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

U.S. Citizenship and Immigration Services

D7

[redacted]

NOV 01 2004

File: WAC 03 147 51974 Office: CALIFORNIA SERVICE CENTER Date:

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)

IN 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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Delaware in December 1990. It is an independent film production and distribution company. It seeks to temporarily employ the beneficiary as its financial director. Accordingly, the petitioner endeavors to classify the beneficiary as a 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 claims that it is a wholly owned subsidiary o[redacted] LTD., located in Durban, South Africa.

The director denied the petition concluding that the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the beneficiary's proposed job duties are executive and managerial.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). 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) further 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 issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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
>
> 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), provides:

> The term "executive capacity" means 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 an attachment to the I-129 petition, the petitioner stated that the beneficiary would manage the corporation and its staff and the duties would include:

1. Accounting functions including the preparation of financial statements.
2. Liaising with the Corporations auditors.
3. Negotiating contracts on behalf of the company.
4. Receiving and evaluating budgets and feasibilities on various projects submitted to the Corporation.
5. Prepare various reports for submission to the board of directors.
6. Liaising with Corporation's attorneys.

The petitioner stated on the I-129 petition that it currently employed two individuals.

On April 15, 2003, the director requested: (1) a detailed description of the beneficiary's specific job duties including the percentage of time to be spent on each duty; (2) an indication whether the beneficiary would have other supervisory, professional, or managerial employees under his direct supervision in the U.S.; and, (3) a list of all current employees in the U.S., including names, job titles and duties, entry date of employment, education levels, and salaries/wages.

In an April 25, 2003 response, counsel for the petitioner submitted the same job description but instead of indicating that the beneficiary would manage the corporation, indicated that the petitioner's staff was responsible for the duties specified, under the beneficiary's supervision. The list of duties included a percentage of time allocated to each of the duties:

1. Accounting functions including the preparation of financial statements. 15%
2. Liaising with the Corporations auditors. 15%
3. Negotiating contracts on behalf of the company. 15%
4. Receiving and evaluating budgets and feasibilities on various projects submitted to the Corporation. 30%
5. Prepare various reports for submission to the board of directors. 10%
6. Liaising with Corporation's attorneys. 10%

Counsel for the petitioner indicated that the beneficiary would oversee a proposed staff with the above duties and the staff would spend the percentage of time listed on each of the duties. Counsel for the petitioner expressed the petitioner's desire to expand, specifically with a new accounting department. Counsel also included the petitioner's March 5, 2003 letter confirming the beneficiary's employment and listing the beneficiary's duties as the duties initially described. Counsel acknowledged the petitioner currently employed two individuals and listed the positions as creative director and production coordinator. The petitioner indicated that the petitioner's creative director was responsible for finding, developing, and creating story ideas for motion picture entertainment. The petitioner stated that the production coordinator for development was responsible for facilitating film element delivery, administration, assisting the chief executive officer of the company, and handling open writing assignments.

The director determined that the record did not sufficiently demonstrate that the beneficiary would be employed in a position directing the management of the organization. The director observed that the description of the beneficiary's duties included duties that traditionally were not managerial or executive duties. The director concluded that the beneficiary would be performing all aspects of the petitioner's day-to-day operations and would not be employed in a primarily managerial or executive capacity in the United States.

On appeal, counsel for the petitioner submits an exhibit prepared by the beneficiary. The exhibit indicates that the beneficiary would effectively be senior to the two existing employees and that the beneficiary would be in charge of a major component or function of the petitioner. The petitioner lists some of the functions as:

(a) Be responsible for directing activities of existing staff.
(b) Identify projects to be considered for production.
(c) Evaluate viability and risks of projects.
(d) Produce detailed budgets.
(e) Produce or evaluate detailed financial reports.
(f) Prepare, negotiate and finalize contracts on business deals both for production and distribution of the picture.
(g) Prepare participant reports on pictures and also arrange for payments.
(h) Conduct production audits on pictures.
(i) Liaise with holding company on business aspects.
(j) Determine policy, budgets, evaluations and operation of the petitioner.
(k) Liaise with financiers and banking institutions on behalf of petitioner.

The petitioner also stated that the beneficiary would: establish goals and policies and determine which projects merit evaluation and development; decide funding and time allocation and make decisions in negotiations; be responsible to the management of the company; manage all aspects of the work and supervise projects; have the right to hire or fire personnel; and, have full discretion over the day-to-day operations of all aspects of the personnel, business, and projects..

Counsel also submits copies of videotapes and lists of productions that the beneficiary has executive produced in the past.

The petitioner's appeal is not persuasive. The submission of videotapes and lists of productions does not address whether the beneficiary's proposed position will be managerial or executive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's initial description of the beneficiary's duties includes preparing financial statements, negotiating contracts, evaluating budgets, and preparing reports for the board of directors. Neither the petitioner nor counsel explains how these tasks comport with the definitions of managerial or executive capacity. Moreover, preparing financial statements, negotiating contracts, and evaluating budgets are not traditionally managerial or executive duties. 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).

In response to the director's request for evidence, the petitioner implies that the petitioner's staff would be responsible for the duties initially described. However, when the petition was filed, the petitioner employed only two individuals, neither of whom were held responsible for the accounting functions, negotiating contracts, evaluating budgets, or preparing reports, according to the petitioner's description of their duties. As such, the beneficiary would be the individual responsible for performing the various functions outlined. The petitioner's plan to expand the accounting department is not relevant to this proceeding. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Finally, the petitioner's belated description of the beneficiary's duties on appeal does not contribute to a conclusion that the beneficiary is eligible for this visa classification. First, a petitioner that has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency cannot offer the evidence for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Second, even if the AAO accepted the lengthier description of the beneficiary's duties offered on appeal, the description is not comprehensive and does not establish the beneficiary's eligibility. The petitioner continues to list duties that the beneficiary will perform on behalf of the petitioner. The petitioner does not substantiate that it employed sufficient staff when the petition was filed to relieve the beneficiary from performing primarily non-qualifying duties. 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). Further, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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.). Finally, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

In sum, the record does not establish that the beneficiary's proposed position will be primarily managerial or executive. The petitioner's description of the beneficiary's duties shows that the beneficiary will be primarily responsible for performing the petitioner's accounting functions. The petitioner's attempt to expand the duties of the beneficiary on appeal will not be considered. The petitioner has not provided sufficient evidence to establish that the beneficiary's assignment for the petitioner would be primarily managerial or executive. The record does not contain sufficient evidence to overcome the director's decision on this issue.

Beyond the decision of the director, the petitioner has provided confusing evidence regarding the petitioner's ownership and control. The petitioner stated on the petition "[The beneficiary] is 1/3 owner of the foreign company and 17.5% owner of the US company. The foreign company owns 300 shares of stock in the US company and US company owns 17.5% of stock in the foreign company." The petitioner has submitted its stock transfer ledger showing that it issued 300 shares to Distant Horizon Ltd. in July 1986 and that the 300 shares were subsequently transferred to Videovision Entertainment (Pty) Ltd. in May 2002. The petitioner also submits its stock certificate number 2 showing that 300 shares had been issued to Videovision Entertainment (Pty) Ltd. The record does not contain sufficient information to clarify whether the beneficiary owns an interest in the petitioner or how the petitioner could issue stock in 1986 prior to its incorporation in 1990. 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 petition will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER**: The appeal is dismissed.