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U.S. Citizenship
and Immigration
Services

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File: EAC 07 154 51427 Office: VERMONT SERVICE CENTER Date: **AUG 29 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 employ the beneficiary as a quality control 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 corporation organized under the laws of the State of Delaware and is in the food processing business.

The director denied the petition concluding that the petitioner did not establish that the beneficiary was employed abroad in a 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 performed primarily managerial duties abroad.

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 was employed abroad 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.

Although the petitioner does not claim that the beneficiary has been or will be employed in an executive capacity, the AAO will nevertheless consider this classification. *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 petitioner describes the beneficiary's duties abroad as "manager of quality control for olives" in a letter dated May 1, 2007 as follows:

1. Directs and coordinates the activities of all staff members who are responsible for olive preparation and processing operations that relate to quality control: i.e., the inspection of olives at all stages in processing against company standards, the

calibration of processing and canning/bottling machinery to ensure compliance with company standards, the reporting of compliance and incidents of noncompliance to company management;

2. Prepares work schedules and assigns specific duties to Quality Control Technicians;
3. Reviews performance data to measure productivity, quality of olives processed to determine areas needing cost reduction or other improvement;
4. Assists with the determination of staffing requirements (i.e., the number and qualifications of appropriate staff) to meet both production and quality control goals; and
5. Reports compliance and/or incidents of noncompliance at any stage of olive and olive oil manufacturing and processing to senior management for further action, along with a recommendation on what action should be taken.

The number of Quality Control Technicians and processing staff, over which the Manager of Quality Control for Olives has authority, will vary from day to day, depending on the work schedules for particular shifts. Those work schedules, in turn, will depend on the demand for Petitioner's olives. The total number of staff, for which the Manager of Quality Control for Olives is responsible, may exceed 100 on any given day.

On May 15, 2007, the director requested additional evidence. The director requested, *inter alia*, a description of the "typical managerial responsibilities that were performed by the beneficiary abroad." The director also requested a list of all subordinate supervisors under the beneficiary's management and a description of the job duties of the managed employees.

In response, counsel submits an undated letter in which he addresses the director's request for evidence of the beneficiary's managerial decisions abroad as follows:

There is no documentary evidence of her day-to-day decisions in Greece; most, if not all, of her instructions were given orally to her subordinates, while other items (such as work schedules and non-compliance reports) were not retained for more than a few months as there is no corporate or legal need to retain such documents in Greece.

Counsel also indicates that the beneficiary supervised approximately five subordinate supervisors, also described as "quality control associates." Counsel described the duties of these workers as follows:

These staff members were responsible for the inspection of Petitioner's olive products, to ensure that they met predetermined quality standards. As a corollary of those duties, Quality Control Associates also were responsible for reporting non-compliance of any product with those standards.

On August 22, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary was employed primarily in a managerial capacity.

On appeal, counsel asserts that the beneficiary primarily performed managerial duties abroad. Counsel also

argues that the director erred in stating that "the evidence submitted does not establish the beneficiary has been employed exclusively in [a] managerial capacity abroad." Instead, counsel argues that the petitioner only needs to establish that the beneficiary "primarily" performed qualifying duties. Finally, counsel argues that the beneficiary managed an essential function abroad and that she managed "professionals." As an example, counsel points to an approved L-1B petition for another beneficiary (EAC 06 074 52050) who has a university degree and who was allegedly among the beneficiary's subordinates abroad.

Upon review, counsel's assertions are not persuasive.

As a threshold issue, it is noted that the director's insinuation that the petitioner was required to establish that the beneficiary was "exclusively" engaged in performing qualifying duties abroad was in error, and the director's decision will be withdrawn in part. As noted by counsel, the petitioner only needs to establish that the beneficiary "primarily" performed qualifying duties. Nevertheless, as the petitioner failed to establish that the beneficiary "primarily" performed qualifying duties, the petition must be denied and the appeal will be dismissed.

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). The petitioner's description of the job duties must clearly describe the duties performed by the beneficiary and indicate whether such duties were either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary was employed abroad in a primarily "managerial" or "executive" capacity. In support of the petition, the petitioner claims that the beneficiary directed the activities of olive preparation and processing workers, prepared schedules, reviewed performance data, assisted with determining staffing requirements, and reported compliance issues. However, the petitioner fails to explain what, exactly, the beneficiary did to "direct" or "coordinate" these activities other than to act as a first-line supervisor of non-professional olive processing and preparation workers. Furthermore, when asked to produce evidence of the beneficiary's managerial decisions, the petitioner claims that such evidence, e.g., reports and schedules, were not retained and, thus, cannot be produced. It is emphasized that the burden of proving eligibility in this matter remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary actually performed managerial or executive duties. 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 (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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Consequently, the record is not persuasive in establishing that the beneficiary "primarily" performed qualifying duties. As noted above, the petitioner asserts that the beneficiary "managed" the petitioner's olive quality control workers. However, the record does not establish that the beneficiary was relieved of the need to perform the non-qualifying, first-line supervisory tasks inherent to her ascribed duties by a subordinate staff. For example, the petitioner claims that the beneficiary prepared schedules and reported compliance issues to senior management. However, the petitioner does not explain who, other than the beneficiary, performed these first-line supervisory tasks. Accordingly, it appears more likely than not that the beneficiary primarily performed non-qualifying first-line supervisory, administrative, or operational tasks in her administration of the business. 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). 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.

The petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As asserted in the record, the beneficiary directly supervised olive processing and preparation workers. However, it has not been established that any of these workers is a supervisory or managerial worker. The only job description provided for the beneficiary's subordinates, the "quality control associates," describes these workers as performing the tasks necessary to the production of a product. The petitioner failed to specifically describe the duties of any of the five claimed subordinate supervisors or managers even though this evidence was requested by the director. 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). Overall, the record is not persuasive in establishing that any of the beneficiary's subordinates were truly a managerial or supervisory worker. Once again, 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.

Furthermore, the petitioner has failed to establish that the beneficiary supervised professional workers abroad. 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).

In this matter, the petitioner does not claim in the underlying petition that the beneficiary supervised professionals abroad but, on appeal, counsel argues that the beneficiary supervised professional workers. As an example, counsel points to an approved L-1B petition for a different beneficiary who allegedly has a

university degree and who was allegedly among the beneficiary's subordinates abroad. However, this uncorroborated claim by counsel is not persuasive in establishing that the beneficiary supervised one or more professionals abroad. First, on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Accordingly, it was inappropriate for counsel, on appeal, to widen the scope of the beneficiary's purported authority to include the supervision of professional workers when such a claim was not made initially.

Second, the petitioner failed to establish the duties of the "quality control technical staff" member or to establish that her degree was necessary to the performance of her duties. The AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's, or even a master's, degree by a subordinate employee does not automatically lead to the conclusion that an employee was employed in a "professional" capacity as that term is defined above. Therefore, as the petitioner has failed to establish that an advanced degree was actually necessary to perform the duties of the "quality control technical staff" member, the petitioner has failed to establish that the beneficiary supervised one or more professional workers abroad. Once again, 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. Regardless, the unsupported statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).¹

Finally, on appeal, counsel argues that the beneficiary managed an essential function of the organization abroad, i.e., the quality control department. However, the record is not persuasive in establishing that the beneficiary managed an essential function. 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 tasks related to the function.

In this matter, the petitioner has not provided evidence that the beneficiary managed an essential function.

¹It is also noted that, just because a beneficiary is deemed eligible for L-1B status, this does mean that this beneficiary is also employed in a "professional" capacity as defined above. An L-1B nonimmigrant only needs to meet the definition of a "professional" if entering under a blanket petition. *See* 8 C.F.R. §§ 214.2(l)(4)(ii) and 214.2(l)(1)(ii)(E).

The petitioner's vague job description fails to document that the beneficiary's duties were primarily managerial. To the contrary, as explained above, the record indicates that the beneficiary primarily acted as a first-line supervisor of non-professional, olive processing and preparation employees. As serving as a first-line supervisory is not a qualifying managerial duty, the petitioner has failed to establish that the beneficiary primarily performed managerial duties abroad. Absent a clear and credible breakdown of the time spent by the beneficiary performing managerial duties, the AAO cannot determine what proportion of her duties were managerial, if any, nor can it deduce whether the beneficiary primarily performed 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). Accordingly, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary acted 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 acted primarily in an executive capacity. As explained above, it appears more likely than not that the beneficiary was primarily employed as a first-line supervisor and performed the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Accordingly, the petitioner has failed to establish that the beneficiary primarily performed managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive position. 8 C.F.R. §§ 214.2(l)(3)(ii).

Counsel claims in his letter submitted in response to the director's Request for Evidence that the beneficiary "will be performing the same job in the United States that she performed already in Greece." Counsel also claims that the beneficiary will supervise four employees in the "quality division" of the United States operation -- a quality control manager and three quality control clerks. The clerks are described as performing the tasks necessary to the operation while the manager is described as being "responsible for implementing the instructions of Beneficiary and ensuring compliance with those instructions."

Upon review, the record is not persuasive in establishing that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Similar to the foreign position, it appears that the beneficiary will be primarily employed as a first-line manager. While counsel claims that the beneficiary will supervise a subordinate manager who, in turn, will supervise three subordinate workers, this assertion is not

credible and not supported by any evidence. The petitioner has failed to establish that this subordinate "supervisor" will truly be a supervisory or managerial worker. The vague job description provided by the petitioner fails to provide any details regarding the duties of this worker. 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). 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. 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).

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

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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

ORDER: The appeal is dismissed.