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

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 100 51558 Office: TEXAS SERVICE CENTER Date: OCT 10 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy
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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 filed this nonimmigrant petition seeking to extend the employment of its general manager as an L-1A nonimmigrant intracompany transferee pursuant to § 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 in the State of Florida that offers visual and video product services. The petitioner claims that it is the affiliate of the beneficiary's foreign employer, located in Santa Fe de Bogotá, Colombia. The petitioner now seeks to extend the beneficiary's stay for three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel asserts in a lengthy brief that the beneficiary, who would be supported by two managers and a secretary, would be employed by the petitioner in a managerial capacity. Counsel also contends that, in the alternative, the beneficiary should be considered to be employed as an executive or functional manager.

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.
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> (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) 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 in the present proceeding is whether the beneficiary would be employed by the U.S. 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-

(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) 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

(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 a letter submitted with the nonimmigrant petition, dated February 19, 2003, counsel outlined the requirements for establishing eligibility for L-1A classification. Counsel provided the following explanation as to the beneficiary's employment in a qualifying capacity:

> [The beneficiary] is responsible for managing the U.S. entity and has the [sic] discretion over operations decisions for the company. He manages an essential function of the organization and is the organization['s] top manager. He negotiates contracts on behalf of the corporation and deals with the U.S. supplier of goods. He manages the essential function within the organization of overseeing the organization and selling the products to be distributed in the U.S., Colombia, and other regions in South America. He directly supervises lower level managers and has the authority to hire and fire or recommend employees as well as other personnel actions (such as promotion and leave authorization). [The beneficiary] also functions at the highest level within the organizational hierarchy or with respect to the function managed. [The beneficiary] also exercises discretion over the day-to-day operations of the activity or function for which he has authority. However, [the beneficiary] is not involved in day-to-day operations as his lower level staff manage daily tasks.

Counsel provided the following allocation for the time the beneficiary would spend on particular job responsibilities:

(5%) Networking with business industries in [the] community to identify and cultivate new information sources, attend trade shows and conferences to keep abreast of the industry.
(15%) Evaluate and review the services ultimately provided by the company to ensure it meets proper specifications as per customer, and the products to ensure conformity with standards.
(10%) Identify new markets for penetration and develop marketing strategy accordingly.
(10%) Maintain regular communication with the foreign parent company.
(60%) Monitor the activities of all employees, including the Sales Manager, Administrative Manager and Administrative Assistants, and hiring of new employees. Manage the overall activities of the company; handle and/or supervise the administration and finances of the company.

Counsel further provided a job description for the three employees reporting to the beneficiary: sales manager, administrative manager, and administrative assistant. Counsel stated that the job descriptions prove that "the employees in the U.S. entity manage all day-to-day activities," thereby allowing the beneficiary to

perform only managerial functions. Counsel submitted resumes for the beneficiary and the petitioner's three employees as evidence of their qualifications.

In an additional letter submitted with the petition, dated February 18, 2003, the beneficiary, as the general manager for the petitioning organization, stated the following:

> I hold the position of General Manager of the American corporation. This position is a key managerial position in our US company as I direct the management of the organization, plot strategies for the expansion of our business in North Miami Beach, develop business objectives and time tables within which they are to be completed, implement the organization's policies on a day-to-day basis, and improve communications between the U.S. and Colombian companies. I am also responsible for the overall performance of the organization, including sales, marketing, purchasing, and finances.
>
> As General Manager, the position also entails networking with business industries in [the] community to identify and cultivate new information sources, attend trade shows and conferences, negotiate contracts and authorize purchases, control budgets and coordinate with the foreign entity the strategies and planning of purchases, and evaluate and review the services provided by the company to ensure it meets proper specifications as per customer. Additionally, I handle all personnel decisions for [the petitioner]. I have the responsibility for retaining, dismissing and placing all of [the petitioner's] employees within the United States as necessary, as well as overseeing lower level management, and training of employees.

In a request for evidence, dated March 5, 2003, the director noted that the U.S. organization employs four full-time employees, three of which have managerial titles. The director asked that the petitioner "explain how a limited-sized audio/visual business can justify having seventy-five percent of its' [sic] workforce in a managerial capacity."

Counsel responded in a letter dated April 3, 2003. Counsel stated that neither the Act nor the regulations require that the petitioner provide an explanation on why it employs three managers. Counsel cited *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1574 (N.D. Ga. 1988), *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1107 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990), and an unpublished AAO decision as evidence that a small staff is not indicative of whether the beneficiary is employed in a primarily managerial or executive capacity. Counsel further stated that these decisions indicate that when determining employment in a qualifying capacity, Citizenship and Immigration Services (CIS) "should not place any emphasis in [sic] the size of the operation."

In a decision dated April 8, 2003, the director stated that the petitioner has not demonstrated that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization, nor has the petitioner established that the beneficiary would be involved in the supervision and control of other supervisory, professional, or managerial employees. The director concluded that the majority of the beneficiary's time would be spent on nonmanagerial, day-to-day operations of the business, and therefore, the beneficiary would not be engaged in primarily managerial duties. The director stated that "[u]nderscoring this [conclusion] is the fact that three of the four workers for the petitioner have managerial titles and, given their job duties, serve in a de facto managerial capacity." The director noted that it is not the

norm in corporate America for a business to have this high a percentage of its workforce employed as managers. Accordingly, the director denied the petition.

In an appeal filed May 8, 2003, counsel contends that CIS may not determine managerial capacity based solely on either the titles of the lower-level managers and employees, or the number of managers and employees employed by the U.S. entity. Counsel also claims that CIS did not specifically explain why the beneficiary does not qualify as a manager.

Counsel again describes the subordinate personnel, and states that both the sales and administration managers are in charge of the petitioner's essential functions and are clearly managed by the beneficiary. Counsel contends that the director's reasoning, which counsel states would require the employment of additional employees below the two managers, is incorrect. Counsel also claims that the director neglected to analyze the functions of the petitioner's employees in order to determine whether the beneficiary is performing primarily managerial job duties.

Additionally, counsel states that CIS never questioned whether the beneficiary is the petitioner's "top manager," and therefore contends that "[t]his alone is reason to approve the instant petition." Counsel also states that, in the alternative, the beneficiary may be considered an executive and a functional manager. Counsel states that the beneficiary directs the management of the organization, establishes goals and policies for the organization, exercises wide latitude in discretionary decision-making, and is supervised by the board of directors only. Counsel contends that the beneficiary also qualifies as a functional manager because the beneficiary "has managerial control and authority over all functions and operations of the company and operates at a senior level within the organization's hierarchy."

On review, while the AAO recognizes that counsel addresses valid issues on appeal, the record does not conclusively establish that the beneficiary would be employed by the U.S. entity in a qualifying 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

Although counsel submits a descriptive explanation of the beneficiary's job responsibilities, the job description does not demonstrate the beneficiary's employment in a primarily managerial capacity. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(B), which defines managerial capacity, requires that the beneficiary meet each of the four criteria if the petitioner is representing the beneficiary is a manager. In other words, the petitioner cannot establish a beneficiary's eligibility as a manager by demonstrating only one or two of the regulatory requirements for managerial capacity.

In the present matter, while the beneficiary may "[manage] the organization," as claimed by counsel on appeal, the petitioner did not establish that the beneficiary is supervising and controlling the work of other supervisory, professional, or managerial employees. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). Counsel asserts on appeal that the beneficiary's sales and administrative managers should be considered managerial employees for purposes of proving managerial capacity, even though neither manages any subordinate employees. Counsel further claims that an employee's title is irrelevant to his or her specific functions. Counsel also states in his February 2003 letter that the two managers "manage all day-to-day activities" of the U.S. organization. Counsel's assertions are not credible. Counsel has not explained how these employees can be considered to be managers if there are no

additional lower-level employees to perform the business' daily operations. While the AAO acknowledges counsel's claim that an employee's title alone is not conclusive of his or her employment capacity, counsel cannot customize the subordinate employees' titles or job duties in an attempt to conform to the regulatory requirement of supervising "managerial employees." *Id.* If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The AAO disagrees with counsel's assertion on appeal that CIS requires the petitioner to employ a certain number of employees in order to establish managerial capacity. Section 101(a)(44)(C) of the Act states that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development.

At the time of filing the instant petition, the petitioner employed the beneficiary, two managers, and an administrative assistant. As noted by the director, all except one employee, who is responsible for the business' secretarial work, have managerial titles. Despite the managerial titles given to the sales and administrative managers, counsel describes the employees as performing the functions of the business. On the other hand, counsel explains in his February 2003 letter that "the employees of the U.S. entity manage all day-to-day activities required [of the petitioning organization]." The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Regardless of the exact role the lower-level employees may play in the organization, it does not appear that the reasonable needs of the petitioner might plausibly be met by the services of the beneficiary as the general manager, two managerial employees, and an administrative assistant. If the managerial employees are in fact considered managers, this leaves only one individual employed by the petitioner to perform the business' functions. More importantly, the beneficiary himself states in his February 2003 letter that he is "responsible for the overall performance of the organization, including sales, marketing, purchasing, and finances." While counsel has accounted for the performance of the sales and purchasing functions by the two managers, the record does not clearly explain who would be responsible for the business' marketing and finance except for the beneficiary. This brings into question whether sixty percent of the beneficiary's time can actually be devoted to monitoring the employees' activities and handling and supervising the administration and finances, as claimed by counsel in his February 2003 letter. The AAO acknowledges that a beneficiary is not required to perform managerial job duties only. However, it is the responsibility of the petitioner to clearly document what proportion of the beneficiary's time is spent performing in a managerial capacity. *See Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991) (concluding that the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions.) 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). The petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties.

Contrary to counsel's claim on appeal, CIS does not take the position "that to be a manager is solely to give directions and not to review actual work." As noted previously, the beneficiary may perform non-managerial job duties as long as the petitioner has clearly demonstrated that the majority of the beneficiary's time would be spent in a *primarily* managerial or executive capacity. The instant record, however, does not clearly establish that the beneficiary would be employed by the U.S. entity in a primarily managerial capacity.

Counsel's additional assertion on appeal that the beneficiary would be employed in a primarily executive capacity is unsupported by the record. Counsel simply outlines the four criteria for demonstrating executive capacity, and claims that the beneficiary's employment satisfies each requirement. 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. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Specifics are clearly an important indication of whether a beneficiary's duties are 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. at 1108.

Additionally, the record is not persuasive in establishing counsel's claim on appeal that the beneficiary would be employed as a functional manager. 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. Again, 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. at 604. In this matter, counsel has not provided evidence that the beneficiary manages an essential function.

Based on the foregoing discussion, the AAO cannot conclude that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

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.