

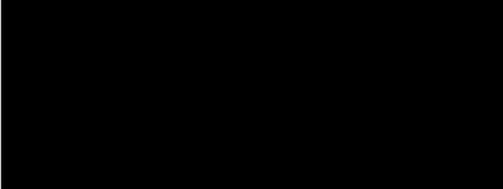
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U.S. Citizenship
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File: EAC 06 204 51272 Office: VERMONT SERVICE CENTER Date: OCT 04 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 THE 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 the employment of its president/chief executive officer 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, which claims to be a Florida corporation, is engaged in the provision of pest control and lawn services. It states that it is an affiliate of Druway Formwork & Carpentry, Ltd., located in the United Kingdom. The beneficiary was initially granted a one-year period in L-1A classification in order to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for two additional years.¹

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director concluded that the beneficiary, as the petitioner's sole employee, would be responsible for the non-managerial, day-to-day operations of the business, rather than performing primarily managerial or executive duties.

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 fully responsible for the day-to-day operations of the company, has full hiring and firing authority, and does in fact supervise two employees. The petitioner submits additional evidence in support of the appeal.

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:

¹ The petitioner stated on the L Classification supplement to Form I-129 that the beneficiary is coming to the United States to open a new office. The beneficiary was previously granted L-1A status in order to open a new office for the instant petitioner, with validity dates from July 1, 2005 until June 30, 2006. Under the governing regulations at 8 C.F.R. § 214.2(l)(3)(v), a U.S. petitioner that has been doing business for less than one year may petition for a manager or executive if it can be expected that the new office will, within one year, support a managerial or executive position. After one year, the regulations require the petitioner to file for an extension with supporting documentation evidencing that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii). The petitioner can no longer be considered a new office, nor can it be granted a second "new office" approval.

- (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 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 nonimmigrant petition was filed on June 30, 2006. The petitioner stated on Form I-129 that it has one employee, and indicated that the beneficiary would "manage day-to-day operations" of the petitioner's pest control and lawn service business in his position as president/chief executive officer.

In a letter dated June 29, 2006, the petitioner described the beneficiary's duties as follows:

As President of [the petitioner], [the beneficiary] will be responsible for directing the development and continuing operations of the company. [The beneficiary's] primary responsibilities will include:

- 1) Purchasing or leasing all capital equipment for use by the company.
- 2) Personnel responsibilities including hiring, firing, scheduling and training.
- 3) Formulating, implementing and enforcing operations policy.
- 4) Developing and implementing a marketing program to further develop the company's customer base.

- 5) Developing a long-term growth plan for the company including identifying additional revenue sources and expanding the target customer profile.
- 6) Directing and controlling the administration function including budgeting, managing purchases and expense disbursements, managing inventory, managing cash flow, and liaising with the company's outside accountants and legal counsel.

The petitioner stated that it has been providing pest, lawn and termite services to homes and businesses located in Polk County, Florida since the start of operations on January 1, 2006. The petitioner provided a financial statement for its first six months of operations, which indicated total revenue of \$32,635 and salary expenses of \$8,427.

On September 27, 2006, the director issued a request for additional evidence, advising the petitioner that the evidence submitted did not establish that the beneficiary would be managing any subordinate employees or that he would be relieved from carrying out the day-to-day operations of the company. The director requested the petitioner to provide a complete position description for any subordinate employees hired by the petitioning company, as well as a breakdown of the number of hours devoted to each of the subordinates' job duties on a weekly basis, educational credentials for any employees, and copies of pay stubs to establish that the petitioner has employed any claimed workers. The director also requested copies of the petitioner's 2005 IRS Form 1120, U.S. Corporation Federal Income Tax Return, and a copy of the company's 2005 IRS Forms W-2 and pay roster.

The petitioner's response consisted of a letter dated October 16, 2006 from "Central Florida Visa Group, Inc.," apparently an immigration consulting firm, which stated the following:

It was noted in the original petition that the company began operations on January 1, 2006 under the leadership of [the beneficiary]. Due to the complexity of operating a pest control business, [the beneficiary] felt that before hiring field technicians to perform the day to day pest control and lawn services his first responsibility was to learn about the industry from professionals. To this end [the beneficiary] has been working in congress with Bio-Tech Termite and Pest Control, a local leader in the industry, to learn safe and appropriate uses of chemical products used in the industry. At the end of the first year of operations [the beneficiary] will hire two field technicians to provide the pest control and lawn services.

Additionally, [the beneficiary] supervises the activities of company employee, [REDACTED] in her rolls [sic] of client relations, sales and treasurer.

The director denied the petition on January 19, 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 noted that although the petitioner stated that the business has commenced operations, the beneficiary still had not hired employees as of October 2006. The director observed that the petitioner's business has not grown to a point where it can support a managerial or executive position, and concluded that the beneficiary, as the petitioner's sole employee, would be engaged primarily in the non-managerial, day-to-day operations of the business.

On appeal, the petitioner states the following on Form I-290B, Notice of Appeal:

[The beneficiary] is the president of the company and is full [sic] responsible for the day-to-day of U.S. operations. [The beneficiary] establishes goals and policies of the company and has full hire and fire authority over the company employees, [REDACTED] . . . and [REDACTED] . . . [The beneficiary] exercises wide latitude in decision making and receives only general direction from the other stockholder.

The petitioner submits a letter dated February 8, 2007, from [REDACTED] of Bio-Tech Termite and Pest Control. [REDACTED] states that [REDACTED] are employed by the petitioning company and explains as follows:

They provide pest control and lawn services for the company under the direction of [the beneficiary]. [The petitioning company] is hiring through our company to take advantage of insurance and licensing agreements in place with our company. [The petitioning company] has full hire and fire authority for these two employees.

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary will be employed in a primarily 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(I)(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 definitions of executive and managerial capacity have two specific requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Here, the petitioner's description of the beneficiary's job duties fails to establish that he would perform primarily managerial or executive duties under the extended petition. The description includes broad, general duties such as "directing the development and continuing operations," "formulating, implementing and enforcing operations policy," "developing a long-term growth plan," and "directing and controlling the administration function." The petitioner did not identify the specific tasks associated with these duties or the amount of time the beneficiary allocates to them. The AAO does not doubt that the beneficiary exercises discretion over the company as its president, but the petitioner bears the burden of providing a clear, credible description of the beneficiary's responsibilities within the context of the petitioner's business. 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. 1103,

1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Furthermore, although the beneficiary's responsibility for hiring and firing employees falls within the statutory criteria for managerial capacity, the record does not establish that the beneficiary had actually hired any employees as of the date of filing, thus suggesting that this duty is prospective in nature. 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).

Furthermore, the beneficiary's responsibilities for purchasing and leasing equipment, implementing a marketing program, and duties associated with inventory, cash flow, purchase and expense disbursements have not been shown to be managerial or executive in nature. The petitioner has not established that it employs any staff who are responsible for the marketing or sales of the petitioner's services, routine bookkeeping and banking tasks, or other administrative functions. Notwithstanding the petitioner's claims that the beneficiary "manages" these functions, it is evident that he is also responsible for all non-managerial tasks associated with the administration, marketing and financial operations of the U.S. company.

Finally, the response to the director's request for evidence suggested that the beneficiary was still "working in congress with Bio-Tech Termite and Pest Control. . . to learn safe and appropriate uses" of products used in the pest control industry. Based on this statement, it appears that the beneficiary was still undergoing training in pest control products and services with an unrelated company more than three months after the expiration of his initial L-1A visa, which raises doubts as to whether he was actually performing the claimed managerial duties as stated in the petitioner's letter dated June 29, 2006. 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. 582, 591 (BIA 1988).

Therefore, based on the position descriptions alone, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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 petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. As observed by the director, the record does not demonstrate that the petitioner has a sufficient number of employees who could perform the non-managerial duties associated with operating the petitioner's service-oriented business on a day-to-day basis. The AAO acknowledges that in certain situations a beneficiary who is the sole employee of a company may qualify as a manager or executive. It is the petitioner's obligation to establish however, through independent documentary evidence that someone other than the beneficiary performs the

day-to-day non-managerial and non-executive tasks of the petitioning entity. 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).

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, 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.

At the time of filing, the petitioner claimed to have been in the business of providing pest control and lawn care services since January 1, 2006. The petitioner claimed to have one employee, thus suggesting that the beneficiary is the sole employee. In response to the director's request for evidence, the petitioner referred to the beneficiary's supervision of "company employee [REDACTED]" who was described as performing the roles of client relations, sales and treasurer. Although requested by the director, the petitioner did not offer evidence of payments to this employee or a detailed description of the duties she performs. 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)). Furthermore, on appeal, the petitioner appears to have abandoned its claim that [REDACTED] is or was an employee of the company. The petitioner also stated in response to the request for evidence that the beneficiary had been undergoing training in the pest control industry, and had yet to hire any field technicians to perform the day-to-day services. Therefore, the director's conclusion that the beneficiary, the sole documented employee and the only employee trained to provide the services of the company, was primarily engaged in the day-to-day operations of the business, was reasonable.

The AAO concurs with the director's conclusion 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. The record does not establish that the beneficiary was relieved from primarily performing non-managerial duties associated with the company's sales, marketing, administration, finances, customer service, service provision and other routine functions.

The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has consistently required the petitioner to establish that the beneficiary's position consists of primarily managerial

and executive duties. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner asserts for the first time on appeal that the petitioner has hired two technicians to provide pest control and lawn services, yet provides no information regarding these employees other than their names and social security numbers. Given the petitioner's previous claim that the company had not yet hired technicians as of October 2006, the AAO assumes that the claimed employees were hired subsequent to that time, and well after the expiration of the beneficiary's initial period in L-1A classification. The petitioner has not provided the date of hire for these employees or any evidence that the petitioner has actually paid them. In addition, the petitioner's relationship with Bio-Tech Termite and Pest Control has not been explained, although it appears that the petitioner is located at that company's address and now claims to be "hiring through" the unrelated company. Regardless, even if the petitioner has actually hired two technicians as of 2007, the fact remains that business activities and hiring that occur after the date of filing 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).

While the AAO recognizes that the beneficiary may exercise discretion over the day-to-day affairs of the business, the fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The actual duties themselves reveal the true nature of the employment. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record as presently constituted does not contain evidence of a qualifying relationship between the foreign petitioner and the U.S. entity, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. 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).

The petitioner claims to be an affiliate of Druway Formwork & Carpentry Ltd., located in the United Kingdom, and states that both the U.S. entity and the foreign entity are owned in equal proportions by the beneficiary and [REDACTED]. The petitioner has not presented evidence of ownership for the foreign entity and the petitioner's claim can therefore not be confirmed. 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. At the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the

regulations as "the 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." 8 C.F.R. § 214.2(l)(1)(ii). There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

The beneficiary's initial L-1A petition was valid from July 1, 2005 until June 30, 2006. A review of the beneficiary's passport shows that his visa application was denied by the U.S. Embassy in London for unknown reasons on August 8, 2005. His L-1A visa was eventually granted on September 21, 2005, and he entered the United States for the first time on October 11, 2005. The petitioner claims that the U.S. company commenced business operations on January 1, 2006. The petitioner has not adequately explained the delay in commencing operations, nor provided any evidence of business activities conducted since January 2006. According to the company's financial statement, the company did not pay any rent during the first six months of operations, and the petitioner's bank statements show minimal activity of any type during this period. The petitioner has not submitted any documentary evidence of its business activities, such as invoices, receipts, or advertisements. The petitioner indicates that the beneficiary works at an address also identified as the address of its accountant and immigration consultant. The petitioner also claims to operate its business from an address identified as the premises of another pest control business. It is not clear that the petitioner has business premises from which to conduct its operations. Based on these deficiencies, the \$32,000 in income shown on the petitioner's financial statement is insufficient to establish that the company is doing business in the United States.

Based on the foregoing discussion, the petitioner has not established that the U.S. company is a qualifying organization. For these additional reasons, the petition cannot be approved.

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or 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.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.