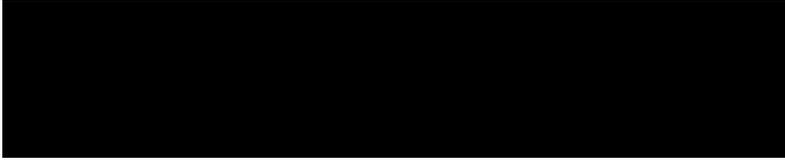




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



DT

File: SRC 03 102 50296 Office: TEXAS SERVICE CENTER Date: **OCT 28 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)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

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 general 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 in the State of Florida that is engaged in property sales, rentals, and management. The petitioner claims that it is the subsidiary of [REDACTED] located in Caracas, Venezuela. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, which was subsequently extended for two years. The petitioner now seeks to extend the beneficiary's stay for three more years.

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 filed an appeal in response to the denial.¹ On appeal, the petitioner submits a two-page letter in which it restates the beneficiary's qualifications. In support of its assertions, the petitioner submits several supporting documents intended to provide a more concise overview of the petitioner's business and the beneficiary's duties.

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(1)(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.

¹ The AAO notes that the petitioner was represented by [REDACTED] upon the filing of the initial petition. At the time of the filing of the appeal on Form I-290B, a properly executed Form G-28 dated December 24, 2004 was submitted which designated [REDACTED] as the petitioner's new counsel. In a letter dated January 29, 2004, the petition notified the AAO that it was no longer represented by [REDACTED] and submitted a written supplement to the appeal. As a result, the AAO will treat the petitioner as self-represented.

- (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 primary issue in this 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 the initial petition, former counsel for the petitioner submitted a letter dated February 24, 2003, which provided the following description of the beneficiary's role in the petitioner's organization:

During the past years that [the beneficiary] joined [the petitioner], he has been employed in the capacity of General Manager and he is responsible for the internal operation of the company, such as final decision making regarding contracting, hiring and firing authority of all personnel, staffing, marketing and programming of the company activities. He is responsible for the complete operation and administration of the business. In this position, he has full responsibility for the staffing and supervision of the company. This responsibility includes the recruitment and training of staff, over which he has hiring and firing authority. He is also responsible for coordinating the work so as to run the business in an efficient and profitable manner. He exercises complete day-to-day discretionary authority over the work of the company. [The beneficiary] has been in charge of supervising all personnel's work, set standards for the work and general guidelines for each assignment which must be followed and executed by the personnel. Strong managerial skills are needed for the important coordination and scheduling functions performed by the General Manager.

[The beneficiary] also has the discretionary authority to seek the purchase of any existing business and/or enter into negotiations for such an entity. His executive level positions [sic] permits [the beneficiary] to produce more assessment for the subsidiary and parent company.

He is responsible for the management, administration and financial aspects of the business, along with the hiring and training of the personnel. His years of management and executive level experience in this field, has given him the latitude to make these decisions without having to consult with any other person or entity. His position is at the executive level since he formulates policy and has the ultimate discretionary authority to make necessary changes in the structure of the business. His functions with the organization are purely executive since he performs only those executive functions and leaves the daily tasks to the company employees.

The director found the initial evidence submitted to be insufficient to warrant approval. Consequently, the director issued a request for evidence on June 13, 2003. In the request, the director asked counsel to submit details regarding the beneficiary's employment abroad, copies of the petitioner's Employer's Quarterly Tax Returns, accompanied by payroll records, for the fourth quarter of 2002 and the first quarter of 2003, evidence that both the U.S. entity and foreign entity are doing business, along with confirmation as to the year the U.S. entity began doing business. In a response dated August 25, 2003, counsel for the petitioner submitted the information requested by the director with supporting evidence.

On December 2, 2003, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the

organization. The director further concluded that the beneficiary did not supervise a subordinate staff of managerial, supervisory, or professional employees, and instead was merely acting as a first-line supervisor.

The petitioner's newly retained counsel submitted a brief statement on the Form I-290B which alleged that the petitioning entity had the organizational complexity to qualify the beneficiary for L-1 status. Additionally, counsel requested an additional 30 days within which it would file a brief and additional evidence. Along with the petitioner's letter of January 29, 2004, which advised the AAO that it was now self-represented, the petitioner submitted a second letter addressing the director's denial and submitted several folders containing various documents in support of the petitioner's position. Specifically, the petitioner discussed the importance of the beneficiary's role in the U.S. entity, and continually asserted that the beneficiary was in fact a qualified executive employee. Each of the folders provided contained documentation pertaining to each division of the company and the responsibilities of the employe[es] within each unit.

Upon review, the petitioner's assertions are not persuasive. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is an executive by virtue of his position title, experience, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed executive duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The description of the beneficiary's duties, provided in the initial letter of support from the petitioner's former counsel, is vague and merely repeats the regulatory definitions. Specifically, the identification of duties such as "responsib[ility] for the internal operation of the company," "formulating policy," and "responsib[ility] for the management, administration, and financial aspects of the business " do little to clarify what the beneficiary does on an average workday. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.* at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41. In reviewing the beneficiary's stated duties, it appears that the majority of his time is devoted to the company's marketing and acquisitions. For example, his stated duties include the "discretionary authority to seek the purchase of any existing business and/or enter into negotiations for such an entity." Furthermore, one of the folders provided by the petitioner on appeal contains evidence that the beneficiary traveled to trade shows and apparently operated a booth or display on behalf of the company. At the same time, the description of duties provided in the February 24, 2003 letter claims that he leaves all the daily tasks to the company employees. On appeal, the petitioner then claims that the beneficiary performs all the "financial-legal-sales-marketing-accounting [and] licensing" duties. It appears from the overall description of his duties that he is the person primarily responsible for the marketing and promotion of the petitioner's enterprise, as evidenced by his involvement in trade shows and Florida tourism, in addition to handling all of its sales, legal services, marketing, and accounting services. 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 director also concluded that the beneficiary was not supervising managerial, professional, or supervisory employees. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See section 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by 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 that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the reservation services provided by [REDACTED] the reservation agent, or that such a degree is required to perform the duties of [REDACTED], who appears to be an administrative assistant performing clerical and administrative functions.

Finally, although the petitioner claims to have contractual employees in the areas of maintenance, landscaping, and pest control, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. The petitioner has also failed to show that the reservation agent or the administrative assistant would qualify as managerial or supervisory positions, such that the beneficiary would not be considered a first-line supervisor. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties would be primarily managerial or executive in nature. For this reason, the petition may not be approved.

Beyond the decision of the director, the petition also may not be approved because there is insufficient evidence of a qualifying relationship between the petitioner and the foreign entity. The petitioner claims that it is a subsidiary of the foreign entity. However, the only evidence submitted by the petitioner in support of this claimed relationship is a stock certificate indicating that the foreign entity owns 510 shares in the U.S. entity, whereas the beneficiary owns 490 shares. As general evidence of a petitioner's claimed qualifying

relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Furthermore, the AAO notes that the petitioner's Form 1120, Corporation Income Tax Return for 2001 indicates on Schedule K and Statement Five that the beneficiary owns 60% of the U.S. entity, and that an unidentified foreign person owns the other 40% of the entity. This directly contradicts the ownership interests set forth on the stock certificates. In addition, while the petitioner's Articles of Incorporation indicate that it is authorized to issue 1000 shares at a par value of \$1.00, Schedule L of this same 2001 tax return indicates that the petitioner has \$5,000 worth of stock outstanding, which at a par value of \$1.00 each would be 5,000 shares. 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). 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).

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 she 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 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.

ORDER: The appeal is dismissed.