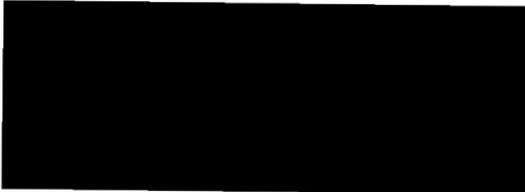


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File: EAC 07 163 52952 Office: VERMONT SERVICE CENTER Date: **JUL 08 2008**

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

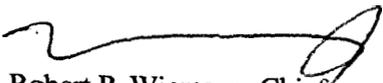
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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, a Florida corporation, states that it is engaged in real estate development. It claims to be a subsidiary of Modulo Cinco, S.C., located in Caracas, Venezuela. The petitioner seeks to employ the beneficiary as its marketing manager for a period of three years.

The director denied the petition concluding that petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity with the United States entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director's decision contained factual errors. The petitioner emphasizes that although the company is small, it contracts work out to other organizations and requires managerial staff such as the beneficiary to supervise its projects.

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 sole issue addressed by the director is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The nonimmigrant petition was filed on May 15, 2007. In a letter submitted in support of the petition, the petitioner stated that the beneficiary would perform serve as its marketing manager and perform the following duties:

Determines the demand for products and services offered by the firm and its competitors and identify potential customers; develop pricing strategies with the goal of maximizing the firm's

profits or share of the market while ensuring the firm's customers are satisfied; oversee product development or monitor trends that indicate the need for new products and services; develop marketing strategies, based on knowledge of establishment policy, nature of market, and cost and mark-up factors, among others.

The petitioner stated that the U.S. company was established "to promote, develop and manage medium scale residential and commercial real estate projects in South Florida and North Carolina." The petitioner indicated on Form I-129 that it has three employees, and provided evidence of wages paid to employees in 2006 in the form of federal and state quarterly tax returns.

On June 27, 2007, the director issued a request for additional evidence. The director instructed the petitioner to submit the following: (1) a comprehensive description of the beneficiary's proposed duties with an explanation as to how such duties will be managerial or executive in nature; (2) a list of employees identifying each employee by name and position title; (3) a complete position description for all employees, including a breakdown of the number of hours each employee devotes to their job duties on a weekly basis; (4) a copy of the company's IRS Form 941, Employer's Quarterly Federal Tax Return for the first quarter of 2007; and copies of all IRS Forms W-2 and W-3 issued by the petitioning company in 2006.

In a response received on August 13, 2007, the petitioner provided the following description of the beneficiary's proposed duties:

The Marketing Manager is in charge of two important managerial and executive functions. It provides relevant and up to date information about business developments and market information regarding the company's projects to potential investors, and conveys information about foreign business investment opportunities, business practices, and legal and tax implications to potential investors.

Another managerial function carried out by the Marketing Manager is to act as a liaison between Venezuela and US offices, and therefore be responsible of [sic] keeping and [sic] up to date portfolio of all the developments, properties and other services that both offices have. Also, it must ensure that there exists a clear communication channel through which all these information can flow without any problem.

Furthermore, The Marketing Manager performs the bidding and hiring of advertising agencies for the promotion and publicity of the company's projects, and it supervises the production of all marketing materials (brochures, renderings, flyers, web sites and videos). [The petitioner] currently has an outsourcing contract with Quantum Creative Group and Reactivos (Venezuela) to perform these activities.

To ensure viability, the Marketing Manager with the support of the Administrative Department and the help from its team of assistants, interns or part time employees, performs a market, risk and business analysis to determine which projects will yield higher profits. The Marketing Manager then uses this information to prepare reports and presentations to

investors (mainly Venezuelans), financial agencies, the Financial Manager and President of the company, and to other Real Estate Agencies.

The Marketing Manager also has enough independence and authority to book meetings with potential investors and presentations to professionals and commercial chambers.

The petitioner indicated that the beneficiary would supervise an administration manager who performs the following duties:

Coordinate activities of clerical and administrative personnel; analyze and organize office operations; and manage the company's office supplies. The Administrative manager also supervises the preparation of annual tax returns and payroll forms, and makes sure that all the accounting information (bank accounts, payables and receivables, taxes, operating expenses and payroll) is kept up to date.

The Administration Manager gathers all this information from the Marketing Manager to ensure that bills are paid, conferences and presentations are scheduled on time, and the company's files are well organized and filed.

The petitioner also submitted an organizational chart for the U.S. company which depicts a president and a financial manager above the beneficiary's position. The individual who holds the position of financial manager also serves as the project manager. The chart depicts the administration manager, real estate agencies, a legal and tax advisor, and the above-referenced marketing/advertising agencies, under the beneficiary's position.

The petitioner indicated that the financial manager is responsible for carrying out purchase negotiations with investors and clients, preparing and presenting business plans for company projects, performing market analysis to determine demand for real estate projects, and forming investor groups.

As evidence of wages paid to its employees, the petitioner submitted the requested IRS Form 941 for the first two quarters of 2007, and copies of its Forms W-2 and W-3 for 2006. The petitioner paid total wages of \$56,000 to its three employees in 2006 and paid total wages of approximately \$32,000 during the first half of 2007. The petitioner did not submit copies of any IRS Forms 1099 or 1096 for 2006 as evidence of payments to contract employees.

The director denied the petition on October 2, 2007, concluding that the petitioner had failed to establish that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity. In denying the petition, the director noted that the petitioner was offering the beneficiary a salary of \$32,000, but paid her only \$12,000 in 2006, and failed to establish that she would in fact supervise any employees. The director further found that none of the employees in the petitioning company, who earned salaries of \$32,000, \$12,000 and \$12,000, respectively, received compensation commensurate with a bona fide manager or executive in a major metropolitan area.

The director acknowledged the position descriptions submitted for the beneficiary, but determined that the petitioner had not established that the beneficiary would manage a function within the organization, or that she would be involved in the supervision and control of the work of supervisory, professional or managerial employees who would relieve her from performing non-qualifying duties. The director concluded that the beneficiary would likely be engaged in the non-managerial, day-to-day operation of the business, performing duties related to providing a service or selling a product.

On appeal, the petitioner notes that the director's decision contains a factual error, as the beneficiary is not currently employed by the company and she did not receive a salary of \$12,000 in 2006, as stated by the director. The petitioner notes the person who received that salary is "Maria Cottin," the petitioner's administrative employee, whose name is similar to the beneficiary's. The petitioner is correct and the director's comment in this regard is withdrawn.

With respect to the director's findings that the beneficiary would not serve in a bona fide managerial position and that the petitioning organization would not support the beneficiary's proposed position, the petitioner asserts that it clearly described the objectives and functions of the organization. The petitioner contends that "it was made clear that in order to have permanence in time it is of the highest importance to have sponsors that either provide funds to invest in new projects or are buyers of the units that can be described as 'the end products' of our business." The petitioner further explains as follows:

Marketing to get investors and buyers is key to the operations of the business. This has to be made on a person to person basis and cannot be delegated unto others. These relations have been established for more than 30 years and cannot be handed over to anyone. For this reason, marketing functions at this level have to be performed by a professional that possesses a degree of education . . . and the necessary social and corporate level skills to communicate with the company's clients and potential investors.

So these functions are vital to the stability of the business in time and the person that performs them has to fulfill some conditions that are typically managerial.

The petitioner further emphasizes that since the company is primarily a project and construction management company, most of the work is performed by others outside the organization. The petitioner states "this does not mean that there is not a managerial function performed by executives within the organization."

Finally, the petitioner addresses the director's observation that the company appears to pay salaries that are not consistent with managerial or executive positions, noting that due to the nature of its industry, it seeks to keep costs low during the formation of investor groups, design, permitting and construction phases of its projects.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. Although the appeal will be dismissed, the AAO will withdraw the director's comments with respect to the beneficiary's salary as an indicator of whether she will be employed in a managerial or executive capacity. The director should refrain

from holding the petitioner to his unsupported opinion of what constitutes an appropriate salary for a managerial employee, and instead focus on applying the statute and regulations, which contain no salary requirements. Similarly, the director's observation that the petitioning company appears to be a family-run business has no bearing on a determination regarding the beneficiary's employment capacity, and the director's comments in this regard are also withdrawn.

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.*

The petitioner initially provided a vague description of the beneficiary's duties that failed to demonstrate what the beneficiary would do on a day-to-day basis within the context of the petitioner's real estate development business. The petitioner's description included such duties as determining demand for products and services, identifying potential customers, developing pricing strategies, overseeing product development, and monitoring marketing trends to determine the need for new products and services. Given that the petitioner describes its main functions as identifying and structuring investment projects and serving as project managers for such projects, the beneficiary's responsibilities for developing pricing strategies and overseeing product development appear to be incongruous with the type of business operated and offered little insight into her role within the company. Furthermore, the duties, without further explanation, appeared to be more akin to those of a marketing analyst than those of a marketing manager who manages a function of the organization or a staff of subordinate managers, professionals or supervisors. The petitioner did not indicate what specific tasks the beneficiary would perform to carry out her objectives, or whether she would perform such duties with the assistance of subordinate personnel. Specifics are clearly an important indication of whether a beneficiary's duties are 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).

The director reasonably requested a comprehensive description of the beneficiary's proposed duties and requested that the petitioner provide a breakdown of the number of hours devoted to each employee's job duties on a weekly basis. In response, the petitioner provided a new description for the position which bore little resemblance to the position description submitted with the initial petition, and which fell significantly short of qualifying as "comprehensive." The petitioner stated that the beneficiary will be "in charge of" two managerial functions, including: (1) providing information about business developments, market information, legal and tax implications to potential investors; and (2) acting as a liaison between the Venezuelan and U.S. offices. It is insufficient for the petitioner to state that the beneficiary is "in charge" of these areas without identifying the specific tasks she would typically perform as marketing manager for the petitioning company, and explaining how such tasks qualify as managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Furthermore, the director specifically instructed the petitioner to submit a breakdown of the number of hours each of its employees devotes to his/her job duties on a weekly basis, and this request reasonably included the beneficiary's proposed position. The petitioner did include this requested information in its response. Any 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).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because some of the beneficiary's responsibilities, such as preparing reports for investors and managers, and "keeping an up to date portfolio," do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary would be primarily performing managerial duties. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). In addition, although the petitioner has assigned the beneficiary the title of "marketing manager," the petitioner indicated that her direct supervisor, the financial manager, is also charged with performing market analysis duties and forming investor groups, duties which appear to overlap with the beneficiary's duties and which raise questions regarding the beneficiary's level of authority within the petitioner's marketing function.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the petitioner claims that the beneficiary would be supported by an "Administrative Department" and its "team of assistants, interns or part time employees," and that she would be responsible for hiring advertising agencies, and supervising the production of marketing materials. However, based on the evidence submitted, the petitioner has not established that its "administrative department" includes any employee other than the "administration manager." The duties performed by this employee, as described by the petitioner, are primarily clerical in nature and it appears that she is responsible for providing administrative support for the whole organization, rather than specifically performing any duties, specifically associated with the marketing function. Furthermore, the petitioner has not indicated that the beneficiary has the authority to make or recommend personnel decisions.

Although the petitioner's organizational chart depicted real estate agencies, a legal and tax advisor and advertising/marketing agencies under the beneficiary's position, the petitioner has not adequately documented

the petitioner's use of such external staff, identified the services these individuals provide in relation to the beneficiary's job functions, or explained how the services of the contracted employees would obviate the need for the beneficiary to primarily perform non-qualifying marketing duties. While the petitioner may utilize the services of these outside employees or agencies, a distinction must be drawn between regularly supervising employees and occasionally working with an outside professional in order to accomplish a specific task. For example, while the services provided by an accountant or attorney may be professional in nature, the petitioner has not established that the beneficiary would spend a significant portion of her time on a day-to-day basis supervising the outside employees and agencies named on the organizational chart. Without documentary evidence to support its statements, the petitioner does not meet its 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)).

Based on the foregoing, the petitioner has not established that the beneficiary would be employed in a managerial capacity based on her supervision of a subordinate staff of supervisory, professional, or managerial employees. See § 101(a)(44)(A)(ii) of the Act.

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, 8 U.S.C. § 1101(a)(44)(A)(ii). 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 clearly describe the duties to be performed in managing the essential function, 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). Furthermore, whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are primarily managerial. As discussed above, the petitioner merely stated that the beneficiary is "in charge of" two managerial functions, but failed to discuss what specific duties the beneficiary would perform in relation to these functions. In the case of a function manager, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. It is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary. Here, the petitioner has not met that burden.

On appeal, the petitioner argues that the marketing function is an essential function, as its business depends on the participation of investors and buyers. The petitioner emphasizes that the marketing manager's duties must be performed by a "professional" with social and "corporate level" skills. The petitioner also states that the person who communicates with its clients and potential investors must "fulfill some conditions that are typically managerial." While the AAO does not doubt that the beneficiary is a professional who would hold an important and necessary role within the organization, the petitioner must establish that she would perform duties that are primarily managerial by providing a detailed description of her proposed role and her level of authority within the petitioner's organizational hierarchy. It is insufficient for the petitioner to claim that the beneficiary performs "some" managerial duties, and inadequate for the petitioner to generalize that she would perform duties that are "typically" managerial. Again, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed by the U.S. entity in a managerial or executive capacity. For this reason, the appeal will be dismissed.

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

ORDER: The appeal is dismissed.