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U.S. Citizenship  
and Immigration  
Services

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File: SRC 05 211 52181 Office: TEXAS SERVICE CENTER Date: JUL 16 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 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 is a corporation organized under the laws of the State of Florida and allegedly operates a dry cleaning drop store. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay. The petitioner claims a qualifying relationship with Texas Photo Studio of San Juan, Trinidad as an affiliate.<sup>1</sup>

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 and that the beneficiary's duties are primarily those of an executive or manager. In support of this assertion, the petitioner submits a brief.

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.

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<sup>1</sup>According to Florida state corporate records, the petitioner's corporate status in Florida was "administratively dissolved" on September 15, 2006. Since the corporation may not carry on any business except that necessary to wind up and liquidate its affairs, and the petitioner has not taken steps under Florida law to seek reinstatement, the company can no longer be considered a legal entity in the United States. *See Fla. Stat. 607.1421 (2006)*. The dissolution of the petitioner calls into question its continued eligibility for the benefit sought in the current petition.

- (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 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. 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 record in its totality reveals that the petitioner operates a dry cleaning drop store and employs four people, including the beneficiary. Counsel to the petitioner described the beneficiary's job duties as "president and chief executive officer" in a letter dated July 25, 2005 appended to the initial petition as follows:

Directs, plans, and implements policies and objectives of organization or business in accordance with charter and board of directors; Directs activities of organization to plan procedures, establish responsibilities, and coordinate functions among departments and sites; Confers with board members, organization officials, and staff members to establish policies and formulate plans; Analyzes operations to evaluate performance of company and staff and to determine areas of cost reduction and program involvement; Reviews financial statements and sales and activity reports to ensure that organization's objectives are achieved; Directs and coordinates organization's financial and budget activities to fund operations, maximize investments, and increase efficiency; Assigns or delegates responsibilities to subordinates;

Directs and coordinates activities of business or department concerned with production, pricing, sales, and/or distribution of products; Directs and coordinates activities of business involved with buying and selling investment products and financial services; Directs non-merchandising departments of business, such as advertising, purchasing, credit, and accounting; Establishes internal control procedures; Prepares reports and budgets; Presides over or serves on board of directors, management committees, or other governing boards; Negotiates or approves contracts with suppliers and distributors, and with maintenance, janitorial, and security providers; Promotes objectives of institution or business before associations, public, government agencies, or community groups; Screens, selects, hires, transfers, and discharges employees; Administers program for selection of sites, construction of buildings, and provision of equipment and supplies; Directs in-service training of staff.

On August 1, 2005, the director requested additional evidence. The director requested, *inter alia*, a list of the beneficiary's duties, a breakdown of how much time the beneficiary devotes to each duty, a list of subordinate staff members and a description of their job duties, and an organizational chart for the United States operation.

In response, the petitioner provided an organizational chart showing the beneficiary at the top of the organization. The beneficiary is shown supervising a "controller/manager," who, in turn, is shown supervising an "assistant manager" and a "sales/operations" employee. The petitioner describes the "controller/manager" as being responsible for supervising the subordinate staff, repairing and maintaining equipment, and advertising. The other two employees are described as waiting on customers and processing orders.

Counsel also provided a letter dated October 29, 2005, in which he asserts that the beneficiary does not "do any of the activities that produce the services which [the petitioner] market[s] to the public." Instead, counsel describes the beneficiary's role as follows:

[The beneficiary] spend[s] about 25% of [his] time directing advertising activities, including dealing with printers, newspapers, and sign shops. [The beneficiary] spend[s] about 25% of [his] time directing the financial affairs of the business, including making sure the bills are paid timely by the staff, proper account records are preserved, employees are trained, and cash, checks and other financial media are handled properly. [The beneficiary] spend[s] approximately 50% of [his] time in reviewing the financial statements and making the financial decisions, including changing policies and procedures as necessary to keep the company viable and profitable.

On November 15, 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, the petitioner asserts that the beneficiary's duties are primarily those of an executive or manager.

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

Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (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 United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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 "directs, plans, and implements policies and objectives" and "establishes internal control procedures." The petitioner did not, however, specifically define what policies and objectives will be directed or what procedures will be established. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes 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).

The credibility of the job description is further undermined by its inclusion of duties which are entirely inconsistent with the petitioner's description of its business operation. For example, the job description states that the beneficiary "directs and coordinates activities of business involved with buying and selling investment products and financial services." However, the petitioner has described its business as a "dry cleaning drop store," not as an investment or financial planning business. Therefore, the job description does not even appear to be applicable to the beneficiary in question. Moreover, the petitioner does not explain this inconsistency in the job description. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Further, 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 beneficiary is described as spending 25% of his time on advertising, 25% of his time on "financial matters" such as paying bills and training employees, and 50% of his time on "reviewing the financial statements and making the financial decisions." While this breakdown is vague, it is nevertheless clear that the beneficiary must perform the tasks necessary to provide a service and does not manage the performance of those tasks by a subordinate staff. Engaging in advertising, reviewing bills, and keeping accounts are non-qualifying administrative or operational tasks which do not rise to the level of managerial duties when the beneficiary performs those tasks himself. Based on the job descriptions for the subordinate employees, it is clear that the petitioner does not employ a subordinate staff dedicated to relieving the beneficiary of performing those administrative or operational tasks implicit in operating a small business, other than processing customer orders. Therefore, it must be concluded that the beneficiary performs these administrative or operational tasks. 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 employees, the beneficiary appears to manage a staff of three employees who are engaged in operating the petitioner's business, i.e., a dry cleaning drop store. While the petitioner has given the subordinate employees lofty titles and has described the "controller/manager" as having supervisory or managerial functions, the petitioner has not established that this employee is primarily engaged in performing supervisory or managerial duties. To the contrary, the subordinate employee appears to be engaged in performing tasks related to providing a service or producing a product, i.e., fixing and maintaining equipment and arranging some advertising. Inflated job titles and artificial tiers of subordinate employees are not probative and will not establish that an organization is sufficiently complex to support a managerial position. In this case, it is simply not credible that the operation of this four-employee dry cleaning drop store has become substantial enough to support an employee primarily engaged in performing managerial duties. *See Family, Inc. v. United States Citizenship and Immigration Services*, 469 F.3d 1313 (9<sup>th</sup> Cir. 2006).

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 or executive 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, as the subordinate employees do not possess university degrees, 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 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

Similarly, the petitioner has failed to establish that the beneficiary has been or 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 appears to be primarily employed as a first-line

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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).

<sup>3</sup>While 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 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 is primarily a first-line manager of non-professional employees. 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 is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

supervisor and 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.

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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

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, a related issue is whether the petitioner has established that the United States and foreign entities are still qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G). A "qualifying organization" is defined in pertinent part as an entity which "is or will be doing business." "Doing business" is defined as "the regular, systematic, and continuous provision of goods and/or services." 8 C.F.R. § 214.2(l)(1)(ii)(H). In this matter, the petitioner has failed to establish that the foreign entity is "doing business" as defined in the regulations and, therefore, has failed to establish that the petitioner and the foreign entity are still qualifying organizations.

In the initial petition, the petitioner provided a variety of organizational and business documents related to the foreign entity. However, all of these documents predate the filing of the original "new office" petition with the exception of a December 31, 2004 financial statement for the foreign entity and the beneficiary's personal foreign tax return. While the financial statement and tax return establish that the foreign entity had some business activity in 2004, these documents do not establish that the foreign entity continued to do business in a regular, systematic, and continuous fashion on the day the instant petition was filed.

On August 1, 2005, the director requested additional evidence establishing that the foreign entity is currently doing business. The petitioner, however, did not provide any further evidence regarding the foreign entity's business activities in its response. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In view of the above, the petitioner has not established that the foreign entity is "doing business" in a regular, systematic, and continuous fashion. The petitioner has not provided any evidence of current business activity. The financial statement, the tax return, and the business documents which predate the approval of the original "new office" petition in 2004 are not probative of current business activity. Therefore, as the petitioner has not established that the foreign entity is still a qualifying organization as required by 8 C.F.R. § 214.2(l)(14)(ii)(A), the petition may not be approved for this additional reason.

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ.*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a

