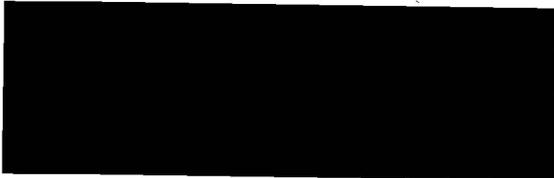


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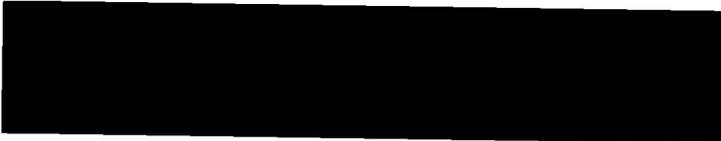
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IN RE: Petitioner:  
Beneficiary



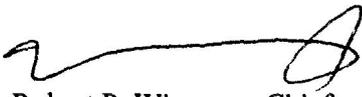
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON 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 nonimmigrant visa petition. 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 California corporation, is described as a residential facility. It claims to have a joint venture relationship with the beneficiary's foreign employer, A.C. Go Construction Company, located in the Philippines. The petitioner indicates that the beneficiary will be employed as the manager of a new office in the United States.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director also observed that the record contains insufficient evidence that the U.S. entity has a lease agreement to carry out the intended business, or that the foreign entity has made any financial investment in the U.S. 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, counsel for the petitioner asserts that the director has incorrectly evaluated the petition. Counsel asserts that the beneficiary will be providing services to the U.S. affiliate in a managerial capacity as he will be managing all aspects of construction projects undertaken in the United States. Counsel states that the beneficiary "is not going to be hired by [the petitioner]. He is being transferred by his own entity as a manager in the U.S. affiliate." Counsel states that the petitioner "will be entering into the lease agreements as well as providing the financial funding for the foreign entity." Counsel submits a brief, but no new evidence, in support of the appeal.

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.

As a preliminary matter, the AAO will address whether the petitioner qualifies as a "new office." The term "new office" is defined at 8 C.F.R. § 214.2(l)(1)(ii)(F) as an organization which has been doing business in the United States through a parent, branch, affiliate or subsidiary for less than one year.

The term "doing business" is defined at 8 C.F.R. § 214.2(l)(ii)(H) as the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner indicated on the L Classification supplement to Form I-129 that the beneficiary would be coming to the United States to open a new office. However, the petitioner in this matter, G.M. Homes, Inc., is a California corporation established in 1994, which claims to have 18 to 22 employees and gross annual income in excess of \$1 million. It appears to be operating a residential care facility.

Based on a review of the a business plan submitted in support of the petition, the beneficiary intends to engage in the "drafting of partnership or corporation papers" before the end of 2006. However, the "new office" to be established by the beneficiary did not exist as a legal entity at the time the petition was filed. The entity that filed the instant petition, G.M. Homes, Inc., was established 12 years before the petition was filed and appears to be actively doing business, and is thus not a "new office" as that term is defined at 8 C.F.R. § 214.2(l)(1)(ii)(F). Therefore, the regulations pertaining to evidentiary requirements for "new office" petitions at 8 C.F.R. § 214.2(l)(3)(v) will not be applied in this matter. The director's comments with respect to the petitioner's failure to submit a lease agreement and evidence of funding by the foreign entity will thus be withdrawn.

The primary issue addressed by the director is whether the petitioner established that the beneficiary would be employed in the United States 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.

The nonimmigrant petition was filed on July 17, 2006. The petitioner indicated on Form I-129 that the beneficiary would serve as "manager" with responsibility to "obtain construction and improvement projects" and "oversee them to conclusion."

The beneficiary, on behalf of the foreign entity, later submitted his "business plan for starting my company in the U.S.," which listed the following proposed actions:

- July 17, 2006 through December 31, 2006
- Filing of petition [sic].
  - Acquire office and storage warehouse.
  - Application of contractor's license.
  - Drafting of partnership or corporation papers.

January 1, 2007 to July 17, 2008

- Start building home improvement, home renovations and repairs. (minimum target: 20 housing units)
- Evaluating market to acquire unimproved lots to build and resell.
- Bid on government projects for construction of roads and highways.

The director denied the petition on March 1, 2007, concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director observed that the petitioner had failed to provide a detailed description of the proposed position, and had not demonstrated that the beneficiary would function at a senior level within the organizational hierarchy, other than in position title. The director further noted that the evidence did not establish that the beneficiary would be involved in the supervision and control of a subordinate staff of managerial, supervisory or professional employees who would relieve him from performing the services of the company.

On appeal, counsel for the petitioner asserts that the foreign entity will employ the beneficiary in the United States in a managerial capacity, and contends that the petitioner submitted “a detailed chain of command and heirarchy [sic] outlining the role of the beneficiary which qualifies him as a manager.” Counsel further describes the beneficiary’s proposed position as follows:

[The beneficiary] will be working at various construction projects in affiliation with GM Homes. GM Homes intends to act solely as a financier for the projects. The actual undertakings of the projects is to be handled exclusively by [the beneficiary]. [The beneficiary] will have the authority of hiring other personnel in performing these projects. [The beneficiary] shall have the authority of overseeing the work of these other personnel, both professional and non-professional, as is customary in the construction industry. [The beneficiary] shall enter into contracts and other such relations with entities who will be doing the actual construction. [The beneficiary] shall have the discretionary authority to oversee entire project(s) as well as the day to day operations. Given these task, which are here stated in brief, are well within the definitions of a manager.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity in the United States.

Preliminarily, it should be noted that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In this matter, the petitioner has requested that CIS rely upon an entirely speculative position description as the basis for its analysis of the beneficiary’s employment capacity.

However, as discussed above, notwithstanding the petitioner’s claim that the beneficiary will open a new office in the United States, there currently exists no new legal entity to serve as the beneficiary’s employer, and the petitioner in this matter, G.M. Homes, Inc., cannot be considered a new office. Therefore, the petitioner must establish that the beneficiary would be employed in a primarily managerial or executive

capacity immediately upon approval of the petition. There is nothing in the record to suggest that the beneficiary would be in a position to immediately commence his proposed duties as a construction project manager. Based on the beneficiary's own representations in the submitted business plan, he first needs to acquire office space and a warehouse, apply for a contractor's license, and establish a new company before he can engage in any of the proposed managerial duties.

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.*

While counsel has submitted a description of the beneficiary's proposed duties on appeal, it fails to demonstrate what the beneficiary would do on a day-to-day basis. Counsel indicates that the beneficiary would have the authority to hire and oversee the work of professional and non-professional personnel, enter into contracts, and "have discretionary authority to oversee the entire project(s) as well as the day to day operations." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's proposed activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, while it is stated that employees will be hired to perform the actual construction activities to be undertaken in the future, it is unclear who would be responsible for performing other functions, such as sales, marketing, purchasing, customer service, administrative and financial tasks. It cannot be concluded that the beneficiary would be relieved from performing non-managerial tasks associated with these functions, which also would be essential to the provision of the business's services. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO does not doubt that the beneficiary would have the authority to make purchasing decisions, determine the petitioner's office location, hire employees and contractors. However, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties would be managerial in nature, and what proportion would be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Based on the petitioner's submission of a vague and speculative position description, the fact that the business activities to be managed by the beneficiary would not commence for at least several months following the approval of the petition, and the lack of evidence regarding the beneficiary's proposed subordinates, the petitioner has not met its burden of establishing that the beneficiary's duties would be primarily managerial or executive in nature. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the remaining issue to be addressed is whether the petitioner established that a qualifying relationship exists between the U.S. company and the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) 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;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

\* \* \*

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

\* \* \*

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner indicated on the L Classification supplement to Form I-129 that the U.S. company has a joint venture relationship with the beneficiary's foreign employer. Where asked to describe the ownership and managerial control of each company, the petitioner indicated that the U.S. company and the foreign entity are both sole proprietorships. In an attachment to the L Classification supplement, the petitioner indicated that "the two enterprises are entering into a joint venture to engage in the business of the foreign employer," and that the beneficiary "is coming to the United States to open a new office of the foreign employer, A.C. Go Construction" and "operating out of the offices of the U.S. employer."

The petitioner submitted a copy of its articles of incorporation, which show that the U.S. company is a California corporation established on February 17, 1994. The directors of the corporation are Henry Martinez and Susan Martinez.

On October 2, 2006, the director requested additional evidence to establish the ownership and control of the petitioning company, including a copy of the U.S. company's stock ledger and all stock certificates issued. The director also requested similar evidence of ownership for the foreign entity.

In a response dated December 11, 2006, the petitioner indicated that the U.S. company has "no stock transactions" and that that no stocks have been issued by the foreign entity. The petitioner described the relationship between the two companies as follows:

The foreign company will be lending the educational and licensure know how to continue to operate in the United States. The financing will be provided by G.M. Homes, Inc. The foreign company has finances from the Philippines which it will utilize to remunerate [sic] the beneficiary. In addition, G.M. Homes, Inc. will also share this responsibility, if necessary.

\* \* \*

The foreign company did not fund the incorporation of G.M. Homes, Inc. This is going to be an intracompany transfer.

The foreign entity is going to initially transact business from the premises owned by G.M. Homes, Inc. As of now, the plan is to occupy the premises for a few months, for which no rent is being charged.

As noted above, the petitioner also submitted a business plan prepared by the beneficiary, in which he indicated that he would be establishing a partnership or corporation in the United States before the end of 2006.

On appeal, counsel for the petitioner refers to the petitioner as a "U.S. affiliate" of the foreign entity, and states that the company "will be entering lease agreements as well as providing the financial funding for the foreign entity."

Upon review, the evidence of record does not establish that the petitioning company and the foreign entity have a qualifying relationship. The petitioner has not provided a consistent description of the nature of the of the relationship between the companies, considering that that the petitioner initially indicated a joint venture relationship and now refers to an affiliate relationship on appeal. 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 record contains no evidence of the ownership and control of either the U.S. company or the foreign entity and therefore, no affiliate or parent-subsidary relationship has been established. 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)).

Furthermore, the petitioner has provided no evidence of a qualifying joint venture relationship between the two entities. Citizenship and Immigration Services (CIS) accepts the interpretation that a 50-50 joint venture creates a subsidiary relationship for purposes of section 101(a)(15)(L) of the Act. See 8 C.F.R. § 214.2(l)(1)(ii)(K). Neither the Act nor the regulations provides a definition of the term "joint venture." However, the AAO has applied a broad definition of joint venture in prior decisions. *Matter of Hughes* states that a joint venture is "a business enterprise in which two or more economic entities from different countries participate on a permanent basis." *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (quoting a definition from Endle J. Kolde, *International Business Enterprise* (Prentice Hall, 1973)). *Matter of Siemens Medical Systems, Inc.* states: "Where each of two corporations (parents) owns and controls 50 percent of a third corporation (joint venture), the joint venture is a subsidiary of each of the parents." 19 I&N Dec. 362, 364 (BIA 1986). In order to meet the definition of "qualifying organization," a joint venture must be formed as a corporation or other legal entity. 8 C.F.R. § 214.2(l)(1)(ii)(G). A business created by a contract as opposed to one created under corporation law is not be deemed a "legal entity" as used in section 101(a)(15)(L) of the Immigration and Nationality Act. *Matter of Hughes*, 18 I&N Dec. 289, 294 (Comm. 1982); see also *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970).

In this case, there is no evidence of a "third corporation" or other legal entity formed by the petitioner and the beneficiary's foreign employer, and thus no evidence of a valid joint venture relationship for immigration purposes. The record indicates that the beneficiary intends to form a partnership or corporation after the instant petition is approved, but it has not been shown that this company would be a 50-50 joint venture between the petitioner and the foreign entity. Regardless, the petitioner must establish eligibility at the time

of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Furthermore, based on the petitioner's representations, the U.S. company will be providing the beneficiary with office space and financing for U.S.-based construction projects. There is nothing in the description of the relationship between the two companies to suggest that they intend to form a bona fide 50-50 joint venture company. The petitioner did not submit any supporting evidence, such as a joint venture agreement, that would clarify the intent of the two parties.

Further, it is noted that, even if the petitioner and the foreign entity had formed a qualifying 50-50 joint venture prior to the date of filing the petition, the petitioner in this case is not the joint venture itself, but rather one of the partners or shareholders in the alleged joint venture. The partners or shareholders of a 50-50 joint venture do not acquire a qualifying corporate relationship by virtue of forming a joint venture; the qualifying relationship formed exists only between each individual parent and the joint venture entity. Other than the petitioner's statement that the beneficiary would be employed by the joint venture, there is no indication that the petitioner intended to file the petition on behalf of a separate entity.

The evidence of record suggests the possibility that the petitioner and foreign entity's proposed "joint venture" would be a temporary business enterprise that would not be established as a legal entity. At best, the record suggests that the proposed joint venture simply had not yet been formed as a legal entity at the time of filing. In either case, there is no evidence that the beneficiary's foreign employer enjoyed a qualifying relationship with an entity in the United States as of the date of filing the petition, and the petition cannot be approved.

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.