U.S. Department of Homeland Security
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Washington, DC 20529

D-7

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 271 51343 Office: TEXAS SERVICE CENTER Date: AUG 03 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

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DISCUSSION: The Director, Texas 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 provides Internet services. It currently employs the beneficiary as its project manager, and seeks to extend the beneficiary's employment for three years. The petitioner filed a petition to extend the classification of the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary would not be employed in the U.S. entity in a primarily managerial or executive capacity.

In an appeal dated February 20, 2003, the petitioner explains that as an "e-trade business," the petitioner's work is outsourced to independent contractors whom the beneficiary manages. In support of the appeal, the petitioner submits a letter and articles explaining "eLance" businesses, which utilize freelancers or "eLancers."

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.
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> (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.
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> (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 management or executive capacity; and

(e) Evidence of the financial status of the United States operation.

The issue is whether the beneficiary would be employed in the petitioning organization in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) 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;

(3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(4) 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), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a September 12, 2002 letter submitted with the nonimmigrant petition, the petitioner stated that as the project manager for the U.S. company, the beneficiary is responsible for supervising and developing the company's projects, websites and systems, and supervising the work of the projects department. The petitioner explained that the beneficiary has the authority to hire and fire personnel, and works with the petitioner's general manager to set the department's goals, strategies, policies and procedures. The petitioner submitted the business plan of the petitioning organization in which the beneficiary's position is described as "managing the operation of the site," including the day-to-day business of the company, researching and evaluating new technologies, planning web site design, developing project plans, and performing usability testing. Other proposed employees included an image art department manager, customer service and sales representatives, programmers, and designers. In a chart forecasting personnel expenditures, the petitioner indicated that during the year 2002 the employees would include a general manager, project manager, art manager, and customer service and sales representative.

In a request for evidence dated October 10, 2002, the director asked that the petitioner submit the following: (1) an organizational chart of the U.S. corporation, including the name, job position, and start date of each employee; (2) copies of the petitioner's Florida quarterly wage reports for the periods ending in December 31, 2001 through June 30, 2002; (3) a copy of the Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for the year 2001; (4) photographs of the petitioner's interior and exterior premises; and (5) a statement describing subordinates of the beneficiary, including a description of their job duties, or if the beneficiary does not supervise other employees, a description of the essential function managed by the beneficiary in the petitioning organization.

The petitioner responded on December 26, 2002. In the response, the petitioner stated that the U.S. company is an "e-Lance" business, meaning the business "[does] not need many employees in the company." The petitioner explained that the work of the U.S. entity instead "requires high technology and knowledge, people who are capable to [sic] develop [sic] interactive and automatized interphases, so that our sites will be handled automatically without the need of human intervention." The petitioner also explained that as project manager, the beneficiary is presently supervising six employees – a development team manager, three web developers, a graphic designer, and a character sketcher – and included agreements outlining the capacity in which they are employed. The petitioner included an organizational chart, which identified the above-listed individuals as the beneficiary's subordinates, and noted that each resides in Argentina.

In addition, the petitioner submitted articles in support of its claim that as an "e-trade business," the U.S. company does not require many employees, but instead outsources its work to independent contractors.

In a decision dated January 23, 2003, the director determined that the beneficiary would not be employed in the U.S. entity in a primarily managerial or executive capacity. The director stated that while the beneficiary possesses the title of project manager, the record does not demonstrate the employment of any subordinate managers, and therefore, the beneficiary would actually be performing the day-to-day operations of the company. The director also stated that the record failed to establish that the beneficiary would be performing an essential function of the organization rather than supervising subordinate employees. The director concluded that the

petitioner had not grown to a point where the beneficiary would function at a senior level within the organizational hierarchy. Consequently, the director denied the petition.

On appeal, the petitioner asserts that since the beneficiary's employment in the United States in September 2001, the beneficiary "has been performing duties of a managerial/executive capacity." The petitioner states that the beneficiary controls the work of professionals, manages an essential function within the organization, has the authority to hire and fire employees or recommend other personnel actions, and exercises discretion over the day-to-day operations of the organizational function. The petitioner further states that because the U.S. entity "is based in a globalized world with no frontiers," the fact that the beneficiary's subordinates are not physically present in the United States does not prevent classification of the beneficiary as a manager. The petitioner again submits the corporation's annual and quarterly tax returns and articles explaining the shift to an "e-Lance economy."

On review, the record does not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. 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). Moreover, a petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. Finally, as the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition, the AAO will adjudicate this appeal based on the record before the director at the time of her review. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In the present matter, the petitioner stated on appeal that the beneficiary is performing in a managerial/executive capacity. The petitioner, however, did not provide a sufficient description of the beneficiary's job duties that would substantiate its claim that the beneficiary would be employed as both a manager and an executive. The brief job description provided in the petitioner's September 12, 2002 letter fails to identify the specific managerial or executive job responsibilities of the beneficiary. Additionally, several of the job duties outlined in the September 2002 letter and on appeal, such as "the authority to hire and fire," "set[ting] policy, strategy, procedure, and goals for the Project Department," controlling the work of professionals, and exercising discretion over the company's daily operations, are simply restatements of the statutory requirements. *See* sections 101(a)(44)(A) and (B) of the Act. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The actual duties themselves reveal the true nature of the employment. *Id.* The petitioner's conclusory assertions fail to establish the beneficiary's employment as a manager and an executive.

Moreover, the record does not demonstrate that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees. The petitioner asserts on appeal that the beneficiary "controls the work of professionals in the field," yet the petitioner offers minimal evidence substantiating its claim. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary

or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner submitted certificates for one of the beneficiary's four subordinates indicating that he completed courses in English and Dreamweaver 3, which involves the creation of web pages, and received a diploma as an electronics technician.[1] The petitioner has not, in fact, established that an advanced degree is actually necessary to perform as a web developer or a graphic designer, who are among the beneficiary's subordinates. 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).

Furthermore, even if the beneficiary's subordinates, and specifically the "development team manager," were deemed to be supervisory, professional, or managerial, the record does not conclusively establish that the beneficiary would supervise or control their work as required in the regulation at 8 C.F.R. § 214.2(l)(1)(B)(2). The petitioner stated that the beneficiary's subordinates are independent contractors or freelancers in Argentina. While the AAO recognizes that an independent contractor may be considered when determining whether the beneficiary supervises others, the petitioner has not offered evidence that the beneficiary actually supervises or controls the work of the independent contractors or freelancers. *See* 9 FAM 41.54 N8.2-1. In fact, the employment agreements between the petitioning organization and the independent contractors state that with regard to the relationship between the two parties, the "[petitioner] is interested only in the results to be achieved, and the conduct and control of the work will lie solely with [the] contractor." The AAO cannot therefore conclude that the beneficiary would supervise or control others.

The petitioner has also failed to substantiate its claim on appeal that the beneficiary manages an essential function within the organization, or a department or subdivision of the organization. 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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to

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[1] Although the petitioner stated on appeal and in its response to the director's request for evidence that the beneficiary has six subordinate employees, the record indicates that two were hired subsequent to the filing of the present petition. Again, 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. at 249.

produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Based on the evidence presented, the AAO cannot conclude that the beneficiary would be employed in the petitioning organization in a primarily managerial or executive capacity as required in the regulation at 8 C.F.R. § 214.2(l)(3)(ii).

Beyond the decision of the director, an additional issue is whether the foreign and U.S. entities are qualifying organizations as required in 8 C.F.R. § 214.2(l)(3)(i). The petitioner indicated on the nonimmigrant petition that the U.S. entity is a wholly owned subsidiary of the beneficiary's foreign employer. The petitioner submitted a stock certificate identifying the foreign employer as the owner of the petitioner's 1,500 shares of authorized common stock, which have a par value of $1.00 per share. However, Schedule L of the petitioner's 2001 U.S. Corporation Income Tax Return reflects common stock in the amount of $17,719. Moreover, on Schedule K of the tax return the petitioner answered in the negative to two questions pertaining to ownership of the corporation's voting stock by a foreign person, individual or corporation during or at the end of the tax year. 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). For this additional reason, the appeal will be dismissed.

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).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.