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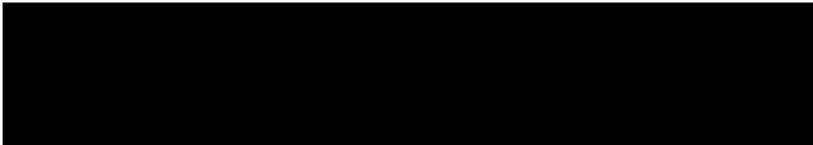
File: SRC 05 016 51739 Office: TEXAS SERVICE CENTER Date: MAY 10 2006

IN RE: Petitioner:  
Beneficiary:



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

IN BEHALF OF PETITIONER:



**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president/CEO 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 the real estate management business. The petitioner claims that it is the affiliate of Stephen Hartley Ceiling Partition Installation Limited, located in Wigan, United Kingdom. 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 beneficiary is indeed employed in the United States in an "executive/managerial capacity." In support of this assertion, the petitioner submits a brief and 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.
- (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.

At 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.

In a letter dated October 15, 2004 accompanying the Form I-129, Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's job duties as follows:

- Develop and direct the US business
- Exercise executive and financial control over company [sic].
- Develop policies and procedures.
- Establish business objectives.
- Engage in business/market development.
- Negotiate contracts with clients.
- Hire and fire personnel, including independent contractors.

On the Form I-129, the petitioner indicated that it has one employee plus independent contractors.

On November 18, 2004, the director requested additional evidence. Among other things, the director requested an organizational chart for the U.S. entity that includes the name, job title, and a detailed job description for each employee. The director also requested "convincing evidence that the beneficiary is employed in a managerial capacity as per 'L' regulations by the U.S. entity."

In response, counsel submitted an organizational chart listing at the top the beneficiary as president, with the same job description provided in the initial petition. Under the beneficiary is an office manager whose duties include: "[m]anage recordkeeping, mail, telephones, filing and other office support services[; p]rovide clerical and administrative support[; a]nswer inquiries and obtain information for customers[; p]erform light bookkeeping[; and a]s company grows, oversee additional staff." The petitioner also lists four independent contractors who provide pool maintenance service, pest control service, lawn care service, and housekeeping service, respectively.

On January 3, 2005, the director denied the petition. The director determined that the petitioner has failed to establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Specifically, the director observed that while the petitioner claimed that in addition to the beneficiary, it has one other employee plus independent contractors, there is no evidence that the other employee is paid or was granted work authorization in the United States. The director also noted that there is insufficient evidence that the entities performing certain services for the petitioner were paid as contractors or were supervised and controlled by the beneficiary. The director concluded that in the absence of further evidence regarding the other employee and the independent contractors, it would appear that the beneficiary was and will be engaged primarily in non-qualifying functions for the petitioner, and therefore cannot be considered to be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary's duties are those of an executive/managerial capacity and do not entail performing the functions of a property management business. Counsel reiterates the beneficiary's job description as previously provided. Counsel then attempts to elaborate upon how the beneficiary's duties meet each prong of the definitions of "managerial capacity" and "executive capacity." With respect to independent contractors, counsel claims that the beneficiary monitors and controls their work and has the discretion and authority to hire and fire them. Counsel also asserts that the beneficiary's spouse is indeed employed as the petitioner's office manager and was issued an employment authorization card valid from July 21, 2004 through October 28, 2004. Counsel then submits that the beneficiary's duties are "primarily and exclusively those of an executive/manager," and that he does not perform the functions of the business, but rather, "plans, organizes, directs, controls, leads, manages and guides the organization" through others.

On reviewing the petition and the evidence, the AAO concurs with the director's conclusion that the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity in the United States. 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. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the criteria set forth in the statutory definition for executive and the statutory definition for manager.

In this instance, 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 "develop[ing] and direct[ing] the US business," "exercise[ing] executive and financial control over [the] company," "develop[ing] policies and procedures," and "establish[ing] business objectives." The petitioner did not, however, define the business objectives, policies, or procedures in question, or clarify what "developing and directing" the business entailed. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed

description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.*

Moreover, it is not clear whether the petitioner is claiming that the beneficiary is primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. Instead, counsel has asserted both in the petition and on appeal that the beneficiary functions in an "executive/managerial" capacity. As noted earlier, if the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. The description of the beneficiary's duties that the petitioner provided is simply insufficient in detail to demonstrate that the criteria set forth in both statutory definitions have been met. It is noted that counsel attempts to address each of the statutory criteria in her appeal brief. However, counsel offers no more than different paraphrasing of the statutory requirements without any further specifics, or any supporting evidence, regarding the actual tasks the beneficiary engages in on a daily basis. Again, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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 Obaighena*, 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).

Further, in addition to showing that the beneficiary performs the high level responsibilities that are specified in the definitions of "executive capacity" and "managerial capacity," the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The record is insufficient to demonstrate that the staffing of the U.S. entity is such that the beneficiary is not required to be involved in the non-qualifying day-to-day functions of the business. The AAO does not dispute counsel's statement that the beneficiary "does NOT clean pool, spray for pest control, clean homes, or mow lawns" because these tasks are performed by independent contractors. However, the AAO finds that there is insufficient evidence to support the petitioner's claim that it employs an office manager who handles various clerical, administrative, and customer service tasks in the daily operation of the business. Specifically, as the director noted, the petitioner has provided no record of wages or salaries paid to this person at any point in time. Counsel asserts on appeal that CIS granted employment authorization to this individual for the period from July 21, 2004 through October 28, 2004, but even assuming that she had valid employment authorization, there is still insufficient evidence to demonstrate that she was indeed employed by the petitioner in the capacity described at the time the petition was filed. This failure of documentation is significant insofar as the office manager appears to be the only employee other than the beneficiary to be involved in the day-to-day administration of the business. If the office manager is not employed by the petitioner as claimed, it must be assumed that the beneficiary himself has to be involved to some extent in the tasks ascribed to the office manager. If the beneficiary actually performs recordkeeping, clerical and administrative support, customer service and first-line supervision of subordinate staff or contractors, he

would be performing tasks necessary to provide a service or product that are not 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 "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Given the deficiencies in the current record, the AAO is unable to determine whether the claimed managerial or executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties.

In light of the foregoing, the AAO finds that the record is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity in the United States, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the record is insufficient to establish that there continues to be a qualifying relationship between the U.S. entity and the foreign entity as required under 8 C.F.R. § 214.2(l)(14)(ii)(A). The petitioner claimed that the two entities are both 100% owned by the beneficiary and are therefore affiliates. The petitioner submitted a copy of the U.S. entity's articles of incorporation and a copy of a stock certificate showing that the beneficiary holds 10,000 shares, which constitute the entirety of that company's authorized, issued and outstanding shares. The U.S. entity's federal tax return for 2004 also confirms that the beneficiary owns 100% of the company's stock. However, the only documentation provided relating to the beneficiary's ownership interest in the foreign entity is that company's financial statement for the year ending April 2004, which indicates that the beneficiary's holding in the company consists of two "£1 ordinary shares." Without further information regarding the foreign entity's share capital, the AAO is unable to verify that the beneficiary's ownership in the foreign entity is as claimed by the petitioner, such that the foreign entity could be considered an "affiliate" of the U.S. entity as that term is defined under 8 C.F.R. § 214.2(l)(1)(ii)(L). Accordingly, the petitioner has failed to establish that there continues to be a qualifying relationship between the U.S. entity and the foreign entity. For this additional reason, 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. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if 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 at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

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**ORDER:**      The appeal is dismissed.