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U.S. Citizenship  
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Services

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File: SRC 03 049 50067 Office: TEXAS SERVICE CENTER

Date: JUN 28 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

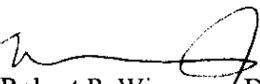
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 business development 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).<sup>1</sup> The petitioner is a Louisiana limited liability company that is engaged in the construction business. The petitioner claims that it is the subsidiary of [REDACTED] located in Bogota, 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 would 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 qualifies as an intra-company employee who has both executive/managerial capacity and specialized knowledge capacity as described under 8 C.F.R. § 214.2(l)(1)(ii). In support of this assertion, the petitioner submits 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.

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<sup>1</sup> The AAO notes that the petitioner's Citizenship and Immigration Services (CIS) Form I-129, Petition for a Non-Immigrant Worker, shows that at the time the petition for extension of status was filed, the beneficiary was in L-1B status. However, the petitioner indicated on the Form I-129 that it is seeking L-1A classification for the beneficiary due to a change in previous employment.

- (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 management 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 would 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.

On the Form I-129, the petitioner stated that the beneficiary's proposed job duties in the United States would be to "supervise and give direction to other top executives including the Administrative and Financial Director and the marketing technology and Commercial Director, as well as, make all internal decisions [sic]." The petitioner's Form I-129 indicates that the U.S. entity has five employees. In a letter dated November 21, 2002, submitted with the petition, the petitioner stated that the beneficiary "has been responsible for establishing and executing company goals, policies, strategies, and procedures for the different business units established by the company" and that he "supervises and gives direction to other Habitat Digital executives including the Administrative and Financial Director." The petitioner also indicated generally that the beneficiary "has all rights and powers conferred by law, as more particularly described in the Operational Agreement" of the U.S. entity.

The petitioner also stated in that letter that the staff of the U.S. entity includes, in addition to the beneficiary, an administrative and financial director, a commercial and marketing director, a commercial assistant, sales associates, and project managers of the general contractors.

On March 14, 2003, the director requested additional evidence to establish that the beneficiary will be acting primarily in a managerial/executive capacity. The director also requested, in connection with the U.S. entity, copies of the Employer's Quarterly Wage Return for the third and fourth quarter of 2002, with attachments listing the names, social security numbers, and wages of all employees; a copy of the company's commercial

lease; a copy of the audited financial statement for 2002; a list of all jobs completed or pending in 2002; and the actual revenues generated by the U.S. entity. The director also requested that the petitioner establish that it has generated sufficient business to support an executive position. The director further requested additional evidence relating to the foreign company, including a copy of the corporate tax return for 2002; a copy of the employer register for November and December 2002; evidence of business conducted during November and December 2002; and copies of the business license and current lease.

On June 2, 2003, the petitioner submitted additional evidence in response to the director's request. The petitioner stated in the response letter that since his arrival in the United States as a legal employee of the U.S. entity, the beneficiary "has been actively involved in managerial activities related to the following:

- Establishment of the office in New Orleans and Baton Rouge Area
- Obtain of Occupancy Licenses [sic], and proper registration in the State
- Hiring of employees
- Buying and selling properties
- Obtain credit loans
- Networking and establishment of strategic, commercial and technical alliances
- Establishment of the company's strategic and operational plan
- Enrollment in Industry Related Associations . . .
- Proposal preparation
- Company representation in contracting
- Importing support
- Acting as a Principal and Qualifying Party in the process of obtaining the required State Building License as a Builder for [REDACTED]."

The petitioner further indicated that after the earlier stages of securing licenses and regulatory compliance, development of strategy ad marketing and hiring and training personnel, the company had "reached the point in which projects have begun to be performed on a more regular bases [sic]." In the same letter, the petitioner stated that the staff at that time consisted of an office manager, a maintenance person, three sales representatives, and the full time participation of all partners.

On September 22, 2003, the director denied the petition. The director determined that the evidence was not sufficient to show that the beneficiary would be employed primarily in a managerial or executive capacity by the U.S. entity. Specifically, the director noted that the petitioner already has one manager who was granted L-1A status until December 2005, and questioned whether the petitioner's need for two executive/managerial level employees is justified since there are only four persons on its staff. In addition, the director found that the beneficiary would not have the requisite authority over the petitioner's contract personnel, and does not supervise and control the work of other supervisory, professional, or managerial employees. Finally, the director found that although the beneficiary is given the title of business development manager, the petitioner has not clearly demonstrated that the company has such a complex structure as to warrant business development as a separate function within the organization.

On appeal, counsel for the petitioner asserts that the beneficiary qualifies as an intra-company employee who has both executive/managerial capacity and specialized knowledge capacity as described under 8 C.F.R. § 214.2(l)(1)(ii). With respect to the beneficiary's managerial/executive capacity, counsel asserts that in the petition, the petitioner erroneously used the title "business development manager" in reference to the beneficiary. Counsel states that the beneficiary is in fact the general manager and technical director of the company. Counsel then restates the beneficiary's job responsibilities. In response to the director's concern as to whether there is enough work at the managerial/executive level for two managers, counsel contends that the evidence submitted shows that the organization demands the management and specialized knowledge capacities of both of these managers. Counsel also asserts that there should not be exclusive focus on the number of persons employed without taking into account the reasonable needs of the company in light of its overall purpose and stage of development.

On reviewing the petition and the evidence, the AAO finds the petitioner has not established that the beneficiary has been or 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(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. 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.

The AAO notes that the petitioner did not specify whether the duties to be performed by the beneficiary are in an executive or managerial capacity. Moreover, the descriptions of the beneficiary's duties provided by the petitioner are vague and nonspecific, and fail to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner stated that the beneficiary would "supervise and give direction to other top executives," "make all internal decisions" and that the beneficiary "has been responsible for establishing and executing company goals, policies, strategies, and procedures for the different business units established by the company." However, the petitioner did not define such goals, policies, strategies and procedures, or give any specifics relating to the beneficiary's supervisory role. Similarly, in response to the director's request for further evidence, the petitioner merely indicated that the beneficiary "has been actively involved in managerial activities" in connection with certain projects of the company, without clarifying or providing further details of what such managerial activities entailed. 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).

Counsel's assertions on appeal with respect to the beneficiary's job duties also are not persuasive. With respect to the beneficiary's job responsibilities, counsel states that "in addition to supervise [sic] other

managers, [the beneficiary] directs the management of the organization, establishes the goals and policies of the organization, exercises wide latitude in discretionary decision making, and receives general supervision or direction from the board of directors of the organization." Rather than providing any specific details relating to the beneficiary's duties, counsel merely paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). Again, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, *supra* at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Moreover, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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).

Furthermore, the AAO finds that there are substantial inconsistencies in the evidence of record, which casts doubt upon the petitioner's representation of the personnel structure of the U.S. entity, as well as the role of the beneficiary within it. Initially, the petitioner indicated in the Form I-129 and in its November 21, 2002 letter of support that it seeks to employ the beneficiary as its "business development manager." However, the U.S. entity's organization chart depicts the beneficiary as the "general manager and technical director" of the company. The petitioner did not account for this discrepancy in the record. 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). The AAO notes that on appeal, counsel explains that the discrepancy is "the result of improper communication by petitioner with the Service." However, given that the petition was signed, and therefore presumably reviewed, by the managing partner of the beneficiary's employer, such a significant oversight does not appear reasonable. Furthermore, counsel presented no evidence in support of his claim. As noted earlier, without supporting documentation, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

In addition, the petitioner's representations regarding the number and structure of its staff were inconsistent throughout the record. In the Form I-129, the petitioner indicated that it has five employees. In its letter of support, the petitioner stated that its staff includes "the administrative and financial director, commercial and marketing director, a commercial assistant, sales associates, and project managers of the general contractors" in addition to the beneficiary, thus more than five in all. The U.S. entity's organizational chart, on the other hand, presented yet another staff structure with at least ten employees, including the general manager/technical director, the commercial director, the administrative director, three sale associates and four assistants. In the June 2, 2003 letter responding to the director's request for further evidence, the petitioner gave a different description of its staff, stating that it is "made up of an office manager, a maintenance person to maintain properties under contract, and three sales representative, coupled with the full time participation of all partners." In the same letter, the petitioner stated that it filed no IRS Form 941, Employer's Quarterly Federal Tax Return for the third and fourth quarter of 2002 because two of the sale representatives hired at that time worked on a commission basis; this fails to account for the other employees purportedly on its staff

when the petition was filed in December 2002. Similarly, the IRS Form 941 for the first quarter of 2003 that the petitioner did submit indicates that the petitioner has only one employee during that pay period, rather than the ten or more listed in the organizational chart, or the eight set forth on the list of employees provided by the petitioner in the same packet of evidence.

Given these conflicting descriptions of the petitioner's staff and the beneficiary's position, the AAO is unable to determine based on the record what is the exact composition of the U.S. entity's staff, or the beneficiary's role within it. Furthermore, the petitioner failed to reconcile or explain these material inconsistencies in the record. As previously noted, 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. In light of these unexplained inconsistencies, the AAO must question the veracity of the petitioner's representations regarding its staff. 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. *Id.* If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In all, the record is not persuasive in demonstrating that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. Given the indefinite description of the beneficiary's job duties and the indiscriminate manner in which the petitioning company uses position titles, the petitioner has not established that the beneficiary is to be employed in a primarily managerial or executive position. The descriptions of the duties to be performed by the beneficiary in the proposed position are vague and do not persuasively demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record contains conflicting information regarding the petitioner's staff, and does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. In light of the foregoing, the AAO concludes that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition will not be approved.

The AAO notes that counsel also challenges on appeal the director's determination that the petitioner's business is not sufficiently developed to justify the need for two managers. Counsel correctly observes that 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, 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 at 15. 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, as is the case in this proceeding. *Id.* 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.

Finally, the AAO notes counsel's assertion on appeal that the beneficiary qualifies alternatively as an employee with a specialized knowledge capacity, based on past experience with the Colombian company, his extensive knowledge of the company's system, his language capabilities, and his understanding of the management and technical aspects of the company. The petitioner clearly indicated on the petition and in its letter of support dated November 21, 2002, submitted with the petition, that it sought to classify the beneficiary "as a L-1A intra-company transferee in his executive or managerial capacity." There was no indication that the petitioner wished to request consideration for L-1B status for the beneficiary based on his specialized knowledge capacity, nor was there any evidence submitted to that effect.<sup>2</sup> Absent an explicit request by the petitioner at the time the petition was filed, the AAO will not consider such request by counsel at this time. 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). Moreover, as noted earlier, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. See *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

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.

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<sup>2</sup> The AAO notes that the record includes a copy of a petition for L-1B status, filed by the petitioner on behalf of the beneficiary in October 2001. The record also indicates that the beneficiary was granted L-1B status through December 20, 2002 based on that petition. In light of that grant, and of the fact that information in that petition is neither timely nor relevant to this L1-A proceeding, the AAO will not consider that petition as an alternative request for L-1B status under the current petition.