

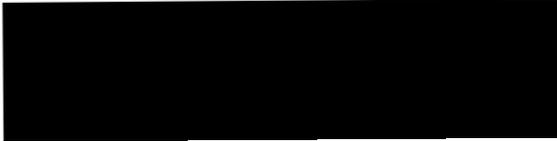


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File: EAC 08 107 51246

Office: VERMONT SERVICE CENTER

Date: NOV 03 2008

IN RE: Petitioner:

Beneficiary:



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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as its chief executive officer 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 Virginia corporation claiming to be a publishing and multimedia enterprise. The petitioner seeks to employ the beneficiary from March 15, 2008 until March 14, 2011. The director denied the petition after concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel disputes and addresses the director's adverse findings. The director's findings and counsel's arguments in response thereto will be addressed in a full decision below.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying

organizations as defined in paragraph (l)(1)(ii)(G) of this section;

- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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.

In support of the Form I-129, the petitioner provided a letter dated February 27, 2008 which listed the following description of the beneficiary's proposed responsibilities:

1. Oversee Production Operation and Expansion
  - A. Set specific company-wide goals and objectives for each newspaper, magazine and other service products of the company[.]
  - B. Oversee market research and analysis of competitors[.]
  - C. Develop and implement sales policies and programs[.]
  - D. Confer with [the s]ales [m]anager for specific sales and marketing strategies[.]
  - E. Confer with the [p]resident to develop and implement new online service projects for [the petitioner.]
  - F. Confer with key clients to understand goals and objectives, and resolve service problems via delegating to managers and directors of departments[.]
  - G. Supervise print shop contractor and manage [the] print budget[.]
  - H. Establish long-term goals for other mass media products such as radio and cable channel[s.]
2. Human Resources
  - A. Interview and hire new employees[.]
  - B. Plan and implement training programs for new team leaders[.]
  - C. Establish job descriptions and conduct team performance evaluations[.]
  - D. Appoint department heads, and assign or delegate responsibilities to them [.]
3. Finance and Budgeting
  - A. Manage investment fund and financing projects[.]
  - B. Review and authorize budget proposals presented by department managers and directors[.]
  - C. Authorized purchases, leases, and other expense categories, assigning and delegating responsibility to subordinate managers and directors[.]
4. General Affairs
  - A. Establish new departments as necessary and set department objectives, ensuring that department managers and directors understand and implement them[.]
  - B. Coordinate with the Korea office for collaboration[.]
  - C. Confer with other executive officers to discuss and formulate plans for various issues[.]

5. Public Relations

- A. Develop business alliances and partner companies for resources such as printing and distribution[.]
- B. Manage customer relationship and customer service[.]
- C. Develop customer-church training programs for newspaper distribution strategies[.]
- D. Develop and refine the company image and its brand name[.]
- E. Maintain [a] close relationship with the senior leadership at each customer-church and make presentations to church congregations[.]

The petitioner stated that it has grown to a staff of nine professionals and added that the beneficiary also manages thirteen employees within the foreign entity. The petitioner provided a list of nine employees, which included the beneficiary. The list disclosed each employee's compensation and further indicated that two of the employees are contracted on a part-time basis.

In a request for additional evidence (RFE) issued on March 11, 2008, the petitioner was instructed to provide a comprehensive description of the beneficiary's proposed job duties and to explain how the duties are managerial or executive in nature.

In response the petitioner provided a letter dated April 17, 2008, which indicated that the beneficiary would have five areas of responsibility. The beneficiary's first responsibility was listed as developing and ensuring that the three subordinate managers implement strategies to expound the production operations. The petitioner stated that to meet this responsibility, the beneficiary sets specific company-wide goals and objectives with regard to each newspaper, magazine, and other service products of the company. The petitioner also stated that the beneficiary oversees the work of a production manager, who oversees a design team leader and a team of editors and writers, who are employed by the U.S. entity and the foreign affiliate located in Korea. The petitioner referred to a weekly report of managers' goals and management objectives, claiming that both are set by the beneficiary.

The second duty associated with production operation strategies is overseeing market research and analysis of competitors. The petitioner specified that the sales and marketing manager actually conducts the market research, but stated that it is the beneficiary's responsibility to review the research. The example provided by the petitioner is a new internet tool the company has developed. The petitioner stated that while the sales and research manager conducted feasibility studies of the new internet tool and while the estimates and timeframes of production are determined by the production manager, the beneficiary compiles the information gathered by these subordinates to determine the potential success of the petitioner's newly-created internet tool "Wise Pastor." The beneficiary must assimilate the collected data, set a pricing scheme, and ensure that the sales and marketing manager designs new marketing material.

The third duty associated with production operation strategies is developing and implementing sales policies and programs and overseeing the sales and marketing manager. The four remaining duties associated with the same responsibility include conferring with the company's president to develop and implement new online service projects; conferring with key clients to understand goals and objectives and resolving service problems by delegating to line managers and their staff; supervising print shop contractors and managing the

print budget; and establishing long-term goals for other mass media products such as radio and cable channel.

The petitioner stated that the beneficiary is also responsible for managing human resources, which the petitioner stated includes the following duties: interviewing and hiring new department managers, who would then be in charge of recruiting and screening subordinate staff; planning and implementing training programs for new team leaders; establishing job descriptions and conducting team performance evaluations; and appointing department heads and delegating responsibilities to these individuals.

The beneficiary's third area of responsibility was listed as managing the company's finance and budgeting, which includes the following duties: managing investment fund and financing projects; reviewing and authorizing budget proposals presented by department managers and directors; and authorizing purchases, leases, and other expenses, and assigning and delegating responsibility to subordinate managers and directors.

The beneficiary's fourth area of responsibility was listed as overseeing general affairs to which the following duties were attributed: establishing new departments, setting department objectives, and ensuring that the objectives are understood by those who are assigned to implement them; coordinating the collaboration of the U.S. entity's administration manager and the foreign affiliate's production manager; and conferring with other executive officers and with the board of directors to formulate plans regarding other issues.

The beneficiary's fifth and final area of responsibility was listed as managing public relations, which includes the following duties: developing business alliances with partner companies for resources such as printing and distribution; managing customer relations and customer service; develop customer-church training programs for newspaper distribution strategies; developing and refining the company image and its brand name; and maintaining close relationships with the senior leadership at each customer-church and making key-note presentations at churches and conferences.

The petitioner's response also includes the following hourly breakdown of time allotted to each of the five responsibilities listed above: 20 hours were allotted to the beneficiary's first responsibility; ten hours to the second and fourth responsibilities, respectively; and five hours to the third and fifth responsibilities, respectively to total a fifty-hour work week. The petitioner did not, however, indicate how much time the beneficiary spends performing each of the duties underlying the respective responsibilities.

In a decision dated April 30, 2008, the director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. While the AAO will affirm the denial, the director made a number of comments whose relevance to the issue of the beneficiary's employment capacity is questionable. Such comments will be duly addressed herein.

First, the director noted that the beneficiary's salary does not appear to be "commensurate with a bona fide manager or executive in a major metropolitan business market such as Washington, D.C." The AAO notes that the director may not rely on the beneficiary's salary as an indicator of whether the prospective employment of that beneficiary falls within the legal definitions of managerial or executive capacity. There is also no legal requirement that the beneficiary's employment in the United States must be on a full-time basis. Therefore, the director's comment indicating that a beneficiary's salary is a factor of whether he or she is employed in a qualifying capacity is erroneous and is hereby withdrawn.

That being said, the petitioner in the present matter has indicated that the beneficiary would be employed in the United States on a full-time basis and would be compensated \$60,000 annually. It is therefore reasonable for the director to question the validity of these claims in light of documentation on record, which shows that the beneficiary's compensation thus far is far less than the amount indicated in Part 5, No. 6 of the Form I-129. 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). While the petitioner claims that the beneficiary was being compensated by the foreign entity until the latter portion of 2007, which would explain the discrepancy between the proffered wage and the wages actually paid in 2007, the petitioner's claim must be corroborated with documentary evidence. 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)). In the present matter, such documentation has not been provided.

The director also commented on the beneficiary's level of education and further questioned whether a college degree is required of the beneficiary's proposed position within the U.S. entity, thereby implying that the petitioner must meet an additional underlying burden. The AAO notes, however, that there is no statutory or regulatory requirement as to the beneficiary's level of education as an L-1A nonimmigrant other than showing that "the alien's prior education, training, and employment qualifies [him] to perform the intended services." 8 C.F.R. § 214.2(l)(3)(iv). As such, the AAO hereby withdraws the director's comment.

Notwithstanding the above, the director made a number of key findings that ultimately led to the conclusion that the petitioner lacks the ability to relieve the beneficiary from having to primarily perform non-qualifying tasks. Specifically, the director pointed out the inconsistent information as to the petitioner's staffing composition, which included three employees, who, according to the petitioner, were being compensated by the foreign entity. It is noted, however, that 8 C.F.R. § 214.2(l)(14)(ii)(D) expressly states that the petitioner must provide evidence of wages paid to employees during the beneficiary's employment in the United States in a managerial or executive capacity. *See also 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)). Thus, the petitioner must provide evidence documenting its employment of foreign workers.

In the present matter, the petitioner asserts that two of the management positions as well as the position of assistant editor are filled by individuals who are compensated by the foreign entity. The petitioner seemingly argues that these employees are shared by itself and the foreign entity, even though the foreign entity actually pays their salaries. In the appellate brief, counsel maintains the petitioner's flawed reasoning, affording little consideration to the director's comments which properly question the petitioner's arrangement in which the petitioner operates as a branch of the foreign entity while simultaneously holding itself out as an entity wholly separate from its claimed foreign counterpart. However, as stated above, the petitioner cannot merely claim that it receives services from the employees of a separate entity without establishing that the petitioner is actually compensating for the services such employees are providing. As the petitioner has not provided the required documentation to support the assertions discussed herein, the AAO must question the beneficiary's role in carrying out the duties that are attributed to the production manager, administrative manager, and

assistant editor, none of whom has been established as being actually employed or compensated by the U.S. entity.

Additionally, the AAO notes that the information contained in the petitioner's 2007 Form W-3 does not match the sum total of the Form W-2s submitted for the same year. Specifically, the petitioner's Form W-3, which was submitted in response to the RFE, indicates that the petitioner paid six employees a total of \$128,040. However, the petitioner provided only five W-2 statements for the same year, totaling \$119,639.33, or \$8,400.67 less than the amount claimed in the corresponding Form W-3.

On appeal, counsel explains that a clerical error resulted in the petitioner's failure to submit a Form W-2 for ██████████, the sixth employee whom the individual identified as the petitioner's editor. In support of this claim, the petitioner provides a copy of ██████████'s 2007 Form W-2 showing a total of \$8,000 in wages. It is noted, however, that there nevertheless remains a discrepancy in that the total shown in the Form W-3 is \$400.67 more than the total of the W-2s that were issued for the same year. This discrepancy has not been resolved with the documentation submitted thus far. *See Matter of Ho*, 19 I&N Dec. at 591-92. Additionally, the AAO notes that in its list of employees, which the petitioner provided in response to the RFE, the petitioner indicated that ██████████ is a contractual employee, who telecommutes from her office in California and is compensated \$1,000 monthly. The fact that the petitioner now submits a Form W-2, thereby suggesting that ██████████ is a salaried or wage employee rather than an independent contractor, is inconsistent with the petitioner's prior claim and causes the AAO to question the validity of the photocopied Form W-2, which has created the inconsistency discussed herein.

The director also found that the petitioner relied on general managerial functions to describe the beneficiary's proposed employment and thereby failed to identify specific duties that can be deemed managerial or executive within the context of the petitioner's current staffing arrangement.

On appeal, counsel vehemently disputes the above finding, citing the beneficiary's educational and career achievements as well as his claimed professional staff of subordinates. However, as previously discussed, the beneficiary's level of education is neither a positive nor a negative factor in determining whether the job duties he would carry out in his proposed position with the U.S. entity are primarily within a managerial or executive capacity. Similarly, the beneficiary's prior career achievements will not factor into a determination of the beneficiary's employment capacity in the United States. While the beneficiary's subordinate staff and their related duties are contributing factors in this discussion, the documentation in the present matter is not persuasive in establishing whom the petitioner employed at the time the Form I-129. It follows, therefore, that the AAO cannot determine with any degree of certainty that the petitioner had a sufficient support staff available to relieve the beneficiary from having to primarily perform duties of a non-qualifying nature.

Additionally, 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). In the appellate brief, counsel argues that the petitioner has provided a comprehensive description of the beneficiary's job duties, which establish the qualifying nature of the proposed position. However, a thorough review of the position descriptions on record indicates that counsel's arguments are not persuasive. Namely, the first responsibility cited in the petitioner's RFE response attributes 20% of the beneficiary's time to working with subordinate managers to implement strategies that will ensure expansion of production operations. Similarly, the second

responsibility of managing human resources and the fourth responsibility of overseeing general affairs also involve the beneficiary's claimed oversight. Specifically, the former involves appointing department heads and assigning their responsibilities, while the latter involves overseeing department managers in their respective implementation of objectives set by the beneficiary. As discussed above, the petitioner has not provided adequate documentation to establish that it actually employs the management staff that is supposed to assist the beneficiary in carrying out these responsibilities. Absent this evidence, it would appear that the beneficiary would be required to directly perform the duties that he is claimed to oversee. The petitioner also made no clear distinction between objectives and responsibilities in the context of its business. Therefore it is unclear why these seemingly similar job duties are listed under three different responsibilities.

Further, even if the AAO were to disregard the adverse findings regarding the petitioner's staffing, the description itself lacks sufficient evidence of primarily managerial or executive duties. More specifically, the petitioner referred to a sample of a weekly report as an example of how the beneficiary sets company-wide goals and objectives. However, a review of the report shows that the objectives set are overly broad and do not specify any subordinate managers in a way that would indicate how duties are dispersed among the petitioner's divisions or departments. Rather, the weekly report generally conveys the petitioner's goal to sell its service by marketing to a targeted group of potential buyers within the petitioner's specific industry. As the petitioner failed to attribute a proportion of time to specific duties, there is no indication as to how much of the beneficiary's time has been allotted to the preparation of reports such as the one provided in response to the RFE. While the petitioner also indicated that the beneficiary would review the research and analysis of the sales and marketing manager, again signifying managerial or executive oversight, there is no indication as to the amount of time allotted to this duty or to other duties that may be within a qualifying capacity.

That being said, while some of the duties cited by the petitioner appear to be within a qualifying capacity, including his oversight of a documented managerial employee, a number of the duties do not appear to be qualifying. Duties that fall into the latter category include conferring with clients; supervising print shop contractors, i.e., not print shop "employees;" and making sales presentations as a means of managing public relations. While the statute and regulations permit the beneficiary to carry some non-qualifying duties, it must be firmly established that the non-qualifying duties do not comprise the primary portion of the beneficiary's time, as 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). Thus, it stands to reason that a determination of whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial or executive. *Id.* Here, the petitioner has not documented what proportion of the beneficiary's duties would be in a qualifying capacity and what proportion would not be. Therefore, even if the petitioner were to specifically identify all of the duties to be performed by the beneficiary, in order to meet the statutory requirements the petitioner would also need to establish that the time spent performing qualifying duties would be greater than that spent performing the non-qualifying ones.

In the present matter, neither the petitioner's organizational hierarchy at the time of filing nor the job description attributed to the beneficiary's proposed employment establish that the primary portion of the beneficiary's time would be devoted to duties within a qualifying capacity. On the basis of this finding and in

light of the analysis provided herein, the AAO concludes that the director's decision was well founded and must not be withdrawn.

Lastly, beyond the decision of the director, the petitioner has failed to establish that it has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

A visa petition which involved the opening of a "new office" may be extended by submitting evidence that the petitioner "has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). "Doing business" is defined in part as "the regular, systematic, and continuous provision of goods and/or services."

In this matter, the petitioner claims to be a sales-based operation that generates income from high volume sales of its publishing services to the many Korean churches within the United States. While the petitioner has provided a number of tax documents including its quarterly and annual tax returns, these documents are not proper indicators of ongoing business transactions. As the petitioner has not provided any sales invoices to establish that it has sold its services in a manner defined above, the AAO cannot conclude that it meets the regulatory requirement cited in 8 C.F.R. § 214.2(l)(14)(ii)(B).

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). Therefore, based on the additional ground of ineligibility as cited above, this petition cannot be approved.

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

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

**ORDER:** The appeal is dismissed.