

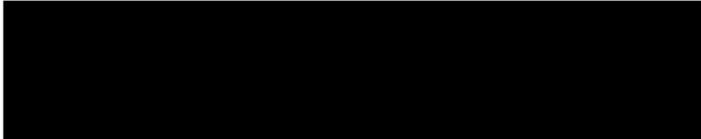
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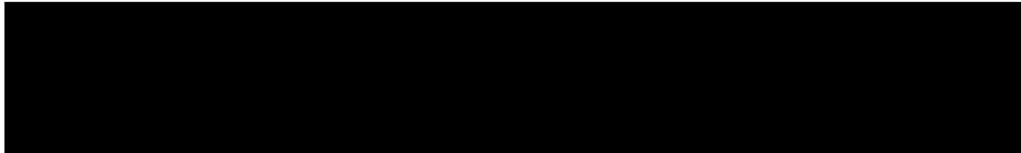


File: SRC 04 243 50254 Office: TEXAS SERVICE CENTER Date: SEP 06 2007

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)

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 petition seeking to extend the employment of its 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 claims to be a corporation organized in the State of Florida, engaging in the industrial cleaning business. The petitioner claims that it is a wholly-owned subsidiary of [REDACTED] located in Sao Paolo, Brazil. 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, counsel for the petitioner asserts that the beneficiary would be employed by the petitioner in a primarily 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 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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner indicated that it has two employees and two subcontractors. In a letter dated September 9, 2004 submitted with the initial petition, the petitioner described the beneficiary's job duties as follows:

The beneficiary will continue managing the U.S. company. Her tasks involve directing and managing all the business activities, supervising and controlling the work of employees and independent contractors. She also will have control over all the Company's financial matters, budgeting and costs evaluation. In addition, she will continue holding the authority to hire and fire employees, or promote personnel, and exercise discretion over day-to-day operations.

On October 7, 2004, the director issued a request for further evidence (RFE). The director requested evidence of business conducted during the year 2004, and evidence that the company was generating sufficient revenue at the time the petition was filed to support a managerial position. The director also requested evidence to show that the beneficiary has been acting primarily in a qualifying capacity including the names, titles and duties of persons who perform the routine tasks of the business; copies of Forms 941 for the last quarter of 2003 and the first three quarters of 2004; and evidence of payment of tax. Finally, the director requested evidence of business conducted by the foreign entity from December 2003 through September 2004 and its payroll records for April through August 2004.

In a letter dated December 31, 2004 responding to the RFE, counsel for the petitioner stated that the U.S. company has three employees and uses independent contractors to perform the routine duties of the business. Counsel stated that, in addition to the beneficiary, the petitioner also employs a commercial manager (sales/service manager) and an administrative assistant. The petitioner submitted Forms 941, Employer's Quarterly Federal Tax Return, and Florida State Employer's Quarterly Reports for the quarters ending March 31, June 30 and September 30, 2004. These documents indicate that the petitioner had two employees at the end of the second quarter and three employees by the end of the third quarter of 2004. The petitioner also submitted Forms 1099-MISC for the year 2003 for two individuals whose roles in the company were not

identified. The petitioner submitted payroll records for the foreign entity for the months January through May 2004, which indicate that the beneficiary and the commercial manager were also on the payroll of the foreign entity during that time period.

On January 14, 2005, the director denied the petition. The director found that "[i]t is not reasonable to conclude that a company engaged in industrial cleaning would require the services of three office personnel, two performing at a management level, while only requiring the services of two contract employees performing the routine tasks that generate revenue." The director further observed that based on the wages paid and the company's limited revenues, it is not credible that there is sufficient work at the management level for the beneficiary to perform in a primarily managerial or executive capacity on a full-time basis. Consequently, the director concluded that the petitioner has not sufficiently demonstrated that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that "the size of the company and the number of employees is irrelevant" in determining eligibility for L-1 classification. Counsel maintains that the beneficiary "manages the entire business" while the commercial manager manages the staff that provides the cleaning service. Counsel claims that the beneficiary directly supervises the administrative assistant, who "bills customers, answers the phone and makes bank deposits among other things." Counsel also asserts that the wage expenses of the U.S. company as stated in the company's tax filings cover only part of the employees' remuneration, as both the beneficiary and the commercial manager continue to be paid by the foreign entity. Since the U.S. entity is still being supported by the foreign entity, counsel asserts, the size of its revenue should not be relevant in considering the beneficiary's eligibility for L-1 classification. The petitioner submits further evidence on appeal, including the U.S. company's tax return, balance sheet and cash disbursement journal for the year 2004; Forms W-2 for its three employees and form 1099-MISC for one contractor for the year 2004; and copies of two agreements for services to be rendered by the U.S. entity to its clients.

On review of the petition and evidence, the AAO finds that the petitioner has not established that the beneficiary would be employed in the United States in a managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). 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.* On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary would do on a day-to-day basis. For example, the petitioner stated that the beneficiary's duties include "directing and managing all the business activities," "supervising and controlling the work of employees and independent contractors," exercising "control over all the Company's financial matters," and "exercis[ing] discretion over day-to-day operations." 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 answer a critical question in this case: What would 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). 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. *Id.*; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Moreover, the AAO notes that the petitioner has failed to provide any description of the duties of the staff as the director had requested specifically in the RFE.<sup>1</sup> This evidence is critical as it would have shed light upon the roles and responsibilities of the beneficiary and other employees within the organization, and would have aided in the determination of whether the beneficiary would indeed function primarily in a managerial or executive capacity. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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).

Similarly, the petitioner has failed to provide sufficient evidence to show that it utilizes independent contractors to perform the company's routine services as claimed. While the petitioner did produce Forms 1099-MISC for the year 2004 for two individuals, the petitioner has provided no other evidence that would identify the nature or duration of the services these individuals performed for the company. Without further information, it cannot be determined how the services of these individuals might obviate the need for the beneficiary to primarily perform the tasks necessary to provide the company's services, rather than supervise or manage the petitioner's business as the petitioner claimed. 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 claims that the beneficiary "supervise[s] and control[s] the work of employees and independent contractors." 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. Here, while the petitioner claims that there is one employee under the supervision of the beneficiary with a managerial title, without further information regarding the duties of the petitioner's employees, it cannot be determined whether either of the beneficiary's subordinates actually function in a managerial or supervisory capacity. Similarly, there is no information on record to establish that either of the beneficiary's subordinates possess an advanced degree, or that their positions require an advanced degree, such that they could be classified as professionals. Thus, the petitioner

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<sup>1</sup> The AAO notes counsel's statement on appeal that the beneficiary "manages the entire business," the commercial manager manages the staff that provides the cleaning service, and the administrative assistant "bills customers, answers the phone and makes bank deposits among other things." However, such information should have been provided in response to the RFE. Further, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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, counsel's contention on appeal that "the size of the company and the number of employees is irrelevant" in this context is not persuasive. The AAO acknowledges that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in approving a visa for a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for the Citizenship and Immigration Services (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). In addition, the size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* Moreover, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9<sup>th</sup> Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). In this instance, particularly in light of the lack of evidence of employees or contractors who would perform the non-qualifying operations of the business as discussed above, the record is insufficient to show that the beneficiary would be "primarily" employed in a managerial or executive capacity.

Based on the foregoing, the AAO agrees with the director's conclusion that the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the AAO finds that the record is insufficient to establish that a qualifying relationship exists between the foreign and U.S. entities as required under 8 C.F.R. § 214.2(l)(3)(i). 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 U.S. and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 593; *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). 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.

The petitioner claimed on the L Supplement to Form I-129 that the U.S. entity is wholly-owned by the foreign entity. However, the petitioner has not provided any evidence whatsoever relating to the ownership or control of the U.S. entity to support that claim. Documentation such as corporate stock certificates, stock ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must 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, CIS is unable to determine the elements of ownership and control, and consequently, cannot determine whether a qualifying relationship exists between the foreign and U.S. entities. 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.