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20 Massachusetts Ave., N.W., Rm. A3042  
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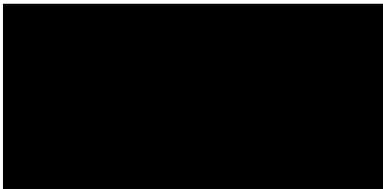
FILE: SRC 04 035 50783 Office: TEXAS SERVICE CENTER Date: JUN 10 2005

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)

ON 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 nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established in July of 2002 and claims to be engaged in the business of importing and exporting medical products. The petitioner claims to be a branch office of [REDACTED] located in Brazil. It seeks to employ the beneficiary temporarily in the United States as the executive secretary of its new office at an annual salary of \$36,000.00. The director determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary will be employed in a managerial or executive capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

*Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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 with 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 serves

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(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

The issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity 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) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level

within the organizational hierarchy or with respect to the function managed; and

- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily—

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In the initial petition submitted on November 18, 2003 the petitioner described the beneficiary's proposed duties as: "Coordinating the office's administrative activities, storing retrieving and integrating information for dissemination to clients. Manage database, conduct research, prepare statistical reports, compose correspondence, supervise office activities and export products to Brazil." The petitioner submitted a copy of an employment agreement in which the beneficiary's proposed duties were described in part as: "[The beneficiary] shall devote substantially all her business time and attention to the business of [REDACTED]" The petitioner submitted translated copies of the beneficiary's certificates and diplomas that showed that she had completed courses in technical secretary studies, typing, executive secretary-art of secretary studies, and clerical studies.

In response to the director's December 1, 2003 request for additional evidence on the subject, the petitioner submitted an organizational chart, which depicted the U.S. entity's proposed hierarchical structure. The chart showed that the beneficiary would report to the company president and vice president and as executive secretary, the beneficiary would have the purchasing, payment, and shipping departments under her direction. In a letter, dated December 17, 2003, the petitioner's accountant stated that the petitioner has no employees on payroll. In a response letter, the foreign entity representative described the beneficiary's duties for the last year, noting: "[The beneficiary] has been in the United States every month to buy medicines and export it in name of the American company...and she spend [sic] full time to our business." The petitioner also described the beneficiary's duties with the foreign entity as:

- Keeps in contact with laboratories and wholesalers in the United States and Europe. Carries out purchase agreements for medicines sold in Brazil;
- Travels to foreign countries for contract signings;
- Make [sic] new contacts for products sales feasibility;
- Conducts research in the international market;
- Employee[s] administrator in the import department;
- Monitoring [sic] shipments from laboratory and keeps track of shipment arrivals in Brazil.

The director subsequently denied the petition after determining that the evidence submitted demonstrated that the beneficiary would be employed as an executive secretary performing primarily secretarial duties rather than serving in a managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary has been employed by the foreign entity as an executive secretary/administrative assistant. Counsel also asserts that the beneficiary is responsible for "performing and coordinating the office administrative activities," and has "served to be the information manager for the company indicating what new products come out and dealing with the purchasing with different wholesale pharmaceuticals companies in the United States [sic]." Counsel further asserted that the beneficiary is responsible for "keeping up-to-date with all the required licenses and documents that the company requires to function properly according to the laws of the United States." Counsel contends that the beneficiary is needed in the United States not only for her secretarial skills but also for her managerial and executive skills. Counsel cites to a U.S. Department of Labor Manual in asserting, "Administrative Assistants assume a wider range of new responsibilities once reserved for managerial and professional staff." Counsel concludes by claiming that the beneficiary's duties will be in a managerial capacity within the plain meaning of the statute.

Counsel's assertions are not persuasive. On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive 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(i)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is

primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. In the instant matter, the evidence demonstrates that the beneficiary will be employed as an executive secretary performing clerical and administrative duties. The descriptions of the beneficiary's duties do not entail managerial or executive tasks.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include performing and coordinating the office administrative activities, storing, retrieving and integrating information for dissemination to clients, managing a database, conducting research, and preparing statistical reports. The petitioner did not, however, define the research and integrating processes, nor did the petitioner detail how the beneficiary was to perform and coordinate office administrative activities. 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). 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).

In addition, as noted above, the petitioner describes the beneficiary as conducting research, storing and retrieving information for dissemination, preparing statistical reports, composing correspondence, and managing a database. Since the beneficiary actually performs these clerical and administrative tasks she is performing tasks necessary to provide a service or product and these duties will not be considered managerial or executive in nature. 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 fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as performing clerical and administrative tasks do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is 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).

On appeal, the petitioner states that the beneficiary has 12 years experience working with a hospital in Brazil. The petitioner further states that the beneficiary's expert knowledge and organizational skills are invaluable to the company, and that her language skills are essential to the growth of the U.S. entity as well as other European countries. Although the petitioner has explained that the beneficiary possesses skills that are valuable to its organization, the skills described are not managerial or executive in nature and cannot be substituted for such. In this matter, the petitioner has failed to overcome the objections made by the director. There has been insufficient evidence submitted to demonstrate that the beneficiary would be employed by the U.S. entity in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, a related issue is whether the petitioner has submitted sufficient evidence to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity as defined in section 101(a)(44) of the Act. The petitioner stated that the beneficiary's title at the foreign entity is that of executive secretary/importer, and that she has been responsible for keeping

in contact with laboratories and wholesalers of medical products, implementing purchasing agreements, making new contacts, conducting research, and monitoring shipments. There has been no evidence presented to demonstrate that the beneficiary has been responsible for directing the management of the foreign organization or a function thereof, or that she has supervised a subordinate staff of professional, supervisory, or managerial personnel who relieved her from performing non-qualifying duties. It appears from the record that the beneficiary has and will continue to perform primarily in an executive secretary's capacity rather than in a managerial or executive capacity. For this additional reason, the petition may not be approved.

Although not directly addressed by the director, another issue in this proceeding is whether the petitioner has submitted sufficient evidence to demonstrate that a qualifying relationship exists between and U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner stated in the petition that the U.S. entity was a branch office of the foreign entity. However, if the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer. The petitioner submitted copies of the U.S. entity's Articles of Incorporation and balance sheet. Although the Articles of Incorporation authorized the company to issue a total of 1,000 shares of common stock with a par value of \$1.00 per share, the company's balance sheet listed the common stock at "10,000." It is noted by the AAO that the petitioner failed to provide copies of its stock certificates or any other documents pertaining to the distribution of U.S. entity company stock. 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). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

For these additional reasons, the petition may 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.2<sup>nd</sup> 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9<sup>th</sup> 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 sustained that burden.

**ORDER:** The appeal is dismissed.