary will manage a two-person staff which is engaged in business planning and working with vendors. While the petitioner has given the subordinate staff members managerial titles and has described them as having supervisory or managerial functions, the petitioner has not established that these employees are primarily engaged in performing supervisory or managerial duties. To the contrary, these staff members have no subordinate employees, and their job descriptions indicate that they are primarily engaged in performing tasks related to providing a service or producing a product. Inflated job titles are not probative and will not establish that an organization is sufficiently complex to support a managerial or executive position. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-

professional employees, the provider of actual services, or a combination of both. A managerial 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. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner has not revealed the educational background or skill level of the subordinate staff members, it cannot be determine if they rise to the level of being professionals.¹ Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.²

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization.

¹In 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).

²While the petitioner has not specifically argued that the beneficiary manages an essential function of the organization, the record nevertheless would not support this position even if taken. 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. 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 furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 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. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's vague job description fails to credibly and specifically document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary will be primarily a first-line supervisor of non-professional employees and will perform non-qualifying administrative or operational tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary will primarily perform 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).

Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, the beneficiary appears to be primarily employed as a first-line supervisor and/or to be engaged in performing non-qualifying administrative or operational tasks. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

Although a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in approving a visa for a multinational manager or executive (*see* § 101(a)(44)(C) of the Act), it is appropriate for Citizenship and Immigration Services to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed abroad in a position that was managerial, executive, or involved specialized knowledge as required by 8 C.F.R. § 214.2(l)(3)(iv). While the petitioner submitted a letter dated May 27, 2005 from the foreign entity claiming that the beneficiary had been employed as the "quality assurance manager," the petitioner did not provide a coherent job description for this position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. Moreover, while this letter claims that the beneficiary was "responsible for hiring and directing the managers of the Quality Assurance Division," the organizational chart does not portray the beneficiary as supervising a subordinate staff. To the contrary, the beneficiary is portrayed simply as supervising "quality control" and "training." The petitioner fails to describe the foreign organizational chart or to disclose whether any of these alleged subordinate staff members are employees of the foreign entity. In fact, the May 27, 2005 letter implies that many, if not all, of the "managers" who are "managed" by the beneficiary are actually employees of distributors or other associated companies. In view of the above, the petitioner has not established that the beneficiary was employed abroad in a position that was managerial, executive, or involved specialized knowledge, and the petition may not be approved for this additional reason.

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.