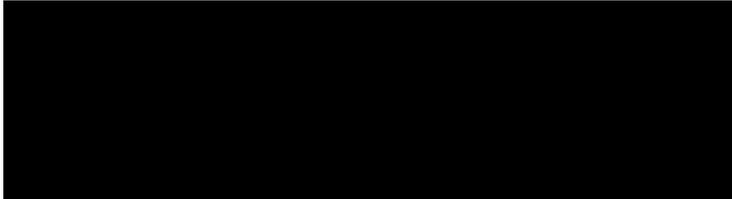


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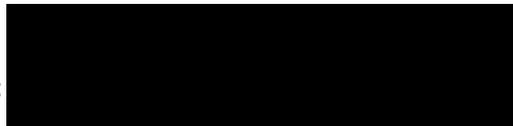


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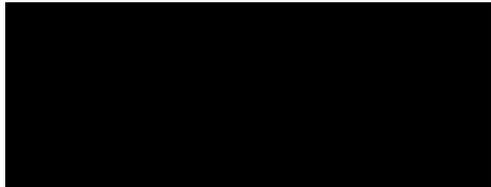
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IN RE: Petitioner:  
Beneficiary:



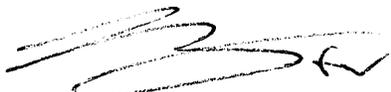
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 extend the employment of its chief executive officer 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 Georgia that is operating as a used car dealership. The petitioner claims that it is the wholly-owned subsidiary of [REDACTED], located in Medellin, Colombia. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

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 director's decision is in error because the beneficiary's job duties are "managerial and executive." Counsel also asserts that the petitioner should still be regarded as a new business. Counsel submits a brief in support of these assertions.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first 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 dated June 24, 2003, submitted with the Form I-129, Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] will be responsible for overseeing all financial, business, marketing and development aspects of the company's U.S. operations. He will direct the business with the objective of providing maximum profit and return on invested capital; establishing current and long-range objectives, plans and policies, and representing the company with its major customers and the financial community.

[The beneficiary] will direct the overall management of [the U.S. entity] including financial development and growth, market share potential and growth, business development, and organization policies. [The beneficiary] will establish the business, financial, marketing, sales, and personnel goals, policies and procedures on behalf of the U.S. organization. He will exercise wide-discretionary decision-making and authority with respect to investor relations, personnel decisions, marketing and sales development, inventory, and other business development for the company. Receiving only general supervision from the CEO of the [U.S. entity's] parent company, [the beneficiary] will be primarily responsible for the viability, profitability and growth of the U.S. entity.

The specific duties and responsibilities of the [beneficiary's] position will include the following:

- Direct the development and implementation of strategic operational plans and policies and short- and long-range goals for the company.
- Develop operating plans and budgets.

- Measure and review the company's performance and report performance.
- Direct development of existing and new customers.
- Set company-wide performance objectives.
- Analyze market studies of users to develop marketing plans to increase sales.
- Direct the preparation and presentation of materials for the Executive Committee and officers.
- Ensure that adequate plans for future development and growth of the business are prepared and present plans to the Board for review and approval.
- Interface with investors. Attend meetings and answer questions regarding various aspects of investor relations.
- Direct the internal auditing of the company.
- Review and approve capital acquisition and expenditure plans.
- Ensure that all corporate activities and operations are carried out in compliance with local, state and federal regulations and laws governing business operations.

On the Form I-129, the petitioner did not state the number of employees it had at that time, but instead indicated that five to ten are "projected for 2004."

On September 23, 2003, the director requested additional evidence. Among other things, the director requested (1) copies of the U.S. entity's state employer's quarterly tax returns for the year 2003 or other evidence of wages paid; (2) a copy of the U.S. entity's organizational chart; (3) a description of the duties of the beneficiary for the past year, indicating the percentage of time spent on each duty; and (4) evidence of the current staffing level of the U.S. entity, including position titles and duties of all employees, and the educational background of the professionals that are employed.

In response, the petitioner submitted through counsel an organizational chart indicating that the beneficiary's subordinate staff comprises four levels. Immediately below the beneficiary is a general manager, who is shown supervising a sales and marketing manager, a garage and maintenance manager, and an administrative manager. The sales and marketing manager in turn supervises sales personnel and market research analysts, and the garage and maintenance manager supervises maintenance supervisors and mechanics. The petitioner broke down the beneficiary's duties as follows:

- Direct the development and implementation of strategic operational plans and policies and short- and long-range goals for the company – (50%)
- Develop operating plans and budgets – (15%)
- Measure and review the company's performance and reports performance – (10%)
- Direct development of existing and new customers – (10%)
- Set company-wide performance objectives – (5%)
- Analyze market studies of users to develop marketing plans to increase sales – (4%)
- Direct the preparation and presentation of materials for the Executive Committee and officers (to parent company) – (1%)

- Ensure that adequate plans for future development and growth of the business are prepared and present plans to the Board for review and approval (parent company) – (1%)
- Interface with investors. Attend meetings and answer questions regarding various aspects of investor relations – (1%)
- Direct the internal auditing of the company – (1%)
- Review and approve capital acquisition and expenditure plans – (1%)
- Ensure that all corporate activities and operations are carried out in compliance with local, state and federal regulations and laws governing business operations – (1%)

With respect to the current staffing level of the U.S. entity, counsel for the petitioner indicated in a letter dated December 22, 2003 responding to the request for further evidence that there is only one employee other than the beneficiary, a sales agent who assists in the sales of used automobiles. The petitioner submitted evidence of payment of wages to that employee in October and November 2003.

On January 20, 2004, the director denied the petition. The director noted that the U.S. entity has only one other employee in addition to the beneficiary and, when a company has a very limited number of employees, it becomes questionable whether the beneficiary is engaged *primarily* in managerial or executive duties. The director concluded that the petitioner has failed to demonstrate that the beneficiary's duties in this position qualify as primarily those of an executive or manager.

On appeal, counsel for the petitioner asserts that the beneficiary's job duties are managerial and executive. Counsel cites to unpublished decisions of the AAO in support of this assertion. Counsel further argues that the U.S. entity should still be regarded as a new business because, due to delays in obtaining permits, it did not begin operation until March 2003, five months after the initial new office petition was approved. Finally, counsel asserts that as the organizational chart shows, the beneficiary will be supervising more managers as the business grows.

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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. The petitioner has not done so in this instance. In fact, the AAO notes that both the petitioner and counsel refer to the beneficiary's job duties as "executive *and* managerial" (emphasis added), and in describing his duties, include some functions that are executive and others that are managerial. 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.

Further, the AAO notes that the petitioner characterized the beneficiary's job on the Form I-129 as "direct[ing], manag[ing] and oversee[ing] all operations on behalf of the company." While the beneficiary is not required to supervise personnel, if it is claimed that his duties involve managing employees, the petitioner

must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Here, although the petitioner claims on the Form I-129 that its "projected" staff will comprise five to ten employees and submits an organizational chart that depicts four layers of subordinate staff under the beneficiary's supervision, the record shows that the beneficiary actually supervises one single subordinate employee, a sales agent whose function is described as "assisting in selling used automobiles." The beneficiary therefore is acting as a first-line supervisor to his subordinate staff of one. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. The petitioner claims that the beneficiary's subordinate employee holds a bachelor's degree. However, in determining whether the employee is a "professional," the AAO must focus on the level of education required by the position, rather than the degree held by the 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 defined by section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32). In the instant case, the petitioner has not established that an advanced degree is actually necessary to perform the work of the sales agent, such that he could be classified as a professional. In addition, the record does not show that this employee 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. As such, the petitioner has not shown that the beneficiary supervises professional, managerial, or supervisory employees such that he could be deemed to be primarily acting in a managerial capacity under section 101(a)(44)(A)(ii) of the Act.

In addition, the petitioner claims that the beneficiary spends 50% of his time "direct[ing] the development and implementation of strategic operational plans and policies and short- and long-range goals for the company," and another 10% "direct[ing] development of existing and new customers." However, there does not appear to be any staff to carry out the functions that the beneficiary purportedly directs. Thus, either the beneficiary himself is performing the functions that he is said to direct and manage, or the direction and management of these functions are not actually part of his responsibilities as the petitioner claimed. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing the operational functions of the company himself, the AAO notes that 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 of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel claims on appeal that "the duties of running the daily functions of the business are handled by [the petitioner's] other employee." However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the petitioner clearly stated in response to the director's request for further evidence that the only responsibility of its other employee is to assist in the sales of used cars. If that employee is in fact responsible for other functions, the petitioner has not provided any explanation for such an inconsistency in that individual's job description. 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. at 591-92.

Counsel contends that the fact that there is only one employee under the beneficiary's supervision does not preclude the finding that the beneficiary acts in a managerial and executive capacity. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Citizenship and Immigration Service (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g., *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* As noted earlier, the petitioner in this matter did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company, other than one single sales agent. Based on the petitioner's representations, it does not appear that the reasonable needs of the U.S. entity might plausibly be met by the services of the beneficiary as chief executive officer and one other employee who assists only with the sales function. Moreover, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he supervises only one employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Finally, counsel asserts that the petitioner should still be regarded as a new business because it only began operation seven months before the expiration of the initial visa, due to delays in obtaining permits. Counsel further asserts that once the business begins to grow, the beneficiary will be supervising more managers, as indicated in the organizational chart. However, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition involving a new office to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. Moreover, 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). In the instant matter, the evidence of record indicates that the U.S. entity has not reached the point where it can employ the beneficiary in a predominantly managerial or executive position.

In light of the foregoing, the AAO finds that the petitioner has not established that beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaging in the regular, systematic and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition involving a new office. In this instance, the initial petition for the new office was approved for the period from October 21, 2002 through October 20, 2003. However, the copy of the business license submitted by the petitioner has an issue date of March 4, 2003. As discussed earlier, counsel also asserts on appeal that the petitioner did not begin operation until March 2003. Moreover, the petitioner submitted no other evidence that it has been doing business since October 2002, when the initial petition was approved. Thus, the petitioner simply has failed to satisfy the regulatory requirement set forth in 8 C.F.R. § 214.2(l)(14)(ii)(B). For this additional reason, the petition will not be approved.

In addition, the AAO notes that there are inconsistencies in the record that cast doubt upon the petitioner's claim that there exists a qualifying relationship between the foreign and U.S. entities. The petitioner stated on the Form I-129 and in its June 24, 2003 letter that the U.S. entity is a wholly-owned subsidiary of the foreign entity. However, the petitioner also submitted a certificate of ownership signed by [REDACTED] chief executive officer of the foreign entity, stating that he owns 100% of the issued and outstanding stock of both the foreign and the U.S. entities, and that the two entities are therefore "qualified *affiliate* companies" (emphasis added). Attached to that certificate is a copy of a certificate of commercial registration from the Chamber of Commerce of Medellin, Colombia, certifying that [REDACTED] is "the owner" of the foreign entity, and a copy of the U.S. entity's stock certificate showing that an individual named Camilo Posada owns 100,000 shares of the U.S. entity. The petitioner has not accounted for these inconsistent characterizations of the relationship between the foreign and U.S. entities. Again, 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. at 591-92. In light of these unexplained inconsistencies, the AAO cannot conclude that the petitioner has established a qualifying relationship between the foreign and U.S. entities. 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). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if the plaintiff shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.