

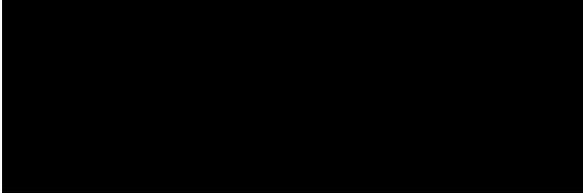
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U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. A3000
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U.S. Citizenship
and Immigration
Services

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File: WAC 04 235 51410 Office: CALIFORNIA SERVICE CENTER Date:

NOV 06 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 operations 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 Canadian corporation that seeks to employ the beneficiary at its claimed affiliate company, [REDACTED] which is based in the State of Arizona and which is engaged in real estate development. 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 a second year. The petitioner now seeks to once again extend the beneficiary's stay for an additional two 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. Specifically, the director concluded that the beneficiary was not supervising managerial, professional, or supervisory employees and thus was merely a first-line supervisor.

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 erred by disregarding submitted documentation, and that the denial was based on speculation. Counsel further asserts that the beneficiary was in fact employed in a managerial capacity, since he manages the organization and has discretion over the day-to-day operations of the business, and that the director's conclusions with regard to his management of a non-professional subordinate staff was incorrect. In support of these assertions, counsel submits a detailed brief.

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

The primary 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.

With the petition, counsel for the petitioner submitted a letter of support from the petitioner dated August 19, 2004. It explained that the primary focus of the U.S. business was land development, and described the beneficiary's job duties as follows:

[The beneficiary] efficiently managed all aspects of developing the land: He located and negotiated with the developer and worked with him on the plans. He presented the plans for County approval. He handled all the engineering aspects and issues involving the electrical company, telephone company, and gas company, as well as the digging of the well which will provide water, and the construction of the fencing concealing the well and utilities. Now that the property has been fully developed, we will offer it for sale.

* * *

In conclusion, [the beneficiary] has accomplished a great deal in the past year. He has a talent for organization and business maturity beyond his years for handling complicated aspects in land development. As soon as this land is sold, the company will buy other property and develop it in much the same manner.

Also included with the initial petition were the petitioner's quarterly tax returns, which demonstrated that it employed the beneficiary and one other person, [REDACTED] during the previous year.

On October 5, 2004, the director issued a request for additional evidence. The director specifically requested a more detailed description of the beneficiary's duties, along with confirmation of the number of employees currently on the U.S. entity's payroll, their place in the U.S. entity's organizational hierarchy, their duties, and their educational backgrounds. The director further requested quarterly wage reports for the most recent four quarters along with the U.S. entity's payroll summaries.

In response, the U.S. entity submitted a letter dated December 21, 2004 from its president.¹ This letter provided the following details regarding the beneficiary's duties:

At the present time [the U.S. entity] has two employees, [the beneficiary] and [REDACTED]. [The beneficiary's] duties are clearly those of a manager as he completely manages all aspect[s] of the land development, including determining the work to be done by the professionals who develop the land, managing this work, and of course managing all the work to be accomplished to be in compliance with governmental regulations.

Specifically, [the beneficiary's] duties are centered on the financial and managerial areas of the business, including acquisitions, expenditures, sales and accounting. He also handles contract negotiations and works with the contractors and consultants and reviews and approves all of the contracts for development and engineering related matters.

[The beneficiary] is responsible for managing all the subcontractor services, such as engineering, construction and marketing of the acquired properties. He is responsible for assuring that time frames and schedules are [properly] established and met. He also manages the marketing of the developed land to completion of the transaction. We are very pleased that he has established excellent professional associations with reputable subcontractors and consulting firms including Aztec Surveying, Inc. [a]nd Faya Construction, Inc. which have been important in the company's success to date.

With regard to the petitioner's other employee [REDACTED], the petitioner stated:

[REDACTED] a permanent resident who is employed as an Administrative Assistant to [the beneficiary], handles the clerical functions, including word processing, documentation organization, filing and receptionist duties. She is a college graduate and a full time employee who is currently earning \$12,000 for the year.

The U.S. entity's organizational chart showed that the beneficiary supervised [REDACTED] and also oversaw three companies who allegedly provided services to the petitioner on an independent contractor basis: (1)

¹ The petitioner also submitted an undated statement entitled "Job Duties" which provided an identical recitation of duties as set forth in the December 21, 2004 letter.

Faya Construction, Inc., which provided construction and construction management services; (2) Aztec Land Surveying, which provided land surveying services; and (3) Coldwell Banker, which provided real estate brokerage services. Quarterly wage reports and payroll summaries were also submitted, which verified the petitioner's employment of the beneficiary and [REDACTED]

On February 2, 2005, the director denied the petition. The director determined that the beneficiary was not acting in a primarily managerial or executive capacity, and specifically noted that the petitioner had failed to show that the beneficiary was overseeing a subordinate staff of professional employees.

On appeal, counsel submits a detailed brief in support of the beneficiary's qualifications, and alleges that the director's decision was erroneously based on the conclusion that the beneficiary did not supervise a subordinate staff of professionals. Counsel asserts that the three companies under the beneficiary's supervision obviously employ, at minimum, one level of supervisory or professional employees, and thus they qualify as professionals for purposes of this analysis.

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.* In this matter, although the petitioner alleges that the beneficiary's position is managerial in nature, the AAO will review the beneficiary's qualifications for compliance under both managerial and executive capacities to provide the petitioner with the greatest opportunity to establish eligibility.

The initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a vague overview of the nature of his duties, which were essentially described as overseeing land development. As previously stated, the initial evidence submitted was insufficient to warrant approval, and consequently the director requested additional information including a more specific description of the beneficiary's duties. The petitioner responded to this request and, in addition to describing the beneficiary's duties in further detail, the petitioner submitted an organizational chart outlining the structure of the U.S. entity and the persons and entities under the beneficiary's control.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. Whether the beneficiary is a managerial 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. Here, the petitioner did provide a fairly detailed overview of the beneficiary's duties for the previous year. However, the duties largely include sales functions, such as overseeing the expansion of the petitioner's business through acquisitions and contract negotiations. Although the petitioner alleges that the three corporations listed on the organizational chart have been retained as independent contractors and handle the essential tasks of the U.S. entity's land development business, there is nothing in the record to indicate that these entities have been retained by the petitioner to provide services and perform duties on its behalf. Although counsel claims that the U.S. entity has retained these contractual employees, the petitioner has

neither presented evidence to document the existence of these employees nor identified the exact services these individuals provide. 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).

The only documentation in the record connecting the U.S. entity with these entities is Vacant Land Purchase Contracts. Specifically, the record contains a one-page Vacant Land Purchase Contract, dated August 27, 2004, and a Settlement Statement, dated September 15, 2004, between the U.S. entity and Faya Construction, Inc. These documents indicate that Faya Construction contracted with the U.S. entity for the purchase of "a 2+/- parcel of land," but no further information or legal description of the property is provided. Additionally, the record contains a Vacant Land/Lot Purchase Contract dated October 19, 2004, which evidences that Coldwell Banker received \$1,000 in earnest money from the U.S. entity for the purchase of a property located in Tucson, Arizona, which has R2 zoning. No documentation evidencing a relationship between the petitioner and Aztec Land Surveying was submitted.

These documents, at best, indicate that the U.S. entity engaged in isolated real estate transactions with these entities. There is nothing in the record to indicate that the U.S. entity has retained the services of these entities for a designated period of time to perform exclusive work for the U.S. entity. Since each of these entities appears to be a for-profit corporation, it is highly unlikely that they provide all services necessary for the petitioner to run a successful land development business without the need for the beneficiary to engage in any of the required tasks. The contracts provided indicate that the U.S. entity bought and sold property to and from Coldwell Banker and Faya. However, these documents do not establish that these entities are contractual employees of the U.S. entity who provide land development services on its behalf. Furthermore, the fact that these contractual agreements were executed after the filing of the extension request (namely, August 27, 2004 and October 19, 2004) indicates that these entities had no relationship with the U.S. entity at the time the extension request was filed on August 24, 2004. It is further noted that no mention of these three entities was made with the initial extension request, and it was not until the petitioner's response to the request for evidence that a relationship between the U.S. entity and these entities was alleged. Even if it was established that these entities did perform the majority of the U.S. entity's services as a result of these agreements, the fact remains that the evidence is not acceptable in this matter. 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).

Based on the above, it appears that the U.S. entity does not employ the beneficiary in a primarily managerial or executive capacity. Contrary to the petitioner's claims, there is no evidence to show that the beneficiary is relieved from performing non-qualifying duties by three independent contracted companies. Furthermore, the petitioner claims, and the evidence corroborates, that the U.S. entity employed only the beneficiary and the administrative assistant at the time of filing. The duties of the administrative assistant include general administrative tasks, such as filing, word processing, and receptionist duties. As a result, it appears that the crux of the U.S. entity business lies in the hands of the beneficiary, who is clearly responsible for all other aspects of the business, including sales, marketing, accounting and financial services, acquisitions and

contract negotiations, and general land development services. Absent evidence that additional persons have been retained to assist the beneficiary, it is clear that these responsibilities are bestowed solely upon the beneficiary. 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 basis for the director's denial in this matter, however, focused on a different line of reasoning. The director focused on the nature of the three independent companies, and stated that since the record did not establish that these companies employed professional employees whose positions required advanced degrees, the beneficiary was therefore unqualified as a manager since this requirement had not been met. As discussed above, this basis for the denial was incorrect, since these entities did not even have an established relationship with the U.S entity at the time of filing. However, the regulations do state that, 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* § 101(a)(44)(A)(ii) of the Act.

Again, since the relationship between the beneficiary and the three corporations is non-existent, the proper focus in this matter should have been whether the U.S entity's other employee, the administrative assistant, was either supervisory, professional, or managerial. The record indicates that [REDACTED] possesses a college degree. However, the petitioner did not provide the level of education required to perform the duties of the administrative assistant position. Thus, the petitioner has not established that this employee requires an advanced degree to perform her duties, such that she could be classified as a professional. Nor has the petitioner shown that [REDACTED] supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that she could be classified as a manager or supervisor. The petitioner clearly states that other than the beneficiary, [REDACTED] is the U.S entity's only other employee. Thus, the petitioner has not shown that the beneficiary's subordinate employee is supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

With regard to the petitioner's employees, 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 Citizenship and Immigration Services (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.* In this matter, the petitioner claims the U.S. entity employed only one other employee at the time of filing. The petitioner simultaneously claimed, however, that the beneficiary was relieved from performing non-qualifying duties by three corporations retained as independent contractors, which has since been shown to be false. It is inconsistent for the petitioner to claim that he acted primarily as a managerial or executive employee when it is clear that he lacked a subordinate staff to relieve him from performing non-qualifying tasks. 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). Regardless, the evidence of record fails to establish that the beneficiary will be relieved from having to primarily perform non-qualifying tasks by an employee that has been proven to have been employed at the time the instant petition was filed.

Based on the evidence submitted, it appears that absent evidence to show that the petitioner had hired a subordinate staff to relieve the beneficiary from performing non-qualifying duties at the time of filing, it cannot be determined that he functions or will function in a primarily managerial or executive capacity. As previously stated, 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. at 604. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates the U.S. entity entered into contracts with Faya and Coldwell Banker since the filing of the extension in August 2004. However, 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. *Id.* Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the petition may not be approved.

Beyond the decision of the director, the minimal documentation of the U.S. entity's and the petitioner's ownership raises the issue of whether there is a qualifying relationship between a U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has submitted no evidence establishing that the claimed owner of the entities, Cameron H. Husynni, in fact owns both entities. Without evidence of his ownership of these entities, the claimed affiliate relationship cannot be established. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. As general evidence of a petitioner's claimed qualifying relationship, stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must be examined to determine whether a stockholder maintains ownership and control of a corporate entity. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. The petitioner has not submitted any such evidence. For this additional reason, the petition may not be approved.

Additionally, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial or executive capacity as defined at sections 101(a)(44)(A) and 101(a)(44)(B) of the Act. With the initial petition, the following brief description of the beneficiary's duties abroad was provided:

In Canada, [the beneficiary] managed daily operations for this mid-size automobile dealership, managing purchasing, inventory control, sales and our personnel until August 25, 2002. He then went to the U.S. to open and manage our company there.

No additional discussion of his role while employed for the foreign entity was provided.

The description of his duties while employed abroad is too generalized and vague to determine the exact nature of his position. 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 did 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). Without further detail of the beneficiary's actual duties, the AAO is unable to determine whether he was employed abroad in a primarily managerial or executive capacity. 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).

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.

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.