

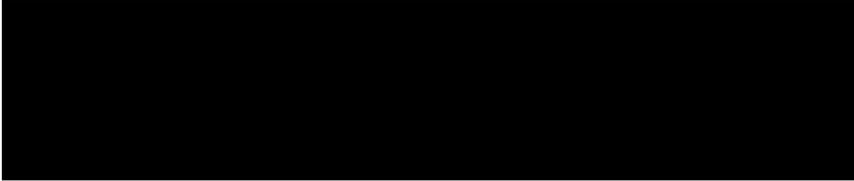
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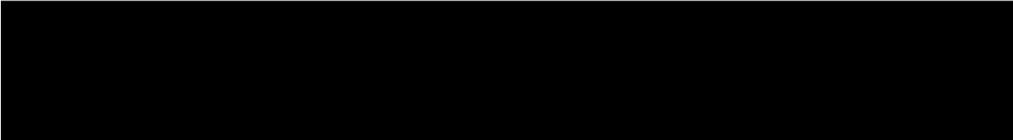
File: SRC 05 191 50869 Office: TEXAS SERVICE CENTER Date: **JUL 06 2007**

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 visa petition seeking to employ the beneficiary as 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 is a corporation organized under the laws of the State of Florida and is allegedly a money service business. The beneficiary was initially granted a one-year period of stay to open a new office in the United States from November 7, 2002 until November 6, 2003 (SRC 03 021 53576). Petitions to extend this petition and the beneficiary's stay were denied on October 24, 2003 (SRC 04 008 50601) and January 4, 2006 (SRC 04 026 52270). The instant petition, which seeks to employ the beneficiary as a manager or executive of a now allegedly "fully functional" business operation, was filed on June 27, 2005.

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, counsel to the petitioner asserts that the beneficiary's duties are primarily those of an executive or manager. Counsel further argues that, because the petitioner's business has failed to reach its "full potential" due to regulatory complications, a "less stringent" application of the law should apply. 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, and implies that the beneficiary will be employed as both an executive and a 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 described the beneficiary's job duties in a letter dated June 13, 2005 appended to the initial petition as follows:

As President of [the petitioner], [the beneficiary] will lead the expansion of the company into the United States. She will help to establish [the petitioner's] position as a premier money transmitter/money services business in the South Florida region that caters to the needs of the Venezuelan community in particular and the wider market in general. She will also promote the Venezuelan company's activities within the United States for potential customers who wish to avail themselves of their services within Venezuela. [The beneficiary] will be responsible to hire employees as well as set their wages, prepare and present annual reports regarding the state of the enterprise and call general and extraordinary meetings as needed to inform members of the operations of the enterprise.

The petitioner also submitted an organizational chart for the United States operation. The chart identifies the beneficiary as the president/director and portrays her as supervising a compliance officer, a vice president/treasurer, a cashier, and a systems analyst.

On September 8, 2005, the director requested additional evidence. The director requested, *inter alia*, job descriptions and educational background information for the subordinate employees and wage reports.

In response, counsel to the petitioner provided a letter dated November 18, 2005 in which counsel explained that the petitioner "presently has one (1) full-time employee, (1) executive officer and two (2) part-time employees." Counsel identified the cashier as the sole full-time employee of the petitioner and described her duties as "counting the drawers' contents comparing the totals with sales data, separating and totaling charge forms, return slips, any other non-cash items." Counsel also attached the cashier's resume which indicates that she attended high school in Cuba.

Counsel explained in the letter that the vice president/treasurer is an officer of the petitioner and not an employee. Counsel also indicated that the petitioner has been unable to employ the "compliance officer" and "systems analyst" on a full-time basis because of the petitioner's purported inability to secure a "money service business account," which is allegedly important to the petitioner's business expansion plans. While the petitioner submitted the wage reports for the previous four quarters, these reports list only the cashier as an employee. These reports do not indicate that the petitioner has employed the "compliance officer" or the "systems analyst" on a part-time basis or otherwise at any point during the year preceding the filing of the instant petition.

Finally, the petitioner provided another list of job duties for the beneficiary as follows:

The position involves the management of the business enterprises operation including but not limited to the following:

- The supervision of the employees and future employees with the company;
- Training of employees (hiring and firing of employees);
- Managing the Finances[;]
- Planning, developing and implementing company strategy;
- Planning the future expansion of the business and the possibility of franchising the said business;
- Developing and implementing policies and procedures for company operations;
- Determining mark-up percentages necessary to insure profit, based on estimated budget, profit goals and average rate of client acquisition;
- Developing policies and procedures for procurement of services;
- Oversee the negotiating of contracts with clients;
- Authorizing purchase of contract services based on estimates;
- Formulating pricing services for sale of services;
- Review statements, invoices, bill[s] of lading and insurance certificates;
- Coordinate the purchase of services, supervising the contact with different vendors to attain the desired services;
- Plan business objectives, develop organization policies and establish responsibilities and procedures for attaining objectives with the business operations of the internet services business;
- Review activity reports and financial statements to determine progress and status in attaining corporate objectives.

On December 26, 2005, 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, counsel to the petitioner asserts that the beneficiary's duties are primarily those of an executive or manager. Counsel further argues that, because the petitioner's business has failed to reach its "full potential" due to regulatory complications, a "less stringent" application of the law should apply.

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.<sup>1</sup>

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 will develop strategies, policies, and procedures, and promote the company. The petitioner did not, however, specifically define what strategies, policies, and procedures will be developed or what, exactly, she will do to "promote" the company. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes lofty duties 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).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees. As explained in the organizational chart, wage reports, and job descriptions for the subordinate employees, the beneficiary appears to manage one employee, a cashier with a high school education, who is engaged in performing clerical or operational tasks. The other staff members do not appear to be employed by the United States operation despite the petitioner's assertions to the contrary because, as indicated above, they are not listed on any of the wage reports for the four quarters preceding the filing of the instant petition. Given that the petitioner employs only one subordinate staff member, it does not appear that the petitioner employs a subordinate staff capable of relieving the beneficiary of the need to primarily perform those non-qualifying administrative or operational tasks inherent to the duties ascribed to her, e.g., promoting the company, managing the finances, and negotiating contracts. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of a non-professional employee, the provider of actual services, or a combination of both. An employee who "primarily" performs

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<sup>1</sup>As a threshold issue, it must be noted that counsel's assertion that "less stringent" standards akin to those applicable to a "start up organization" be applied in this case is without merit. While counsel's argument is not entirely clear, it appears that he is claiming that the criteria in 8 C.F.R. § 214.2(l)(3)(v) applicable to "new offices" should be applied to the instant petition. The one-year "new office" provision is an accommodation for newly established enterprises that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. However, in order for a petitioner to be treated as a "new office," it would first need to meet the definition in 8 C.F.R. § 214.2(l)(1)(ii)(F) that defines "new office" as "an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year." As indicated in the letter dated June 13, 2005 appended to the initial petition, the United States operation is "fully functional." The record also confirms that the petitioner was incorporated in 2002, has filed tax returns, maintains bank accounts, and has employed a cashier for approximately one year before the instant petition was filed. Therefore, as the petitioner has apparently been doing business in the United States for the year preceding the filing of the instant petition, the "new office" provisions are inapplicable, and the petitioner must establish that the beneficiary will be employed primarily in an executive or managerial capacity immediately.

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). 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. Section 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, the petitioner has not established that the beneficiary will manage professional employees.<sup>2</sup> Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>3</sup>

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<sup>2</sup>In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” The term “profession” contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the duties of any of the beneficiary's alleged subordinate staff members.

<sup>3</sup>While the petitioner has not specifically argued that the beneficiary will manage 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 will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties will be managerial functions, if any, and what proportion will be non-managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line supervisor of a non-professional employee and will likely need to perform those non-qualifying administrative and operational tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties will 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).

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. 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 will be primarily employed as a first-line supervisor and will likely 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.

It is appropriate for CIS 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).

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.

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.