

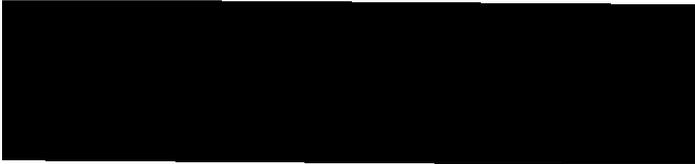
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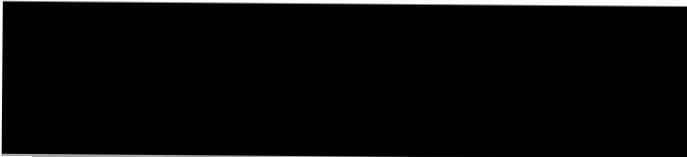
File: WAC 07 143 50617 Office: CALIFORNIA SERVICE CENTER Date: **JUL 17 2008**

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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as its president 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 Florida and is allegedly a "freight/shipping insurance brokerage" business.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary's duties will primarily be those of an executive.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial 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 petitioner does not clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, although counsel on appeal appears to limit the beneficiary to the executive classification. Furthermore, while the petitioner claims in the petition that the beneficiary will be employed in an executive capacity, it also asserts that beneficiary will "temporarily" assume the duties of the general manager. Given the lack of clarity, the AAO will assume that the petitioner is claiming that the beneficiary will be employed in either an executive *or* a managerial capacity and will consider his eligibility under both classifications.

Counsel describes the beneficiary's proposed duties and employment in the United States in a letter dated April 9, 2007 as follows:

[The beneficiary] is replacing Mr. Ahmet Erkan as the President of [the petitioner]. His position is one that is Executive and his duties include the following:

- Direct and coordinate an organization's financial and budget activities in order to fund operations, maximize investments, and increase efficiency.
- Confer with board members to discuss issues, coordinate activities, and resolve problems.
- Analyze operations to evaluate performance of a company and to determine areas of potential program improvement, or policy change.
- Direct, plan, and implement policies, objectives, and activities of organizations or businesses in order to ensure continuing operations, to maximize returns on investments, and to increase productivity.
- Prepare budgets for approval, including those for funding and implementation of programs.
- Negotiate or approve contracts and agreements with customers, federal and state agencies, and other organizational entities.

The petitioner claims in the Form I-129 to currently employ three workers.

On June 28, 2007, the director requested additional evidence. The director requested, *inter alia*, a list of all employees in the United States, an organizational chart for the United States operation, job descriptions for both the beneficiary and any subordinate employees, and quarterly wage reports.

In response, counsel submitted a letter dated September 17, 2007 in which he asserts that, "at the present moment, there is only one employee in the U.S. company," but that the petitioner foresees "hiring four U.S. employees over the next six months." Counsel also claims that the beneficiary will assume his ascribed duties as well as the duties of the general manager, who "will be stepping down."

The petitioner also submitted a quarterly wage report, which indicates that it currently employs one worker, [REDACTED], whom the beneficiary will replace. The organizational chart further indicates that the petitioner plans to employ one worker, the beneficiary, after [REDACTED] resigns. While the chart includes five additional positions, these positions are all currently vacant. Accordingly, the beneficiary will be the petitioner's sole employee. The petitioner does not explain why it claimed to employ three people in the Form I-129 when the record clearly indicates that the petitioner has employed, and will employ in the near future, only one employee.

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

- Plan, formulate and implement administrative and operational policies and procedures for the company; (4 hrs./week)
- Set and review company objectives; (3 hrs./week)
- Setting up and adapting existing company systems and controls; (3 hrs./week)
- Approving all expenses for the company, including all outsourced services in accordance with the policies and procedures set by the parent company; (4 hrs./week)

- Hire/fire personnel and train and evaluate them; (1/2 hr./week)
- Recruit new sales professionals/account managers as needed; (1/2 hr./week)
- Identify and develop business opportunities and project feasibility[;] (3 hrs./week)
- Finding the best suited, high quality shipping and insurance services in the USA and forging a business relationship and commercial agreements with these numerous companies, ensuring that the services provided meet company standards; (3 hrs./week)
- Coordinate and manage the company's shipping broker and insurance broker to ensure the company service standards are kept for all shipments. This includes the loading/unloading of freight in the U.S., tracking their transit and the preparation of the corresponding bills of lading and other shipping documents. Notification of consignees or customers of the arrival of freight and arrange for the delivery, including the clearing through customs, coordinating with U.S. stevedores for the off-loading from the ships; (12 hrs./week)
- Develop the infrastructure and ability to sell the range of services offered by [the petitioner]; (2 hrs./week)
- Acting as the essential interface between [the petitioner] and [the foreign employer] in order to ensure that smooth operation between both companies and exploit the use of economies of scale in order to improve competitiveness and increase profitability of the operations; (5 hrs./week)
- Supervise the production of accurate and representative marketing material: This material, including but not limited to printed matter and Web-based applications, are to be communicated and promoted professionally; See [www.horizonship.us](http://www.horizonship.us) (1 hr./week)
- Responding to all inquiries, requests and ad hoc requirements of the Shipping and Insurance Broker Community and channeling all communication from this source to the various personnel; (2 hrs./week)[.]

On October 5, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

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

Upon review, counsel's assertions are not persuasive.

As a threshold matter, it must be noted that the petitioner's plans to expand its business or to hire additional staff members does not establish that the beneficiary will be employed in a managerial or executive capacity. 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). Accordingly, the petitioner's employment, or planned employment, of additional staff members is not relevant to the instant petition. Based on the payroll records and organizational chart pertaining to the time period in which the instant petition was filed, it appears that the petitioner only employed one person and that this employee will be "stepping down." Therefore, as

further explained below, the petitioner's business has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will develop policies, procedures, and objectives as well as set up "company systems and controls." However, the petitioner does not specifically define any of these policies, procedures, objectives, systems, or controls. Furthermore, the petitioner states that the beneficiary will supervise, coordinate, or manage the production of marketing materials and the performance of various tasks necessary to the provision of the petitioner's services. However, the petitioner does not explain what, exactly, the beneficiary will do in "managing" the performance of these tasks when he will be the sole employee of the business. Vague, executive-sounding duties and an inflated job title are not probative of the beneficiary actually performing qualifying duties as the petitioner's sole employee. Specifics are clearly an important indication of whether a beneficiary's duties will be 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).

Consequently, the petitioner has not established that the beneficiary will primarily perform managerial or executive duties as its "president" and temporary "general manager." To the contrary, it appears more likely than not that the beneficiary will primarily perform non-qualifying administrative or operational tasks inherent to the operation of a one-employee business. In addition to being vague, the job duties ascribed to beneficiary appear to concern primarily non-qualifying tasks and not managerial or executive duties. For example, the petitioner claims that the beneficiary will devote most of his time to developing infrastructure, interacting with the foreign employer, responding to inquiries, and "coordinating" the company's services. However, not only is the record not persuasive in establishing that the beneficiary's "coordination" of the company's services constitutes a qualifying duty, the remaining tasks appear to be operational or administrative tasks necessary to the petitioner's provision of a service. 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).

Also, the record is not persuasive in establishing that the beneficiary will be relieved of the need to perform the non-qualifying tasks inherent to the petitioner's business by a subordinate staff. As discussed above, the record indicates that the beneficiary will be the petitioner's sole employee. While the petitioner claims that the beneficiary will be relieved of the need to perform non-qualifying tasks by future employees, the

speculative employment of subordinate workers does not establish that the beneficiary will primarily perform qualifying duties immediately upon petition approval. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. Accordingly, it is more likely than not that the beneficiary will primarily perform the non-qualifying tasks necessary to the provision of the petitioner's services, e.g., freight tracking, contacting customers and consignees, customs tasks, and marketing services, rather than "manage" the provision of these services.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As indicated in the record, the beneficiary will be the petitioner's sole employee and will not immediately supervise any workers. Furthermore, while the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the tasks related to the function.

In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record indicates that the beneficiary will more likely than not primarily perform non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce with any certainty what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will primarily perform the tasks

necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (CIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9<sup>th</sup> Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

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

Beyond the decision of the director, the petitioner has failed to establish that it has a qualifying relationship with the foreign employer in Turkey.

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

In this matter, the petitioner has failed to establish that it and the foreign employer are qualifying organizations for two reasons.

First, the petitioner has failed to establish that the foreign employer truly owns and controls the United States operation, a Florida corporation. The petitioner claims in the Form I-129 to be 100% owned by the foreign employer, a Turkish company. However, not only has the petitioner failed to submit any evidence to substantiate this claim, the record contains inconsistencies which undermine this assertion. In support of its petition, the petitioner submitted a copies of its Forms 1120-A, U.S. Corporation Short-Form Income Tax Return, which indicate that no single individual or entity owns more than 50% of the petitioner's stock. Accordingly, it appears from the Forms 1120-A that the petitioner is not majority owned by anyone, including the foreign employer. It is also noted that the instructions to the Form 1120-A clearly prohibit its use for United States corporations having "foreign shareholders that directly or indirectly own 25% of more of its

stock." I.R.S. Form 1120-A (Instructions) (2006). The petitioner failed to explain why it repeatedly filed Forms 1120-A when the instructions to this form clearly prohibit its use by taxpayers who are principally owned by foreign individuals or entities. The petitioner also failed to explain why it averred in the Forms 1120-A not to be majority owned by a single interest. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Second, the record is not persuasive in establishing that the foreign employer is currently doing business. While the petitioner submitted various documents pertaining to the foreign employer's organization and its claimed business activities, none of the invoices or other business documents is translated. Therefore, the AAO cannot determine whether the evidence supports the petitioner's claim that the foreign employer is engaged in the regular, systematic, and continuous provision of goods and/or services. See 8 C.F.R. § 103.2(b)(3). As this evidence is not probative and cannot be accorded any weight in this proceeding, the petitioner has failed to establish that the foreign employer is a qualifying organization engaged in doing business. 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.

Accordingly, as the petitioner has failed to establish that it and the foreign employer are qualifying organizations, the petition will not be approved.

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

Counsel described the beneficiary's duties abroad in a letter dated April 9, 2007. As this letter is in the record, the job description will not be repeated here verbatim. Generally, the beneficiary is described as being the foreign employer's "director of operations" and as directing the foreign employer's finances, analyzing operations, implementing policies and objectives, and negotiating contracts.

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a managerial or executive capacity. First, counsel submitted a vague description of the beneficiary's job duties which fails to specifically describe the beneficiary's job duties abroad. Specifics are clearly an important indication of whether a beneficiary's duties were primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, *aff'd*, 905 F.2d 41. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. See sections 101(a)(44)(A) and (B) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

