

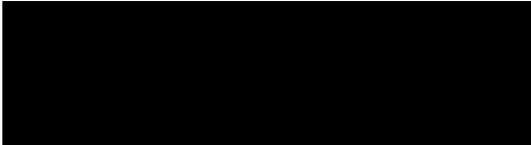
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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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File: SRC 05 203 50729 Office: TEXAS SERVICE CENTER Date: **MAY 01 2007**

IN RE: Petitioner:
Beneficiary:



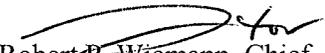
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



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 director of operations 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 limited liability company formed under the laws of the State of Florida and describes itself as an "investments" business. The petitioner claims a qualifying relationship with [REDACTED] of Venezuela.

The director denied the petition concluding that (1) the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) the petitioner did not establish that the beneficiary had been employed by the foreign entity 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's duties both overseas and in the United States are primarily those of an executive or manager. In support of this assertion, counsel to 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.
- (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.

While the regulation at 8 C.F.R. § 214.2(l)(3)(v) provides additional criteria to be met should the petition indicate that the beneficiary is coming to the United States to open a new office, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) defines a "new office" as:

[A]n organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

Moreover, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

A threshold issue in this matter is whether the petitioner is a "new office" as defined by the regulations.

In a letter dated October 17, 2005, previous counsel to the petitioner asserted that the United States operation should be treated as a "new entity for purposes of qualifying the beneficiary for an initial transfer of one (1) year period, since in fact, she will be transferred only to finalize its organizational phase." The director refused to treat the petition as a "new office" petition citing the petitioner's assertions that its business operations are "settled" and "growing" in the United States. The director adjudicated the petition using those standards and criteria applicable to an established petitioner seeking to classify an intracompany transferee pursuant to section 101(a)(15)(L) of the Act. Current counsel to the petitioner did not address this issue on appeal. Nevertheless, the AAO will address this issue in order to clarify the matter.

Although a petitioner may request that it be treated as a new office, the determination of whether a petitioner qualifies under this diminished evidentiary standard remains with Citizenship and Immigration Services (CIS). Thus, whether a petitioner will be, or will not be, treated as a "new office" for purposes of 8 C.F.R. § 214.2(l)(3)(v) depends on whether the petitioner meets, or does not meet, the definition of a "new office" contained in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(F).

In this matter, the petitioner described its United States business operation in a letter dated July 11, 2005. In that letter, the petitioner explained that its business was established in 2002 as a subsidiary of the foreign entity. Since that time, the petitioner explained that its business has been "successfully growing" as a "specialized management company." As evidence of this business activity, the petitioner provided financial statements, a tax return, a lease, invoices, and other documentary evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services for more than one year. In view of this evidence and in reliance on the assertions of the petitioner, the director correctly adjudicated the petition using those standards and criteria applicable to an established petitioner seeking to classify an intracompany transferee pursuant to section 101(a)(15)(L) of the Act. The petitioner is not a "new office" as defined in 8 C.F.R. § 214.2(l)(1)(ii)(F).

Accordingly, as the petitioner has not established that the petitioner should be classified as a "new office," the

director properly considered the first substantive issue in this appeal, namely 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 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 counsel implies on appeal that the beneficiary is acting 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. Given the ambiguity, the AAO will

adjudicate the appeal as if the petitioner is asserting that the beneficiary is acting as either an executive *or* a manager and consider both classifications.

In the letter dated May 10, 2005, the petitioner describes the beneficiary's job duties in the United States as follows:

Among the main duties and responsibilities that [the beneficiary] will have, she will direct the international operations of the organization, which are within our new strategic plan, an essential element of the organization. She will also prepare the annual corporate reports and define our business strategies, along with the expansion plans of our subsidiary office in Florida. In addition, [the beneficiary] will develop business objectives and the time-frame within which they are to be completed and will coordinate the work efforts and communications between the Florida Corporation and the Venezuelan parent corporation.

On July 25, 2005, the director requested additional evidence. The director requested, *inter alia*, further evidence regarding the beneficiary's job duties, wage reports for the petitioner's employees, and an organizational chart.

In response, the petitioner provided a letter dated October 17, 2005 further describing the beneficiary's job duties as follows:

[The beneficiary] will hold both an executive and managerial position within the organization as she will be involved in overseeing the day-to-day operations and she will be in charge of organizing the US company, negotiating contracts with business partners and suppliers, staffing and executing any other agreement necessary in order to start the operations of the company. She will also prepare the annual report and define strategies and the expansion plans, develop business objectives within the time frame in which they are to be completed, coordinate the work efforts and communications.

Counsel further explained that the petitioner has no employees and provided an organizational chart showing the beneficiary managing several "vacant" positions.

On November 3, 2005, the director denied the petition concluding that petitioner did not establish that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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 has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague job description which fails to reveal what the beneficiary will do on a day-by-day basis. For example, the petitioner asserts that the beneficiary will "define strategies" and "direct the international operations." However, the petitioner never clearly explains what strategies will be defined or what operations will be directed. Moreover, the beneficiary's duties all appear to be related primarily to "organizing" the petitioner's United States operation. Many of these duties will undoubtedly involve non-qualifying operational and administrative tasks. Since the petitioner has no employees, it is more likely than not that, at the outset, the beneficiary will need to perform non-qualifying tasks as there are no employees available to relieve her of performing these tasks. In fact, the beneficiary's job description essentially admits that the day-to-day operational activities are not being performed by a subordinate employee since one of the beneficiary's duties is to hire staff to "start" the United States operation.

Also, the beneficiary's job description is so vague and nonspecific that it is impossible to determine how much time she will spend performing managerial duties versus non-qualifying 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 Intl.*, 19 I&N Dec. 593, 604 (Comm. 1988). 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). 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).

In addition, the job description and organizational chart do not establish that the beneficiary will supervise and control the work of supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained above, the petitioner has no employees for the beneficiary to supervise or control. Moreover, as the beneficiary's vague job description fails to document what proportion of the beneficiary's duties would be managerial, if any, and what proportion would be non-managerial, the petitioner has not established that the beneficiary will manage an essential function of the organization. Absent a clear and credible breakdown of the time to be spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties would be managerial, nor can it deduce whether the beneficiary will be 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). Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

Similarly, the petitioner has failed to prove 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.* As indicated above, the petitioner has failed to establish that the beneficiary, who will be the petitioner's sole employee and who will not be relieved of the need to perform non-qualifying duties by a subordinate staff, will be acting 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, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3)(ii).

The second issue in this appeal is whether the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

In response to the request for evidence, counsel described in the letter dated October 17, 2005 the beneficiary's position overseas as follows:

It is clear and evident that [the beneficiary] held an executive/managerial position with the foreign organization for over five years as she held positions such as Project Manager and Manager Director.

As evidence to substantiate the request, we are submitting a letter from the accountant and letters addressed to the beneficiary in her executive capacity by very important clients, wherein they propose and expose their proposition and bidding.

Additionally, we are enclosing a copy of the beneficiary's resume and educational background in order to demonstrate that she is a member of the professions as she has a Bachelors [sic] Degree in Civil Engineering.

In addition, the petitioner provided a letter from the foreign entity's accountant describing the beneficiary's job duties as the "administrative director" as follows:

- Preparation of Bids and Budgets; once these have been granted, she has the responsibility of
- Organizing the Contracts, from their start until they are finished, in all administration aspects of Purchase and Sale of materials as well as the
- Administration and Distribution of adequate labor force for each project that is being carried out.
- The engineer [the beneficiary] will have all necessary resources from the assets of the corporation for the optimal execution of the works[.]

The petitioner also provided an untranslated organizational chart for the foreign entity showing the beneficiary supervising three individuals. The petitioner did not provide job descriptions for these subordinate employees.

On November 3, 2005, the director denied the petition concluding that the petitioner did not establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary has been employed overseas in a primarily managerial or executive capacity.

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

Once again, 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) and (iv). The petitioner's description of the job duties must clearly describe the duties performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In this matter, the petitioner has failed to establish that the beneficiary has acted in a "managerial" capacity. The petitioner has vaguely described the beneficiary as an engineer who prepares bids for work and administers the foreign entity's fulfillment of awarded contracts. While the beneficiary is described as supervising three people, it is not clear from the untranslated job titles alone that these employees relieve the beneficiary of the need to primarily perform non-qualifying tasks. Therefore, based on the job description and organizational chart, it appears that the beneficiary is performing the tasks necessary to provide a service or to produce a product. 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; *see also Matter of Church Scientology Intl.*, 19 I&N Dec. at 604.

Moreover, the job description and organizational chart provided in response to the request for evidence do not establish that the beneficiary will supervise and control the work of supervisory, managerial, or professional employees, or manage an essential function of the organization. The petitioner did not describe the duties of the three subordinate employees; therefore, it cannot be determined that those identified are supervisory, managerial, or professional employees. The record does not even confirm that the subordinate personnel are employees of the foreign entity. In view of the above, the beneficiary would appear to be at most a first-line supervisor. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Also, since the record fails to reveal the educational or skill levels necessary for entry into the positions held by the subordinate employees, it cannot be determined if they rise to the level of professional employees. Finally, as the beneficiary's vague job description fails to document what proportion of the beneficiary's duties are managerial, if any, and what proportion are non-managerial, the petitioner has not established that the beneficiary has managed an essential function of the organization. Therefore, the record does not establish that the beneficiary is acting in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary has acted in an "executive" capacity. As explained above, inherent to the definition of "executive," 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. In this matter, the beneficiary's role as a first-line supervisor, and/or one who performs the task necessary to provide a service or produce a product, is not sufficient to establish that she was employed in an executive capacity abroad.

Accordingly, the petitioner has not established that the beneficiary has been employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3)(iv).

Beyond the decision of the director, a related issue in this proceeding is whether the petitioner has provided evidence sufficient to establish that the petitioner and the foreign entity are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G).

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). A subsidiary is defined in pertinent part as a legal entity, including a limited liability company, of which "a parent owns, directly or indirectly, more than half of the entity and controls the entity."

In this case, the petitioner asserts that it is 100% owned by the foreign entity, thus establishing, if true, a parent/subsidiary relationship. In support of this assertion, the petitioner provided a certificate showing that 30,000 units of the limited liability company were issued to the foreign entity on September 30, 2002. However, the petitioner also provided a copy of its 2004 IRS Form 1065 which identifies the owners of the limited liability company in Schedules K-1. These schedules list the beneficiary and another person as the owners of the limited liability company and do not list the foreign entity. This averment contradicts the petitioner's assertion that it is 100% owned by the foreign entity, and the petitioner offers no explanation for this serious inconsistency in the record. 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). As the inconsistency has not been resolved, the petitioner has not established that it has a qualifying relationship with the foreign employer, and the petition may not be approved for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's

enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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

ORDER: The appeal is dismissed.