

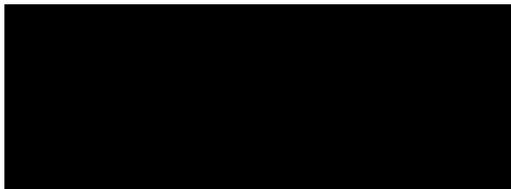
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U.S. Citizenship  
and Immigration  
Services

DJ



FILE: EAC 06 192 51559 Office: VERMONT SERVICE CENTER

Date: OCT 02 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)

ON 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, Vermont 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 its authorization to employ its president and general manager 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, a Florida corporation, states that it is engaged in the cleaning and maintenance of swimming pools. The petitioner claims to be an affiliate of Organizacion Lauras, located in Medellin, Colombia. The beneficiary was initially approved for a one-year period of L-1A classification in order to open a new office in the United States. The petitioner now seeks to extend his status for two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the United States 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 is acting primarily in a managerial capacity and is not involved in the day-to-day operations of the petitioner's business. The petitioner asserts that the U.S. company has three employees and submits tax documentation that was unavailable at the time the petitioner responded to the director's request for 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.

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed 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 nonimmigrant visa petition was filed on June 14, 2006. The petitioner stated on Form I-129 that it has two employees. In an attachment to Form I-129, the petitioner described the beneficiary's duties as president and general manager as follows:

He will be responsible for: 1. the general and active discretionary decision making of the business and affairs of the corporation; 2. presides all the meetings of the shareholders and all the meetings of the board of directors; 3. shall execute bonds, mortgages and other instruments; 4. shall sign certificates of stocks; 5. manage the short and long term financial planning; 6. hire and fire employees; 7. establish general guidelines which must be followed by employees; 8. represent all the interests of [the petitioning company].

The petitioner submitted a copy of its IRS Form 941, Employer's Quarterly Wage and Withholding Report, for the first quarter of 2006, which indicates that the company has two employees. The petitioner indicated that in addition to its two employees, it utilizes "many independent contracts." The petitioner stated that it is engaged in providing swimming pool cleaning and maintenance services. The AAO notes that, based on the submitted invoices and an occupational license, the company is also engaged in office and house cleaning services.

On September 29, 2006, the director issued a request for additional evidence, in which he instructed the petitioner to submit: (1) evidence to establish the duties performed by the beneficiary in the past year and the duties he will perform under the extended petition; (2) a list of employees by name and position title; (3) a complete position description for each employee, including a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis; (3) the amount of time the beneficiary will allot to executive/managerial duties and non-executive functions; (4) if applicable, evidence documenting the number of contractors utilized by the petitioner and the duties they perform.

In a response received on December 21, 2006, the petitioner provided the following description of the beneficiary's duties:

Represent the corporation in its activities - 10%  
Administer and manage all business and operations (sales, purchasing, invoicing, collection)  
- 10%

Identify new opportunities of business – 15%  
Comply with the legal obligations of the corporation – 5%  
Manage the short and long term financial planning – 20%  
Establish general guidelines which must be followed and executed by employees – 10%  
Manage the organization, primarily supervises and controls the work of others [sic] employees – 10%  
Others, indispensable for the good functioning of the corporation – 5%  
Present statements on the results of this operations (monthly and yearly) – 5%  
Determines the demand for products and services offered by the firm and its competitors and identify potential customers; develop pricing strategies with the goal of maximizing the firm's profit or share of the market while ensuring the firm's customers are satisfied. – 10%

The petitioner stated that the company employs an administrative assistant who performs the following duties:

Plan, direct and coordinate supportive services of an organization, such as record keeping, mail distribution, invoicing and collection file keeping, oversee facilities planning and maintenance and custodial operations, coordinates activities of clerical and administrative personnel, analyzes and organizes office operations, etc.

The petitioner's other claimed employee, a pool service technician, was stated to perform the following duties:

Install and service swimming pools. Assembles and align wall panel sections, edging, and drain tiles . . . . Lays out and connects pipelines for water inlets, return valves, and filters, using hand tools. Mixes, pours, spreads, and smooth concrete evenly throughout foundation, walls, and deck surrounding pool. Installs liner into pool. Assembles heater parts; connects gas, oil, or electric lines, and starts heater to verify order of unit. Maintain and repairs pool equipment, advises customers, and sells chemicals to prevent pool water problems.

The petitioner stated that it anticipates an average of four employees "for the coming years," and noted that it has "hired the services of another company or persons as independent contractors to perform some activities in high season." Although requested by the director, the petitioner did not describe the duties performed by contractors or provide documentary evidence of their employment.

The director denied the petition on January 30, 2007, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director found that the petitioner had not adequately documented payments to its two claimed employees, nor did it substantiate its claim that it utilizes independent contractors to perform certain functions. The director determined that, based on the petitioner's staffing levels and the beneficiary's described duties, he would be "doing almost everything involved in the running of the office." The director found that the U.S. company does not have sufficient staff to allow the beneficiary to act in a primarily managerial or executive capacity, and emphasized that the company's future hiring plans could not be considered in determining the beneficiary's eligibility at the end of the new office's first year of operations.

On appeal, the petitioner asserts that the beneficiary is acting in a primarily managerial capacity and is not involved in the day-to-day operations of the business. The petitioner states that there appears to be a

misunderstanding regarding the petitioner's staffing levels, as the company has three employees who allow the beneficiary to act in a managerial capacity. The petitioner submits evidence of wages paid to the beneficiary and the two other employees during the last quarter of 2006, noting that such evidence was not available when the petitioner responded to the director's request for evidence. In addition, the petitioner emphasizes that the U.S. company's small size should not preclude a finding that the beneficiary is employed in a managerial capacity.

Upon review of the petition and supporting evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition.

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(1)(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.*

As noted by the director, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. The petitioner's initial description of the beneficiary's position included few duties that the beneficiary would be required to perform on a regular basis. For example, the petitioner indicated that the beneficiary presides at board of directors meetings, executes bonds, mortgages and other instruments, and signs stock certificates. While these responsibilities may be indicative of the beneficiary's authority over the company as its president and sole shareholder, the AAO is not persuaded that these are among his primary duties on a day-to-day basis. Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The position description submitted in response to the director's request for evidence also lacked sufficient detail to establish the duties the beneficiary performs on a daily basis, and whether such duties are primarily managerial or executive in nature. The petitioner's statements that the beneficiary will "represent the corporation in its activities," "administer and manage all business and operations," "establish general guidelines," "manage the organization," "comply with the legal obligations of the business," and perform "others indispensable for the good functioning of the corporation" do not convey any understanding of the beneficiary's primary duties. 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 any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Furthermore, although the petitioner indicated that the beneficiary will "administer and manage" the functional areas of sales, purchasing, invoicing and collection, and manage financial planning, the petitioner has not claimed to have subordinate employees to perform the non-managerial duties associated with most of these functions. In addition, the beneficiary's responsibilities for identifying business opportunities, determining demand for services, and identifying potential customers suggest that the beneficiary is directly involved in performing market research duties. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority

of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. *See* section 101(a)(44) of the Act.

Overall, the limited job descriptions provided do not establish that the beneficiary will primarily perform in an executive or managerial capacity as claimed by the petitioner. The AAO will not accept a vague job description and speculate as to the related managerial or executive job duties. As noted above, the actual duties themselves will reveal the true nature of the employment. 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. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Without a comprehensive job description of the beneficiary's duties on which to base his determination, the director reasonably looked to the petitioner's staffing levels in order to determine whether the beneficiary could be deemed to be serving in a primarily managerial or executive capacity. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 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 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.

There is no indication in this matter that the reasonable needs of the organization were not considered by the director. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act.

At the time of filing, the petitioner stated that it had two employees, and indicated that it used "many" independent contractors. A review of all of the payroll documentation submitted, including the evidence offered on appeal, shows that the petitioner's staff as of June 2006 included the beneficiary and the individual identified as the administrative assistant. The administrative assistant appears to have been employed on a part-time basis at a salary of \$500 per month. The individual identified as the pool maintenance technician was hired on or after October 1, 2006, approximately four months after the petition was filed. Evidence of hiring that occurred subsequent to the filing of the petition and after the beneficiary's one-year period in L-1A status need not and will not be considered. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Notwithstanding the petitioner's references to its utilization of independent contractors, the record remains devoid of any evidence identifying these contractors or payments to them. Although this issue was

specifically addressed in the director's request for evidence and in the decision, the petitioner does not address its use of contractors on appeal. The 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). Furthermore, the petitioner's 2006 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, does not reflect any payments to outside contractors. 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. The petitioner has not established that it was utilizing the services of independent contractors as of the date the petition was filed.

At the time of filing, the petitioner was a one-year-old company that claimed to be engaged in swimming pool cleaning and maintenance services. According to the petitioner's invoices, the company also provides home and office cleaning services. Accordingly, the petitioner reasonably requires employees to meet with customers to determine and discuss their requirements, provide estimates on costs, schedule customer services, provide the pool maintenance and housecleaning services, market and sell the petitioner's services, purchase supplies and equipment, as well as perform bookkeeping, billing, collections, banking, and other administrative, financial and clerical tasks. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and general manager and one part-time administrative assistant.

The absence of a subordinate staff sufficient to perform the non-qualifying duties of the petitioner's business is a proper consideration in the analysis of the beneficiary's employment capacity. *See Q Data Consulting, Inc. v. INS*, 293 F. Supp. 25, 29 (D.D.C. 2003). Given the absence of employees who would perform the non-managerial or non-executive operations of the company, it is reasonable to conclude, and has not been shown otherwise, that the beneficiary would need to spend a significant portion of his time directly providing the services of the company and performing other non-qualifying duties associated with the company's day-to-day operations. 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).

The AAO acknowledges that the record refers to the future objectives of the U.S. operation. However, as noted above, hiring and business activity that occurs after the date of filing is not probative of the petitioner's eligibility as of the filing date. The AAO is not required to consider evidence of speculative future activity. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The relevant inquiry is whether the beneficiary will be employed in a primarily managerial or executive capacity in the future, commencing on the filing date. While the beneficiary may have achieved significant accomplishments toward establishing the petitioner's operations in the United States, the petitioner has not shown that it has reached the point that he will be employed in a primarily managerial or executive capacity as of the filing date.

In sum, although the beneficiary evidently exercises discretion over the day-to-day operation of the business as its president, sole full-time employee, and sole shareholder, the beneficiary has not been shown to

primarily perform duties associated with the high-level responsibilities identified in the statutory definitions of managerial or executive capacity. The actual duties themselves reveal the true nature of the employment. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The petitioner has not established that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization.

Based on the foregoing, 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). For this reason, the appeal will be dismissed.

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.