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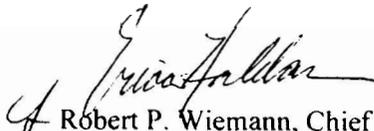
IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

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 the instant 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 is a corporation organized in Nairobi that claims to be an affiliate of the United States entity, which is organized under the laws of the State of Georgia, and is operating as an electrical engineering consultant. The petitioner seeks to extend the beneficiary's employment as the executive director of the United States organization for a three-year period.

The director denied the petition concluding that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that United States Citizenship and Immigration Services (USCIS) erroneously denied the requested petition extension based on the incorrect finding that the beneficiary would not be employed in a primarily executive capacity. Counsel submits a brief and additional evidence in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the **Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L)**. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.

In accordance with the regulation at 8 C.F.R. § 214.2(l)(14)(ii), if a petitioner seeks to extend a visa petition which involved the opening of a new office, the Form I-129 shall be 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 issue in the instant proceeding is whether the beneficiary would 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), provides:

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

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

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

The petitioner filed the Form I-129 on April 15, 2002 identifying the beneficiary as occupying the position of executive director, during which he would "design, layout and implement electrical engineering projects in commercial and residential buildings." The petitioner did not submit additional evidence with its initial filing.

In a notice dated October 2, 2002, the director requested that the petitioner submit: a detailed description of the beneficiary's job duties; a list of the petitioner's employees and their job titles; and quarterly wage statements evidencing wages paid to its employees. The director noted that although the petitioner indicated a staff of twelve employees of the Form I-129, the aggregate amount in compensation paid to employees by the petitioner in 2001 totaled \$44,000.

Counsel for the petitioner responded in an undated letter, in which she clarified the United States entity's staffing on the filing date as consisting of the beneficiary, as well as a designer-architect and an "auto-cad operator and systems designer." Counsel explained that the original number of twelve employees initially stated on the Form I-129 pertained to the foreign entity's staffing levels. With respect to the beneficiary's proposed job duties, counsel stated that the beneficiary would:

Direct the activities of Arvind Patel, architect and Harvinder Kaura, who uses computer assisted design and equipment to prepare project designs and plans. Coordinate projects and assign job duties and evaluate [the] extent to which performance meets company standards. Research, plan, design and administer electrical projects for clients, applying knowledge of electrical systems, design, layout and materials. Perform feasibility and cost containment studies on existing electrical systems and prepare written reports on findings. Analyze operating procedures to devise [the] most efficient methods of accomplishing work and conduct meetings with staff to implement [the] same. Negotiate contracts with existing and prospective clients. Coordinate employee activities in carrying out project design. Establish and maintain relationships with existing and potential clients. Direct the management staff of dry-cleaning operations facility. Direct, administer and control operations of [the petitioning entity] and Fabricare Cleaners. Determine standards and rates of production in accordance with company policy, type of equipment and work load. Observe and analyze work progress and transfer or hire new employees for increased production. Review accounting records to determine cost levels of operation.

Counsel further explained that since the filing of the nonimmigrant petition, the United States company had acquired a dry-cleaning business, in which it employed an additional five workers.

Counsel submitted copies of the United States organization's June and September 2002 quarterly wage reports, and a printout of wages paid to seven employees.

In her December 31, 2002 decision, the director concluded that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director noted the petitioner's three-person staff on the filing date, and explained that because the dry-cleaning business was not purchased until after the April 15, 2002 filing, the beneficiary's responsibilities with respect to the new business would not be considered in the instant analysis. The director stated that the petitioner failed to establish that the beneficiary would manage or direct "the management of a department, subdivision, function, or component of the organization," or that "the beneficiary will be involved in the supervision and control of the work of other supervisory, professional or managerial employees who would relieve him from performing the services of the business." The director concluded that the majority of the beneficiary's time would be spent performing non-executive, day-to-day operations of the business. Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on January 31, 2003, challenging USCIS' denial of the petition. In a subsequently submitted appellate brief, counsel contends that the director improperly disregarded the dry-cleaning business in analyzing the beneficiary's employment capacity, claiming that at the time of filing, the United States organization "was the equitable owner [of the dry-cleaning business], if not [the] legal [owner]." Counsel submits a December 20, 2001 sales contract for the dry-cleaning business, but explains that the closing for the purchase of the dry cleaners did not occur until May 27, 2002 because of complications in transferring the existing lease to the United States organization. Counsel claims that based upon the December 2001 negotiations and contractual agreement to purchase the business, as well as the payment of \$45,000 to the seller prior to closing, USCIS should have considered the beneficiary's role in the operation of the dry-cleaning business in its analysis of whether the beneficiary would be employed as a manager or executive.

Counsel further states that even if the dry-cleaning business is not considered, the beneficiary, as the executive director of the United States consulting company, would be employed in a primarily qualifying capacity. Counsel states:

[T]he beneficiary is required to direct the management of the organization; establishes the goals and policies of the organization; exercises wide latitude in discretionary decision-making and is subject to no supervision. The nature of the services which the beneficiary provides are complex and require analysis, design and implementation of projects completion of which requires [sic] advanced academic training and knowledge applied on a professional level. The beneficiary alone is responsible for the organization, goals, objectives, policies, procedures and growth of the professional consulting business. The beneficiary alone made the decision to invest and expand into other areas due to the characteristically slow rate of growth in professional consulting firms. Further, contrary to the findings of the Director, the two employees over which the beneficiary exercises sole authority and control, an architect and systems information analyst, *are* professionals engaged in the performance of duties of a professional nature, utilizing advanced level

knowledge and requiring formal academic training usually associated with attainment of a baccalaureate degree or higher.

Counsel contends that the director's decision is based solely on the petitioner's staffing levels, without taking into account its reasonable needs and stage of development. Counsel states that "the design, analysis and implementation of electrical engineering projects requires only the services and expertise of an architect, electrical engineer and auto-cad operator/systems analyst," and contends that the number of workers employed by the United States organization is reasonable considering the nature of its business, the length of its operations and its size.

Counsel submits on appeal documentation related to the purchase of the dry-cleaning business. The AAO notes that the director properly excluded the beneficiary's role in the operation of the dry-cleaning business from the instant analysis of the beneficiary's employment capacity. Even if the United States organization was deemed to have purchased the business in December 2001, the record demonstrates that it was not operating until one month after the filing of the instant petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. As a result, the AAO will not consider the beneficiary's purported management of the dry-cleaning staff in the analysis of the beneficiary's employment capacity in the United States.

Upon review, the petitioner has not established that the beneficiary would be employed by the United States organization in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, while the job description initially offered by the petitioner suggests that the beneficiary would spend at least a portion of his time performing managerial or executive job duties, it also indicates that the beneficiary would perform such non-qualifying tasks as "[r]esearch[ing], plan[ning], design[ing] and administer[ing] electrical projects for clients," and negotiating contracts. As the petitioner did not document the amount of time the beneficiary would spend on each particular task, it is not clear what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. This documentation is particularly relevant considering the beneficiary's role in researching and designing customers' electrical projects, which essentially comprises the services offered by the United States corporation. Based on counsel's appellate brief, the beneficiary would also personally devise the company's marketing plans and develop its sales strategies, tasks that are not typically deemed to be primarily managerial or executive in nature. *See* §§ 101(a)(44)(A) and (B) of the Act. The AAO notes that 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). As a result of the limited job description, the AAO cannot determine whether the beneficiary's proposed employment would be primarily

managerial or executive in nature, or whether he would be responsible for primarily performing the operational services offered by the business in the United States.

The additional job description submitted on appeal is equally limited in distinguishing the beneficiary as a manager or executive of the United States entity. The AAO notes that counsel's statements as to the beneficiary's responsibilities of "direct[ing] the management of the organization," establishing its goals and policies, and exercising wide latitude in discretionary decision-making are not representative of the beneficiary's claimed qualifying employment, as they are mere restatements of the statutory definition of "executive capacity." See § 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Counsel further claims on appeal that the beneficiary is eligible for classification as a manager or executive based on his supervision of professional employees. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

The record contains only the job titles of the beneficiary's two subordinate workers. As noted previously, the petitioner did not provide a description of the job duties associated with each position. Counsel claims only that the two employees "[are] professionals engaged in the performance of duties of a professional nature, utilizing advanced level knowledge and requiring formal academic training usually associated with attainment of a baccalaureate degree or higher." Counsel did not submit evidence establishing that these employees possess the requisite educational background for their respective positions, such that they would be classified as professionals. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, the record fails to support counsel's additional claim that the reasonable needs of the organization would be met through the employment of the beneficiary, a designer-architect, and an auto-cad operator/systems analyst. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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).

Here, counsel acknowledged in her response to the director's request for evidence the three-person staff maintained by the United States company on the filing date. The AAO notes, however, that based on the petitioner's third quarter wage report and employee list, the employment of the company's designer/architect was terminated sometime during the two months following the date of filing. As noted previously, the beneficiary would be responsible for performing non-managerial and non-executive functions of the United States business, including its sales, marketing, and negotiations, as well as the actual analysis, development,

and implementation of the recommended engineering plans. The petitioner has not defined the job duties and responsibilities of the other two employees with respect to providing the consulting services of the United States company. Counsel provides only an unsubstantiated statement that the nature of the United States business "requires only the services and expertise of an architect, electrical engineer, and auto-cad/systems analyst." Based on this statement and the record as a whole, it appears that the beneficiary's services as the company's electrical engineer are necessary to meet the reasonable needs of the United States organization as an engineering consulting firm. The record, as presently constituted, does not demonstrate that the beneficiary would be relieved from performing the company's non-qualifying operational functions, or that the two-person lower-level staff would be sufficient to support the beneficiary in a primarily managerial or executive capacity. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534.

Regardless, 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) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Under the present petition extension, the petitioner is obligated to demonstrate that following the beneficiary's initial one-year period of employment in the United States, the United States organization would support the beneficiary in a primarily managerial or executive position. See 8 C.F.R. § 214.2(l)(3)(v)(C). There is no provision in CIS regulations that allows for an extension of this one-year period. Based on the current record, the petitioner has not demonstrated its ability to employ the beneficiary in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the United States organization has been doing business for at least during the year prior to the instant filing as required in the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B). Notwithstanding the incorporation of the United States company on January 18, 2000, it appears that the corporation did not begin doing business until sometime during the year 2001. The United States company's December 31, 2001 balance sheet and appended general ledger identifies the company's first sale as occurring on May 31, 2001, or less than eleven months prior to the instant filing. The petitioner did not submit copies of contracts or invoices for services rendered during 2001. Similarly, while the record contains a copy of the company's annual business and occupational license, it pertains to the period beginning on January 1, 2002. As a result of the limited documentary evidence offered for review, the AAO cannot determine whether the United States corporation was doing business for the requisite one-year period prior to the present filing. For this additional reason, the petition will be denied.

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. 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.