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U.S. Citizenship  
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Services

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File: WAC 08 055 50035

Office: CALIFORNIA 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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as its marketing 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 in the State of California and is engaged in software consulting. The petitioner seeks to employ the beneficiary from January 1, 2008 until December 31, 2011.

The director denied the petition on the basis that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying capacity.

On appeal, counsel disputes the director's findings, asserting that Citizenship and Immigration Services (CIS) provided a deficient request for additional evidence (RFE).

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.

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 primary issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

In support of the Form I-129, the petitioner provided a letter dated December 3, 2007, which contained the beneficiary's proposed position as director of project management and business development. The petitioner stated that the beneficiary would oversee managerial personnel, including product development and project management leaders, who would be in charge of complex projects within the petitioner's clients' respective companies. The petitioner also indicated that the beneficiary would recruit qualified consultants; participate in making decisions that directly effect how the petitioner conducts business and generates income; and

establish business connections with venture capitalists and potential clientele by attending various functions where he would introduce the services offered by the petitioner.<sup>1</sup>

The record also contains the petitioner's organizational chart, which depicts the petitioner as an entity with three managerial levels supported by a consulting staff that is comprised of senior and lower level consultants. The beneficiary is identified as the petitioner's third tier manager whose position is shown as being senior to the organization's consultants. It is noted that the financial documents presented by the petitioner in support of its Form I-129, i.e., its federal tax returns from 2004-2006 do not establish that the petitioner has employed the consultants enumerated in the organizational chart. That being said, the petitioner provided numerous internally generated billing invoices issued to various client companies that were the recipients of consulting services provided by individuals whom the petitioner purportedly hired either directly or indirectly, i.e., on a contractual basis. It is further noted that six out of eight of the individuals who were named as consultants in the petitioner's organizational chart were also named in the petitioner's billing invoices, which identified the individuals who provided the consulting services for which the petitioner billed its various client companies. However, only one of the consultants, i.e., [REDACTED], was issued a Form 1099 by the petitioner. The petitioner did not provide any documentation establishing that it paid the remaining service providers who were named in the billing invoices. Lastly, the AAO observes that the petitioner billed its clients for consulting services that were provided by [REDACTED] who was identified in the petitioner's organizational chart as the chief financial officer (CFO) and managing director, a position that was second from the top within the petitioner's hierarchy.

Subsequent to CIS's initial review of the petitioner's supporting documents, an RFE was issued on December 28, 2007 instructing the petitioner to provide several of its quarterly wage reports as well as the job titles and job descriptions for the employees listed in the relevant wage reports.

In response, the petitioner complied with the RFE, providing its wage reports for the first three quarters of 2007. The wage reports named a total of two employees, only one of whom was named in the organizational chart that was initially provided in support of the Form I-129. Specifically, the wage reports indicated that [REDACTED] earned \$3,000 per quarter, while [REDACTED], whom the petitioner identified as a part-time marketing and administrative employee, earned \$1,500 per quarter. The petitioner also provided its own internally generated "1099 Detail," which included the names of individuals and companies to whom the petitioner issued Forms 1099 for miscellaneous income paid in 2007. It is noted that only one individual to whom a Form 1099 was issued also appears in the petitioner's organizational chart. Despite the fact that the petitioner named a total of eight consultants in its organizational chart, six of whom were named in the invoices previously provided in support of the petition, there is no evidence that the petitioner actually paid wages to anyone other than [REDACTED] for consulting services. 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)).

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<sup>1</sup>The director reiterated the entire position description as provided by the petitioner on the first two pages of its support letter dated December 3, 2007. As such, the AAO need not repeat this information verbatim in the matter at hand.

On January 25, 2008, the director issued a decision denying the petitioner's Form I-129. The director observed that the petitioner did not document its employment of the consultants who were named in its organizational chart. The director further noted that the beneficiary's subordinates would not be professional employees. Lastly, the director found that the preponderance of the beneficiary's duties would be directly providing the services of the petitioner. The director's findings resulted in her ultimate conclusion that the beneficiary would not be employed in a primarily managerial or executive capacity.

While the AAO concurs with the director's conclusion, it is noted that the director's underlying observations are not reflected by the documentation on record. Namely, at the time of the denial the record did not contain conclusive information regarding the educational requirements of the consultants whom the beneficiary would supervise. As such, no conclusion could have been reached as to whether the beneficiary's subordinates would be professional employees. Similarly, the director's observation as to the nature of the duties the beneficiary would primarily perform inherently suggests that the petitioner provided a detailed description of such duties to form the basis for the director's observation. The AAO does not, however, find that the information provided thus far allows for a determination as to what specific duties the beneficiary would perform on a daily basis. Thus, while the AAO also concludes that a denial of the petitioner's Form I-129 was warranted, this determination is primarily based on the lack of sufficient evidence and information rather than on a determination that the evidence of record affirmatively indicates that the petitioner is ineligible for the immigration benefit sought.

To further explain, 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 AAO will then consider this information in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the present matter, the record lacks a comprehensive description of the beneficiary's day-to-day tasks and does not adequately establish the availability of support personnel who would perform the petitioner's daily operational tasks such that the beneficiary would be able to primarily focus on the performance of managerial or executive duties. Specifically, the petitioner previously stated that the beneficiary would oversee management personnel. The inherent implication of this statement is that the petitioner would employ the personnel that the beneficiary would oversee. However, as previously noted by the AAO, the petitioner has not provided sufficient documentation to establish its employment of a support staff for the beneficiary to manage. The petitioner also claimed that the beneficiary would be "responsible for ensuring well planned out introductions of new technologies, business functionality, and changed processes." However, the petitioner did not define "business functionality" or "changed processes" such as to convey a meaningful understanding of what these terms mean in the context of the petitioner's consulting business; nor did the petitioner specify which tasks the beneficiary would perform in order to ensure that he meets these business objectives. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient, as it is the actual duties themselves that 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).

The petitioner also indicated that the beneficiary would review reports from management. However, the petitioner's organizational chart does not indicate that the beneficiary would oversee any managerial employees. The only other possibility is that the petitioner's CFO/managing director, whose position is

directly above that of the beneficiary, would produce the reports for the beneficiary to review. This remote possibility only casts further doubt on the petitioner's overall ability to employ the beneficiary in a primarily managerial or executive capacity.

The remainder of the petitioner's description of the beneficiary's proposed employment gives the AAO further cause to question the nature of the beneficiary's proposed daily tasks, as this information is not readily conveyed in the petitioner's vague statements. Namely, the petitioner indicated that the beneficiary would work with the company's executive team in making business decisions regarding costs, pricing, and personnel. However, the record does not establish that the petitioner currently employs an "executive team;" nor is there any indication as to which specific tasks the beneficiary would perform on a daily basis in order to make the designated business decisions, which the petitioner also failed to define with any specificity.

Lastly, while the petitioner definitively stated that the beneficiary would be charged with the task of recruiting consultants and introducing the petitioner's services through a variety of business venues, the petitioner has not provided sufficient information to establish that these tasks can be deemed managerial or executive. That being said, the fact that the petitioner's billing invoices show that its clients were billed for [REDACTED] consulting services indicates that the petitioner's upper level management has been directly involved in providing the petitioner's services, which thereby leads the AAO to question whether the beneficiary would be similarly engaged in the provision of such services given his proposed placement below [REDACTED] within the petitioner's hierarchy. 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). In the present matter, neither the beneficiary's vague job description nor the petitioner's stage of development are indicative of an entity in which the beneficiary would be employed in a qualifying managerial or executive capacity.

On appeal, counsel asserts that the beneficiary manages professional employees as well as two essential functions within the petitioning entity. However, 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). In the present matter, while the petitioner provided evidence establishing that the educational levels of two of the employees listed as the beneficiary's subordinates fit the definition of professional, the record does not contain sufficient evidence documenting that these individuals are, in fact, employed by the petitioner.<sup>2</sup> Furthermore, even if the educational levels of the purported employees were sufficient, this documentation was not provided for

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<sup>2</sup> 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." Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only the occupations listed in section 101(a)(32) of the Act but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

the remainder of the individuals whom the petitioner's organizational chart named as the beneficiary's subordinates.

Counsel also asserts that CIS failed to provide an adequate RFE specifying all of the deficiencies that were subsequently noted in the director's denial. However, even if the director had committed a procedural error by failing to issue a comprehensive RFE, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner was informed of the record's various deficiencies via the director's decision. As such, the petitioner has been offered the opportunity to supplement the record on appeal. It would serve no useful purpose to remand the case simply to afford the petitioner yet another opportunity to supplement the record with new evidence. Further, with regard to counsel's reference to an interoffice service memorandum dated February 16, 2005, CIS memoranda merely articulate internal guidelines for service personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Namely, 8 C.F.R. § 214.2(l)(3)(i) states that an individual petition filed on Form I-129 shall be accompanied by 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. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *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). In the context of this visa petition, 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. In the present matter, the petitioner has submitted documents that are fraught with significant deficiencies.

First, Article IV of the petitioner's Articles of Incorporation indicates that the petitioner is authorized to issue 20,000 shares of stock. However, the record contains two separate stock certificates each issuing 15,000 shares of the petitioner's stock to [REDACTED] and to [REDACTED] respectively. The combined total of stock issued in these two certificates is 30,000 shares, a total that exceeds the authorized amount by 10,000 shares. Second, even if the AAO were to disregard this anomaly, the fact that both stock certificates, which were each signed and dated July 1, 2004, were issued via stock certificate No. 21 gives further rise to the question of the validity of each document, not to mention the lack of an explanation as to what happened to stock certificate Nos. 1-20. Third, the AAO notes that according to the stock certificates, the value of the petitioner's stock is \$30 per each share issued. In the present matter, it appears that the petitioner attempted to issue 30,000 shares of its stock, which should net the petitioner \$450,000 in exchange for such issue. However, Schedule L, item 22(b) of the petitioner's 2006 federal tax return shows that the petitioner currently holds only \$19,982 in exchange for stock previously issued. Even if the AAO were to assume that only one of the stock certificates (discussed above) were valid, the petitioner should still have received \$225,000 in exchange therefore since, as previously noted, the stock certificates clearly indicate that

each share is worth \$30. 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). The considerable inconsistencies discussed herein with regard to the issuance of the petitioner's stock have not been resolved or addressed in any way. As such, the issue of the petitioner's legal ownership remains in question, causing the AAO to conclude that the petitioner has not established the existence of a qualifying relationship between the beneficiary's foreign and proposed U.S. employers.

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). Accordingly, the additional ground for ineligibility discussed above will also serve as yet another basis for the AAO's adverse decision.

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. 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.