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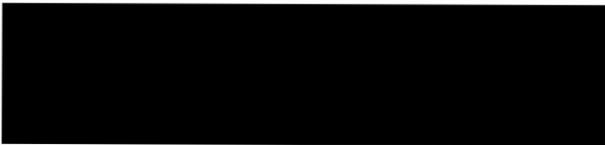
File: EAC 07 104 54287      Office: VERMONT SERVICE CENTER      Date: **APR 03 2008**

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, 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 visa 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 is a limited liability company organized under the laws of the State of Florida. In a letter dated February 27, 2007, the petitioner explains that it "has been involved in the U.S. food service/restaurant industry in central Florida, and desires to enter into the tourism industry by providing limousine service in central and eastern Florida."

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial 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 to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of a manager.

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 primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial capacity.<sup>1</sup>

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.

The petitioner describes the beneficiary's proposed duties in a letter dated February 27, 2007<sup>2</sup> as follows:

[The beneficiary] is required to manage all aspects in initiating the business, create and set up all financial/accounting systems and records, determining the type and scope of and purchase of all necessary equipment, including, vehicles, obtaining and maintaining all licensures, interviewing and hiring staff, managing staff, conduct marketing activities and manage

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<sup>1</sup>It is noted that the petitioner indicated in the L Classification Supplement to Form I-129 that the beneficiary is "coming to the United States to open a new office." The petitioner further explained in an attachment to the Form I-129 that the petitioner is moving, or has moved, its business to a new location at 486 North Harbor City Blvd., Melbourne, Florida. While not directly addressed by the director or the petitioner, it is noted that the petitioner in this matter does not meet the definition of a "new office" in the regulations and, thus, is obligated to establish that the beneficiary will perform qualifying duties immediately upon petition approval. See 8 C.F.R. §214.2(l)(1)(ii)(F); 8 C.F.R. § 214.2(l)(3). A "new office" is defined as an organization which has been doing business in the United States for less than one year. 8 C.F.R. §214.2(l)(1)(ii)(F). However, the record indicates that the petitioner was formed in 2001 and that it has been in operation in the United States since that time. The fact that the petitioner may be opening a new location, moving its place of business, or even entering an entirely new line of business is of no consequence.

<sup>2</sup>It is noted that the February 27, 2007 letter is dated February 28, 2007 on the second page of the letter.

business accounts.

On March 13, 2007, the director requested additional evidence. The director requested, *inter alia*, more detailed job descriptions for both the beneficiary and all subordinate employees, including a breakdown of the number of hours devoted to each duty for each employee; an organizational chart for the United States operation; and the petitioner's quarterly wage reports.

In response, the petitioner submitted a more detailed job description for the beneficiary as follows:

Plans, directs and coordinates the operations of [the] company. Duties and responsibilities include formulating policies, managing daily operations, and planning the use of materials and human resources, too diverse and general in nature of be classified in any one functional area of management or administration, such as personnel, purchasing, or administrative services. Heads a small business establishment whose duties are primarily managerial.

His tasks include managing staff, preparing work schedules and assigning specific duties; reviewing financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement; establishing and implementing departmental policies, goals, objectives, and procedures, conferring with board members, organization officials and staff members, as necessary; determines staffing requirements, and interviews, hires and trains new employees, and oversees those personal [sic] processes; monitors business to ensure that it efficiently and effectively provides the needed services while staying within budgetary limits; and, directs and coordinates organization's financial and budget activities to fund operations, maximize investments and increase efficiency.

Even though the petitioner claims to employ two people in the Form I-129, the petitioner also described the duties of four subordinate workers. These workers are described as performing driving and/or tour guide services. The petitioner submitted an organizational chart indicating that the beneficiary will supervise the drivers and the driver/tour guide. Based on the job descriptions and the vague organizational chart, it does not appear that the petitioner is claiming that it has or will employ a subordinate supervisory or managerial employee inserted between the beneficiary and the drivers.

Finally, the petitioner submitted quarterly wage reports. According to the wage reports for the third and fourth quarters of 2006, the petitioner employed only the beneficiary and the driver/tour guide. The record is devoid of evidence that it has ever employed the "on call" drivers identified in the organizational chart.

On June 7, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial capacity.

On appeal, counsel asserts that the beneficiary's duties are primarily those of a manager.

Upon review, counsel'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.*

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will establish and implement "departmental policies, goals, objectives, and procedures." However, the petitioner does not specifically define any of these policies, goals, objectives, and procedures. Furthermore, general managerial-sounding duties such as "managing daily operations" and "heads a small business establishment" are not probative of the beneficiary performing qualifying duties. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily 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). 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).

Likewise, the record is not persuasive in establishing that the beneficiary will be relieved from the need to perform the non-qualifying administrative or operational tasks inherent to his duties pertaining to the operation of the business. For example, the petitioner asserts that the beneficiary will coordinate "the operations of the company" and will manage components of "personnel, purchasing, or administrative services." In sum, and as noted by the petitioner, the beneficiary will lead "a small business establishment" consisting of one other employee, a driver/tour guide, and three claimed "on call" drivers, who do not appear to be active employees. However, the petitioner has not established that it employs a staff dedicated to relieving the beneficiary of the need to perform the non-qualifying tasks inherent to coordinating operations, directing personnel, purchasing, and administration, or leading a small business. To the contrary, it is more likely than not that the beneficiary, along with his single subordinate employee, will primarily perform the non-qualifying tasks associated with the provision of a product or service. See generally *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9<sup>th</sup> Cir. 2006). Furthermore, the petitioner failed to provide a breakdown of the beneficiary's proposed duties even though this evidence was specifically requested by the director in the Request for Evidence. 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). Accordingly, it has not been established that the beneficiary will be "primarily" employed as a manager. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization.

As asserted in the record, the beneficiary will supervise a single employee, a driver/tour guide, and three intermittent "on call" drivers. However, none of these workers is described as having supervisory or managerial responsibilities. To the contrary, these employees are all described as performing driver or tour guide tasks. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional workers, the provider of actual services, or a combination of both. 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. Moreover, as the petitioner failed to establish the skills required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will manage professional employees.<sup>3</sup> Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>4</sup>

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (CIS) "may properly consider an organization's small size as one

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<sup>3</sup>In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

<sup>4</sup>While the petitioner has not clearly argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record indicates instead that the beneficiary will primarily be a first-line supervisor of non-professional employees and/or will primarily perform non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform 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).

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 at 1316 (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, 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). 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.*

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial duties, and the petition may not be approved for that reason.<sup>5</sup>

Beyond the decision of the director, the petitioner has failed to establish that it and the foreign employer are qualifying organizations.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section." "Subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity." 8 C.F.R. § 214.2(l)(1)(ii)(K).

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<sup>5</sup>Although not addressed by the director, the petitioner has also failed to establish 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce with any certainty what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will be primarily employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Therefore, beyond the decision of the director, the petitioner has also not established that the beneficiary will be employed primarily in an executive capacity.

In this matter, the petitioner states in the attachment to the Form I-129 that the foreign employer "is the owner of, and has always owned 60% of the capital stock of [the petitioner]." However, the record contains serious inconsistencies which undermine this claim. The petitioner's 2004 and 2005 Forms 1120, U.S. Corporation Income Tax Return, indicate that the beneficiary is the 100% owner of the petitioner. As the petitioner has also indicated in a letter dated June 1, 2007 submitted in response to the Request for Evidence that the beneficiary "does not own any shares of the capital stock in the foreign entity," it does not appear that the two entities are affiliated. The petitioner offered no explanation for this fundamental inconsistency pertaining to the petitioner's ownership and control. 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.

Accordingly, the petitioner has not established that it and the foreign entity are qualifying organizations. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii)-(iv).

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a managerial or executive capacity. The petitioner failed to specifically describe the beneficiary's job duties abroad as "sales executive manager." Specifics are clearly an important indication of whether a beneficiary's duties were 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, *aff'd*, 905 F.2d 41. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad, if any. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. *See* sections 101(a)(44)(A) and (B) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Accordingly, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity abroad, and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

In this matter, the petitioner claims to be 20% owned by the beneficiary. Furthermore, as noted above, the petitioner averred in its tax returns to be 100% owned by the beneficiary. Regardless, as a purported significant owner of the petitioner, the petitioner is obligated to establish that the beneficiary's services will be used for a temporary period and that he will be transferred to an assignment abroad upon completion of the assignment. *Id.* However, the record is devoid of any evidence establishing that the beneficiary's services will be used temporarily even though such evidence was specifically requested by the director. 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). Once again, 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). In fact, the petitioner claims in the letter dated February 27, 2007 that, in accepting the transfer to the United States, the beneficiary is undertaking "a permanent assignment in the Melbourne, FL office of [the petitioner]."

Accordingly, as the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States, the petition may not be approved for this additional reason.

The previous approval of an L-1A petition does not preclude CIS from denying an extension based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act, 8 U.S.C. § 1361.

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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.