U.S. Department of Homeland Security
20 Massachusetts Ave., NW, Rm. A3042
Washington, DC 20529

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U.S. Citizenship
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Services

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MAY 04 2005

File: SRC-04-031-50286 Office: TEXAS 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, 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 employee the beneficiary as its Director of Operations 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 corporation organized in the State of Florida that provides tile and concrete installation services. The petitioner claims that it is the subsidiary of Pemcon International Constructors Private Limited, located in Karachi, Pakistan.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial capacity, in that he will manage the petitioner's business operations and oversee independent contractors. In support of these assertions, counsel submits a brief and additional evidence.

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 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 a letter submitted with the initial petition on November 12, 2003, the petitioner stated that "[the beneficiary] will direct the management of our tile, showroom and concrete managers, will be responsible for overall operational excellence, and will engage in executive decision making at the highest level." The

petitioner provided an organizational chart that reflects that the beneficiary will share responsibility with a President and Industrial Management Analyst to oversee two subsidiary companies, namely Suncoast Tile, LLC ("Suncoast") and R. J. Granda Concrete, LLC ("R. J. Granda".) The chart shows that both subsidiaries have a manager and utilize independent contractors and installation crews.

On January 12, 2004, the director requested additional evidence. Specifically, the director instructed the petitioner to "establish the need for a second manager with only three employees (Form 941 ending September 30, 2003). Establish there is sufficient work at the managerial level for this employee and the other manager. Please submit documentation."

In a response dated March 5, 2004, the petitioner submitted: (1) a business plan; (2) additional documentation regarding the business activity of Suncoast; (3) additional documentation regarding the business activity of R. J. Granda; and (4) a letter describing the petitioner's operations and the beneficiary's proposed duties as follows:

> To answer your inquiry regarding how there would be sufficient managerial work to sustain a second management position. While our employee payroll is small our operations have expanded considerably, and by their nature involve the employment of sub contractors to perform our large and growing installation projects in the tile and the concrete side of our businesses. Oversight of these two operations as well as the showroom operations including management of not only our installation teams, but for the concrete side our contract permitting professionals, as well as supplier relations for our tile, concrete and showroom, is full time work which will not leave time to grow our operations and to perform due diligence on other companies of interest to us for acquisition.
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> The transferee . . . will have oversight of our on going business operation managers, while our president will concentrate on the promotion and expansion of our businesses as well as researching and analyzing other businesses whose business models match up well with ours, to acquire their operations, as we acquired Suncoast Tile and R. J. Granda Concrete.
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> The division of responsibility has been made necessary by the growth of our on going operations, the complexity and individuality of our tile and concrete divisions, as well as our increasing sales, which in turn will enable our corporate acquisitions to continue. It is in order to optimize this favorable cycle that we seek the services of [the beneficiary] as our Director of Operations.

On March 31, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated that "it is not reasonable to conclude that a company of three employees would need the services of an additional manager." The director further found that "[t]he petitioner has failed to document this beneficiary will be supervising other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization." The director stated that the beneficiary "has neither the authority to hire,

fire, or recommend personnel actions such as promotion and leave authorization for contract personnel." The director noted that "the petitioner has failed to document the company has sufficient personnel to perform the routine tasks of the business."

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial capacity, in that he will manage the petitioner's business operations and oversee independent contractors. Counsel reiterates that the petitioner is a holding company with two subsidiary organizations. Counsel states that "[t]he record indicates that these companies employ 4 employees, and additionally they have substantial contract crews to design, deliver and install to the satisfaction of their many customers tile and concrete projects." Counsel indicates that the petitioner's president will concentrate on "promotion and expansion, development of the goodwill of the business, and evaluating and negotiating the acquisition of active businesses," leaving the beneficiary to manage the operations of the business. Counsel provides that the petitioner is in the process of purchasing a third business titled Village Floors, and that the beneficiary's managerial duties will expand once the acquisition is complete. Counsel further states the following:

> The Director of Operations of a business that hires independent contractor installation service providers may not have the right to hire and fire staff of the independent contractor, but can and does contract (hire) and terminate contract (fire) the independent contractor who manages the crew in its employ. The customer contracts with the petitioner (akin to a general contractor) and the petitioner is ultimately responsible for the work the contract workers do on its behalf for the customer. A manager who is responsible to the end customers for the work of independent management contractors and their crews is not a first line supervisor, and cannot be reasonably characterized as such.
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> The Director of Operations in charge of sale and installation jobs for a tile company and a concrete company, albeit with the installations performed by independent contractors and their crews, is not a first line supervisory position, nor do the end customers who contract with the petitioner reasonably relate to the position in that manner. The Director of Operations is ultimately responsible for the work of each crew, and each crew is supervised by the independent contractor first line supervisor. If there is a problem with the job, the customer first talks to the on site supervisor, but ultimate responsibility rests with the Manager or Director of Operations that [the] customer contracted, and in [sic] the facts and record in this case [are] reasonably interpreted, that cannot be a first line supervisor position.

Upon review, counsel's assertions are not persuasive. 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 descriptions of the beneficiary's duties submitted by the petitioner are brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the general statements that "[the beneficiary] will direct the management of our tile, showroom and concrete managers" and the beneficiary "will have oversight of our on going business operation managers" do not indicate what tasks the beneficiary will perform on a daily basis. The petitioner provides that the beneficiary "will be responsible for overall operational excellence, and will engage in executive decision making at the highest level," yet this broad assertion fails to explain what will be the beneficiary's daily duties. 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. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job descriptions do not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

The petitioner's organizational chart reflects that the beneficiary will share responsibility with a president and industrial management analyst to oversee two subsidiary companies. Yet, the petitioner has failed to explain how the president will exercise his oversight authority when his duties appear to be limited to functions related to expanding the petitioner's business. Further, the petitioner has provided no description of the duties of the industrial management analyst such that the AAO can understand how this employee will share responsibility with the beneficiary. 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). The fact that the petitioner employs two other management level employees who will share responsibility with the beneficiary further clouds what actual authority and duties the beneficiary will have.

The petitioner explains that it currently has two subsidiaries that will be managed by the beneficiary, Suncoast and R. J. Granda. It claims that the two companies are subsidiaries as the petitioner owns 51 percent of each. Yet, the petitioner has failed to document that it owns a majority interest in R. J. Granda. The single independent document that supports this assertion is a stock certificate, dated June 25, 2003, that reflects that the petitioner acquired 5,100 of a possible 10,000 shares of R. J. Granda. As general evidence of a petitioner's claimed parent-subsidiary relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Further, the financial statement submitted for [redacted] for the period ending December 31, 2003 does not list the petitioner as a stockholder or creditor. The documents submitted as evidence of the purchase of R. J. Granda reflect that an individual named [redacted] purchased the company in his individual capacity. The

"Sale & Purchase Agreement" references a requirement that his spouse sign the sale documents, which further supports that he purchased the entity as an individual. Nowhere in the documents of the sales transaction is the petitioner named. Again, 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. at 190. Thus, the petitioner has failed to establish that it in fact owns a majority interest in R. J. Granda. Therefore, the beneficiary's claimed managerial responsibility regarding R. J. Granda will be given no weight in this proceeding.

On appeal, counsel claims that the petitioner is in the process of purchasing a third business, namely Village Floors. Counsel states that the beneficiary's managerial duties will expand once this acquisition is complete. However, 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). The fact that the petitioner intends to acquire a third business after the date of filing is not probative of the petitioner's eligibility as of the filing date. Accordingly, the resulting impact the acquisition will have on the beneficiary's duties will not be considered in this proceeding.

The petitioner has established that Suncoast is its subsidiary. Suncoast's Florida State Quarterly Report for the third quarter of 2003 reflects that it had one employee, [redacted] as of September 30, 2003. As the petitioner's organizational chart shows that the beneficiary will have supervisory authority over a "General Manager" at Suncoast, it is assumed that [redacted] is the claimed general manager. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

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 has not described the general manager's duties or educational background, thus it has failed to show that a bachelor's degree is required to perform his tasks. Thus, the petitioner has not established that the beneficiary supervises a professional subordinate. Nor has the petitioner clearly shown that the general manager supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that he could be classified as a manager or supervisor.

Counsel asserts that the beneficiary is not a first-line supervisor, as he manages independent contractors. Counsel alleges that the beneficiary has authority to hire or terminate the services of contractors, and he is ultimately responsible for their work product. Yet, the petitioner has failed to sufficiently explain the involvement the beneficiary will have with the referenced independent contractors. For example, it is unclear whether he will be present at a construction site during an installation to manage the workers, or whether he will merely communicate with a manager or foreman of the respective contractors to monitor the progress of projects. Merely hiring a company to perform work for the petitioner does not establish that the petitioner has managerial authority over all employees of the hired company. For example, if an individual hires a general contractor to construct a private residence, the established business relationship does not place the individual in a managerial position as contemplated by section 101(a)(44)(A)(ii) of the Act. Thus, greater explanation is required to establish precisely what relationship the petitioner's employees will have with the contracted workers.

Further, the petitioner has failed to submit sufficient documentation to show that it currently employs individual contractors. Such documentation would include recent invoices from contractors for services rendered, or documentation of projects currently in progress including the nature of the work, number of employees working on the job, and associated fees. Once again, 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. at 190.

Accordingly, the petitioner has not shown that the beneficiary's manages subordinate employees who are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii).

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed abroad in a primarily managerial or executive capacity as required by the regulation at 8 C.F.R. § 214.2(l)(3)(iv). The record lacks a sufficiently detailed description of the beneficiary's duties with his foreign employer, and the subordinates he supervised abroad, such that the AAO can determine whether he was employed in a primarily managerial or executive capacity. 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. The petitioner has not met this burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

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