PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 024 54222 Office: TEXAS SERVICE CENTER Date: AUG 04 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

**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 is an import-export company. It currently employs the beneficiary as its president-managing director, 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 U.S. business would not support employment of the beneficiary in a primarily managerial or executive position.

In an appeal dated February 10, 2003, counsel states that Citizenship and Immigration Services (CIS) erred in its denial of the petition, and claims that the beneficiary's duties are managerial or executive.[1] Counsel submits a brief and additional documentation in support of the appeal.

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.
>
> (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:

---

[1] Counsel incorrectly states that the beneficiary is employed in a qualifying capacity pursuant to 8 C.F.R. § 214.2(l)(9)(ii)(C). The AAO notes that the proper regulation for the extension of a petition involving a new office is 8 C.F.R. § 214.2(l)(14)(ii).

(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 in this proceeding is whether the beneficiary would be employed in the U.S. entity 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.

On the petition for a nonimmigrant visa, the petitioner stated that the beneficiary, as president of the U.S. company, would "continue the activities started last year," and would be "in charge of developing and executing contracts for the services provided." In the attached documentation, counsel provided the beneficiary's resume and a list of employees, which included the beneficiary and two additional employees.

In a request for additional evidence, dated December 4, 2002, the director requested that the petitioner submit the job titles of each of the employees of the U.S. corporation. Counsel responded on December 11, 2002, stating that in addition to the beneficiary, the petitioner employs a sales manager, who is responsible for marketing and export promotions, and an administrative assistant-secretary.

In a decision dated January 9, 2003, the director concluded that the beneficiary would not be employed in a primarily managerial or executive capacity. Specifically, the director stated that the beneficiary would not manage or direct the management of a department, subdivision, function, or component of the organization, nor would the beneficiary supervise supervisory, professional, or managerial employees who would relieve him from performing non-qualifying job duties. The director concluded that the petitioning organization had not grown to a point where the beneficiary would be primarily employed as a manager or an executive. Consequently, the director denied the petition.

In a February 10, 2003 appeal, counsel states that "the [b]eneficiary's duties as president have been that of a manager or executive as defined under law." Counsel explains that the beneficiary's responsibilities include planning and developing business policies in the areas of sales, marketing, labor and finance, implementing and supervising business operations, including work schedules, deadlines, salaries and commissions, negotiating contracts, supervising finances, training personnel in marketing and sales, preparing market analyses, and making sales calls to distributors. Counsel further explains that the petitioner employs three permanent employees and two independent sales representatives, and has employed up to forty-four workers on temporary assignments at trade fairs sponsored by the petitioner. Counsel provided Internal Revenue Service (IRS) Form W-9, Request for Taxpayer Identification Number and Certification, for twelve of the petitioner's temporary workers.

On review, the record does not demonstrate that the beneficiary would be employed in the U.S. entity 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). Additionally, as the petitioner is a new office, the regulations clearly indicate that the petitioner shall submit a statement of the duties the beneficiary performed and will perform in the U.S. entity under the extended petition, and a description of the organizational staffing that would support the beneficiary in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(14)(ii)(C) and (D).

In the present matter, the petitioner failed to submit the necessary evidence required by the regulations to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Moreover, the petitioner does not clarify whether under the extended petition the beneficiary would be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Counsel claims on appeal that the beneficiary's job duties are "managerial/executive in nature" and "have been that of a manager or executive." A petitioner may not claim to employ a beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). If a petitioner is representing the beneficiary is both a manager and executive, the 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. Counsel has not satisfied this burden. 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).

Additionally, the job descriptions provided by counsel demonstrate that the beneficiary is employed as neither a manager nor an executive, and is instead performing the services of the business. Counsel explained that the beneficiary was responsible for negotiating contracts, training personnel, performing market analyses, reviewing statistical data, and contacting distributors to offer the petitioner's services. These job duties do not fall under traditional managerial or executive duties as defined in the statute. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the record does not substantiate counsel's claim on appeal that the petitioner's employees are "able to perform the necessary tasks and business obligations called for by its clients," and would relieve the beneficiary from performing non-qualifying duties. In fact, the job description for the petitioner's two salesmen does not include the responsibility of actually selling the petitioner's products.[2] Absent additional evidence, it is reasonable to conclude that the beneficiary is solely responsible for selling the petitioner's products and services. An employee who primarily performs the tasks necessary to 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).

Counsel correctly notes on appeal that the AAO may consider the petitioner's use of independent contractors in the analysis of managerial or executive capacity. However, counsel's mere assertion on appeal that the petitioner has previously employed up to forty-four workers on temporary assignments is not sufficient. Counsel has not offered any additional explanation as to the job duties performed by the independent contractors, and whether they relieve the beneficiary from performing non-qualifying duties. Counsel has also failed to provide evidence, such as contractual employment agreements, as to whether the beneficiary actually has authority over the work of the temporary workers. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the evidence presented, the AAO cannot conclude that the beneficiary would be employed in a primarily managerial or executive capacity in the U.S. entity.

---

[2] Counsel states on appeal that the salesmen are responsible for "provid[ing] information to clients about services and oversee[ing] [the] Internet search of promotional products."

Beyond the decision of the director, the record does not conclusively establish that a qualifying relationship exists between the foreign and U.S. entities as required at 8 C.F.R. § 214.2(l)(1)(G)(1). The petitioner stated that the U.S. entity is a subsidiary of the foreign corporation, and presented a stock certificate identifying the foreign company as the owner of the petitioner's ten shares of authorized stock. The U.S. company's balance sheet, however, does not reflect the correct amount of capital stock sold, which would be $5,000.[3] Rather, the balance sheet indicates capital stock in the amount of $2,380. The petitioner has not offered an explanation for the discrepancy. 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.

[3] Article IV of the petitioner's Articles of Incorporation states that the corporation has the authority to issue ten shares at an individual par value of $500.00.