

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass Ave., N.W., Room 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D7

File: SRC 04 126 51514 Office: TEXAS SERVICE CENTER Date:

MAY 01 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:

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 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 in the State of Florida that claims to be engaged in the distribution and wholesale of lubricants for maritime engines, motor vehicles and aircraft. The petitioner further claims that it is the subsidiary of CARIB-LUB, C.A., located in Carabobo, Venezuela. 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 director denied the petition concluding that the petitioner did not establish that the beneficiary would 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 beneficiary would be employed in the United States in an executive as well as managerial capacity. In support of this assertion, the petitioner submits 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 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.

At 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.

In an undated letter accompanying the initial petition that was filed on April 1, 2004, the petitioner described the beneficiary's job duties as follows:

1. Plan[s], develop[s] and establish[s] policies and objectives of the business organization and operation, as well as organizational policies to coordinate functions and operations of the company (Dedicating approximately 20% of her time to this duty).
2. Manages, control[s] and coordinates our projects. Participation with other members of the organization, [m]anages and organizes the work of the employees under her supervision (Dedicating approximately 10% of her time to this duty).
3. Develop[s] and maintain[s] funding sources for the organization. (Dedicating approximately 15% of her time to this duty).
4. Serve[s] as the organization's spokesperson to business, government and community members and groups throughout the State of Florida. (Dedicating 15% of her time to this duty).
5. Supervise[s] and manage[s] the organization's budget and financial resources. (Dedicating 10% of her time to this duty).
6. Oversees all staff. Hires employees for the correct functioning of the enterprise, she name[s] and fixes salaries and bonuses. ([D]edicating 10% of her time to this duty).
7. Work[s] in collaboration with the Board of Directors. All the Organization staff will report directly or indirectly to the President. The President will report to the Board of Directors. (Dedicating 10% of her time to this duty).

8. Identifies potential trading deals. Coordinates sales distribution by establishing sales territories, quotas, and goals and advises dealers, distributors, and clients concerning sales and advertising techniques. ([Dedicating] 10% of her time to this duty).

The petitioner stated in the same letter that the company has three employees and two independent contractors. The petitioner submitted an organizational chart for the U.S. company showing that the staff under the beneficiary's supervision is comprised of an administration manager and a general manager, who in turn supervises a salesperson and a secretary. A copy of a Florida State Employer's Quarterly Report for the quarter ending December 31, 2003 indicates that the company's three staff members with employee status are the beneficiary, the general manager and the salesperson. The petitioner did not provide any information relating to the two independent contractors.

On May 17, 2004, the director requested additional evidence. Specifically, the director requested the following: an explanation of why the petitioner's tax return shows only three employees on staff when the petition indicated there were five; an organizational chart listing all positions; a list of all employees and their positions, qualifications and duties; a list of the beneficiary's duties and percentage of time spent on each; and photos of the business premises and office space for the beneficiary.

In response, the petitioner explained that when the petition was initially submitted, the company had three employees (the beneficiary, the general manager and the salesperson) and two independent contractors (the administration manager and the secretary), but by the time of the reply, the company had four employees (the previous three plus another individual identified as a secretary) and only one independent contractor (the administrative manager). The petitioner submitted another organizational chart, which differs from the earlier one in that the secretary is now placed under the direct supervision of the beneficiary rather than the general manager. The petitioner also resubmitted the job descriptions of its employees with more details regarding their education and qualifications. In addition, the petitioner provided (1) its Employer's Quarterly Reports for the first and second quarters of 2004, each showing that there are four employees on its payroll, namely the beneficiary, the general manager, the secretary and the salesperson; (2) copies of two independent contractor agreements, one documenting the company's arrangement with the administration manager and the other with the company's former secretary (whose services apparently ceased as of the end of 2003); and (3) photographs of the company's office premises.

On September 28, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Specifically, the director observed it would appear that the beneficiary is engaged primarily in the day-to-day operations of the business without managing any professional or managerial subordinates. With respect to the confusion regarding the number of employees on the company's staff, the director noted that independent contractors are not considered employees for purposes of this petition, and that the relevant employees are those actually on staff at the time the petition was filed and not after.

On appeal, the petitioner reiterates the description of the beneficiary's duties and characterizes them as both managerial and executive in nature. The petitioner further asserts that the beneficiary's subordinate staff

performs the day-to-day operations of the company and the beneficiary is not actually involved. The petitioner claims that the general manager is the person whose duties encompass the day-to-day operations of the company, thus allowing the beneficiary to focus on her executive and managerial role. The petitioner further contends that the beneficiary does supervise professional and managerial employees, since the administration manager is a certified public accountant and the general manager has a bachelor's degree in business administration. The petitioner submits additional documentation, including copies of checks and corporate agreements signed by the beneficiary on behalf of the company and an affidavit of corporation stating the beneficiary's official capacity to serve as president, as evidence of the beneficiary's managerial capacity.

Upon review, the AAO finds the evidence of record insufficient to support the conclusion that the beneficiary would be employed in the U.S. in a primarily executive or managerial 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). 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. 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. If the petitioner chooses to represent 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.

On review, 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's duties include "[p]lan, develop and establish policies and objectives of the business organization and operation," "[m]anages, control[s] and coordinates [the company's] projects," "[d]evelop and maintain funding sources for the organization," and "[w]ork in collaboration with the Board of Directors." The petitioner did not, however, define the policies and objectives that the beneficiary is said to develop, or clarify what will be involved in developing and maintain funding sources, or indicate what working with the Board of Directors will entail. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide sufficient details to answer a critical question in this case: What will the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, it is noted that on appeal, the petitioner asserts that the beneficiary performs duties that are *both* managerial and executive in nature. However, in describing the beneficiary's "executive" capacity on appeal, rather than providing a specific description of the beneficiary's duties, the petitioner again merely repeated the

statutory definition of executive capacity, stating that the beneficiary "directed the organization, established goals and policies, exercised discretionary decision-making authority and received supervision only by the Board of Directors." *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient to establish eligibility in this matter. 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. at 1108.

With respect to the U.S. entity's personnel, the AAO notes that there are certain unexplained inconsistencies between disclosures in the initial petition and information given in response to the director's request for further evidence. In the initial petition, filed on April 1, 2004, the petitioner indicates that the U.S. entity has three employees and two independent contractors. Later, in response to the director's request for further evidence, the petitioner states that, while that was the case at the time the petition was filed, the company now has four W-2 employees and one independent contractor. However, based on documentation submitted with the response, including the Employer's Quarterly Reports for the first two quarters of 2004 and the independent contractor agreements, it appears the company has had four W-2 employees and one independent contractor since the beginning of 2004, and certainly at the time the petition was filed. It is unclear why the petitioner did not disclose this information initially. 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). Moreover, 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.*

In addition, 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. As the director concluded, the petitioner has not made that showing here.

The petitioner contends on appeal that, contrary to the director's finding, the beneficiary does supervise professional employees since two of her subordinates are managers, one of whom has a bachelor's degree in business administration and the other is a certified public accountant. The AAO notes that, although the petitioner did state these employees' educational background in response to the director's request for further evidence, the petitioner did not provide any documentary proof to support this claim. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Moreover, whether or not the subordinate employees may be considered professionals depends on the level of education required by the positions, rather than the degrees held by the subordinate employees. 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. *See, e.g., 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). In the instant case, the petitioner has not established that an advanced degree is actually necessary to perform the work of the two subordinate employees in question. The evidence is therefore insufficient to show that the beneficiary supervises professional employees.

The record is also insufficient to show that the beneficiary supervises managerial or supervisory employees. The record indicates that two of the beneficiary's subordinate employees have managerial titles, namely the administration manager and the general manager. However, it does not appear that the administration manager supervises or manages any other employees, nor is there sufficient evidence to show that this employee is "in charge of all financial matters of the company" as claimed in the job description. The independent contractor agreement between the company and the administration manager indicates only that she provides general accounting and bookkeeping services for the company, and there is no evidence, such as invoices or proof of payment, to show the nature and extent of work she actually performs for the company. Moreover, the beneficiary's job description states that she is the one who "supervise[s] and manage[s] the organization's budget and financial resources," not the administration manager.

With respect to the general manager, although the revised organizational chart submitted in response to the director's request for further evidence indicates that he supervises the salesperson, it is not clear from the job descriptions that this is actually the case. The job description for the salesperson states that he "reports directly to the general manager;" however, the job description for the general manager does not indicate that he has any supervisory responsibility over any aspect of the salesperson's described duties such as telemarketing, development of new accounts, or sales distribution. In fact, the AAO notes that in the same job description for the staff, the petitioner stated that it is the beneficiary herself, and not the general manager, who "coordinates sales distribution by establishing sales territories, quotas, and goals and advises dealers, distributors, and clients concerning sales and advertising techniques." Thus it would appear more likely that the salesperson's work falls under the supervision of the beneficiary herself rather than the general manager. Furthermore, since the beneficiary clearly supervises three out of the four subordinate staff, and the supervision of the fourth is in doubt, the record does not support the petitioner's claim on appeal that the general manager is the one responsible for the day-to-day operations of the company, thus allowing the beneficiary to focus on her qualifying duties.

As such, the record is not sufficient to show that the beneficiary supervises any supervisory or managerial employees, other than in title only. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Finally, the AAO notes the petitioner has submitted additional evidence on appeal – specifically, checks and corporate agreements signed by the beneficiary and an affidavit of corporation – as proof of the beneficiary's managerial capacity. However, while these documents may demonstrate that the beneficiary is authorized to execute corporate documents on behalf of the company and may attest to the beneficiary's knowledge of the company, they do not advance the petitioner's burden of establishing that the beneficiary functions primarily in an executive or managerial capacity as defined in the Act.

In light of the foregoing, the AAO cannot conclude that the petitioner has established that the beneficiary will be employed in a primarily executive or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the director's decision, the petitioner has not provided sufficient evidence to establish that a qualifying relationship continues to exist between the U.S. and foreign entities. The regulations and case law

confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

On the L Supplement to Form I-129, the petitioner indicated that the U.S. entity is wholly owned by the foreign entity. In support of this claim, the petitioner submits a copy of share certificate number 1 of the U.S. entity, which indicates that the foreign entity owns 100 shares of the U.S. entity. The petitioner submitted no other evidence of ownership interest in the U.S. entity. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, the Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control, and therefore cannot conclude that a qualifying relationship between the U.S. and foreign entities continues to exist as claimed. For this additional reason, the petition will be denied.¹

In addition, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial or executive capacity for the requisite one-year period prior to the filing of the petition. In its letter accompanying the initial petition, the petitioner stated that the beneficiary has

¹ The AAO also notes that the copy of the stock certificate submitted has on its face a number of defects that renders its authenticity and validity questionable. First, the certificate is undated. Second, the number of shares is not filled out at the top of the certificate and is partially blanked out with liquid paper in the body of the copy of the certificate. Third, the certificate bears one signature in the blank reserved for the secretary of the company. However, it is questionable whether the signature is actually that of Johannes Lopez, listed in the Articles of Incorporation as the secretary on the company's board of directors, since the signature actually matches that of an accounting service that prepared the company's 2003 federal income tax return. 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. *Matter of Ho*, 19 I&N Dec. at 591. Moreover, if CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

been employed by the foreign entity since 1997 as its operations manager. However, the petitioner has failed to provide any evidence to substantiate the claimed period of overseas employment, or even that the beneficiary was employed by the foreign entity for at least the required one-year period. Moreover, there is insufficient proof that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The petitioner described the beneficiary's job duties abroad as:

Managing the operations of the company in its entirety; reporting any anomalies directly to the President; [developing] marketing plans for efficient use of materials, machines and equipment; [d]esign budget and procedures to capture new projects in the operations area. Ensure proper department functioning. Take personnel actions like firing, hiring, fix bonuses and salaries for the personnel under her supervision.

The petitioner also claimed that the beneficiary supervised "the [two] top managers of the company." However, without any information regarding the organizational structure of the foreign entity, and without further details regarding the beneficiary's job duties beyond the broad and vague description stated above, the AAO is unable to determine whether the beneficiary was in fact employed by the foreign entity in a primarily managerial or executive capacity as required under 8 C.F.R. § 214.2(l)(3)(iv). 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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.