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U.S. Citizenship
and Immigration
Services

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File: SRC 04 010 52060 Office: TEXAS SERVICE CENTER Date: NOV 01 2007

IN RE: Petitioner:
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:



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, Chief
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 visa petition seeking to employ the beneficiary as its systems manager 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 under the laws of the State of Florida and is allegedly an import/export business.¹

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the beneficiary was employed abroad 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 to the petitioner asserts that the director erred and that the petitioner fully responded to the Request for 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.

¹It must be noted that, according to Florida state corporate records, the petitioner's corporate status in Florida was "administratively dissolved" on September 14, 2007. Therefore, since the corporation may not carry on any business except that necessary to wind up and liquidate its affairs, and the petitioner has not taken steps under Florida law to seek reinstatement, the company can no longer be considered a legal entity in the United States. See Fla. Stat. 607.1421 (2006). If this appeal were not being dismissed for the reasons set forth herein, this would also call into question the petitioner's continued eligibility for the benefit sought.

- (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 first and second issues in the present matter are whether the beneficiary (1) will be employed by the United States entity in a primarily managerial or executive capacity; or (2) was employed abroad 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.

The petitioner does not clarify in the initial petition whether the beneficiary will primarily perform, or was primarily performing, managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim that a beneficiary is a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary will be, or was, employed in either an executive *or* a managerial capacity, and the AAO will consider both classifications.

The petitioner described the beneficiary's present and future job duties in an undated letter appended to the initial petition as follows:

[The beneficiary] will fill the position of Systems Manager of [the petitioner]. This position is a key managerial one within each company, because [it] is the Systems Manager, who brings together all the offices and tracks each account, supervises, set[s] standards for the work and general guidelines for [the] company, and coordinates the various offices to assure that each account is serviced adequately and on schedule. The Systems Manager is in charge of designing and handling the computer systems of the company, installation of software and track all the cargo which is ready for distribution, compile all relevant statistics so that the president can keep track of the delivery reports.

* * *

[The beneficiary's] most recent foreign position within the [petitioning organization] is as Regional Manager of our Colombian Antioquia Office, a position to which she was promoted in 2002. In this position, she had full responsibility for the [s]taffing and work of the company, she had the important job of making sure that all cargo cleared customs and was responsible for the distribution of all packages in her area. She also implemented all computer programs and systems so that she could generate the statistical and tracking of delivery reports.

The petitioner also submitted an organizational chart for the petitioning organization. The chart portrays the beneficiary, in her position abroad, as reporting to a logistics manager who, in turn, reports to a manager who, in turn, reports to the president. The beneficiary is shown as supervising an "assistant." The "assistant" is described as follows:

Pick up packages at the airport. Check packages at the storage of the area. Delivery of packages to the [c]onnecting lines.

While the organizational chart includes the "Florida director," who is portrayed as supervising two assistants and a secretary, the beneficiary's proposed position in the United States does not appear on the chart.

On February 4, 2004, the director requested additional evidence. The director requested a more detailed description of the beneficiary's duties abroad, and prospective duties in the United States, including a description of all subordinate employees who report to, or will report to, the beneficiary.

In response, counsel to the beneficiary submitted a letter dated April 2, 2004 in which he indicates that three employees "report directly to the beneficiary." Counsel does not explain whether these three employees report to the beneficiary in her current position abroad or whether she will supervise three employees in the United States.

Counsel also submitted a description of the beneficiary's duties. Once again, counsel does not explain whether this description is applicable to the beneficiary's foreign position, her proposed position in the United States, or to both. The petitioner described the beneficiary as follows:

WORK DUTIES AND AVERAGE OF TIME USED IN EACH DUTY

1. Regulate the regular conduit of the parcel of each central [sic]. (40%)
2. Inducement of the personnel to correct use of each section. (10%)
3. Knowledge of the system for the control of the history of each pack. (20%)
4. Control of [a]ir [w]ay [b]ills and freight. (5%)
5. In concordance with the warehouse: conciliate inventory with the ones in the office. [10%]
6. Control the collection and payments of taxes of each country and cancellation of commissions. (15%)

DESCRIPTION OF THE WORK DUTIES

1. Regulate: Verify that the load arrive according to the parameters imposed for the customs authorities of each country, so the transport of the merchandise is safe and in this way avoid retentions or revaluation in customs.
2. Induction: Training of the new and old personnel every time that there is an actualization of the merchandise system, which allows making an effective track down of the packages....
3. Control of [a]ir [w]ay [b]ills and [f]reight: this function goes since the request of the air way bills to the airlines until the detailed revision of the billing that each airline sends monthly. Each air way bill must be in concordance with the number of pounds and kilograms sent according to the determined freight for each destination.
4. Conciliate inventories with the ones in the office: [v]erify in the relation warehouse-office that the manifested contents in each box, corresponds to the physical content of each package; with the purpose to filter all merchandise that [c]an not enter to the destination countries because of the customs restrictions and the security that forbidden it.
5. Control collections and payments of the taxes of each country and liquidation of commissions: [t]his includes making the physical revision of the bills, in which we do the payments of the taxes and the corresponding commissions to the people that make the customs transaction on each destination (*[a]pplies to Ecuador and Honduras), who receive commission for each pound out of the customs (honorarium fee), and the corresponding payment of expenses of representation and distribution in thee [sic] countries. In the USA, part of this duty is identify the expenses originated

for each central (Florida, New Jersey, Texas, California) and make the pertinent collections to each one to cover the expenses of the sent merchandise and the taxes generated respectively to each country.

6. Extract the information of the cargo system that allows taking monthly statistics of the movement of the merchandise by destination, number of agencies that delivered the merchandise, number of collected packages for each country and average of collected money and the money used for the fixed expenses and the cargo.

Despite the director's request, the petitioner did not identify or describe the duties of the beneficiary's current or prospective subordinates.

On June 7, 2004, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary has been or will be employed primarily in a managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the director erred and that the petitioner fully responded to the Request for Evidence.

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) and (iv). The petitioner's description of the job duties must clearly describe the duties performed by the beneficiary and indicate whether such duties were, or will be, either in an executive or managerial capacity. *Id.*

In this matter, the description of the beneficiary's job duties fails to establish that the beneficiary was acting, or will act, in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary did, or will do, on a day-to-day basis. For example, the petitioner stated that the beneficiary will set standards and general guidelines for the United States operation. However, the petitioner did not define these standards and guidelines. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary performs, or will perform, managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties are or will be 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). 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).

Likewise, it appears that most of the duties ascribed to the beneficiary, both abroad and in the United States, are non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the petitioner has described the beneficiary as administering computer systems, installing software, tracking cargo, compiling statistics, and dealing with customs issues. However, such duties constitute non-qualifying administrative or operational tasks when those tasks are performed by the beneficiary. As the record does not establish that the beneficiary was, or will be, relieved of the need to

perform such non-qualifying tasks, it must be concluded that she performed, or will perform, these tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary supervised and controlled, or will supervise and control, the work of other supervisory, managerial, or professional employees. While the petitioner indicated that the beneficiary has three subordinates, it is unclear whether these workers are stationed abroad or in the United States. The petitioner also failed to describe the duties of these subordinates even though this evidence was specifically requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Furthermore, while the petitioner vaguely described the "assistant" abroad, it is clear that this worker is performing the tasks necessary to produce a product or to provide a service, e.g., pick up and process packages. Therefore, it appears that the beneficiary was and will be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner failed to establish the skills and education required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary managed, or will manage, professional employees.² Therefore, the petitioner has not established that the beneficiary was, or will be, employed primarily in a managerial capacity.³

²In evaluating whether the beneficiary managed or will manage 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).

³While the petitioner has not argued that the beneficiary managed, or will manage, an essential function of the organization, the record nevertheless would not support this position even if taken. 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., 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. See 8 C.F.R. § 214.2(1)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has

Similarly, the petitioner has failed to establish that the beneficiary acted, or will act, in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary acted, or will act, primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary did, or will do, on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary was, and will be, primarily employed as a first-line supervisor and was, and will be, performing the tasks necessary to produce a product or to provide a service. Finally, regarding the beneficiary's employment abroad, the petitioner describes her as having three tiers of management above her position and only one "assistant" beneath her. In view of the foreign employer's purported organizational structure, it appears that she lacked any realistic authority to direct the management of the organization. Therefore, the petitioner has not established that the beneficiary was, or will be, employed primarily in an executive capacity.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act. However, in reviewing the relevance of the number of employees an employer has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d at 1316 (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

not provided evidence that the beneficiary managed, or will manage, an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties were or will be managerial, if any, and what proportion were or will be non-managerial. Also, as explained above, the record establishes that the beneficiary was, or will be, primarily a first-line supervisor of non-professional workers and was, or will be, engaged in performing non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties was, or will be, managerial, nor can it deduce whether the beneficiary was, or will be, primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary was, or will be, primarily performing managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner failed to establish that it has a qualifying relationship with the foreign employer.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." See also 8 C.F.R. § 214.2(l)(14)(ii)(A). Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section." An "affiliate" is defined in part as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 214.2(l)(1)(ii)(L)(1).

In this matter, the petitioner asserts that it and the foreign employer are both 100% owned and controlled by [REDACTED]. While the petitioner submitted a copy of its Florida articles of incorporation dated April 4, 2001, it failed to submit any evidence of ownership and control of the corporation, e.g., stock certificates. In response to the director's Request for Evidence, the petitioner submitted additional articles of incorporation for other corporations formed in other states, including New Jersey, which use the same name as the petitioner. However, as evidence of [REDACTED] ownership of the petitioner, the petitioner submitted a stock certificate dated June 21, 2000 relating to a New Jersey corporation having the same name as the petitioner. The record is devoid of evidence establishing the ownership and control of the petitioner, a Florida corporation. For this reason, the petition may not be approved. 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. 190.

Furthermore, the record contains a serious unresolved inconsistency which undermines the petitioner's otherwise uncorroborated claim to be 100% owned by [REDACTED]. In support of the petition, the petitioner submitted its 2002 Form 1120, U.S. Corporation Income Tax Return, in which the petitioner asserts in schedule K that no individual owned, directly or indirectly, 50% or more of the corporation's voting stock. This averment directly contradicts the petitioner's assertion in the petition that it is 100% owned by Mr. [REDACTED]. The petitioner offers no explanation for this fundamental inconsistency which undermines the petitioner's description of its ownership and control. 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).

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign employer, and the petition may not be approved for this additional reason.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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 appeal will be dismissed.

ORDER:

The appeal is dismissed.