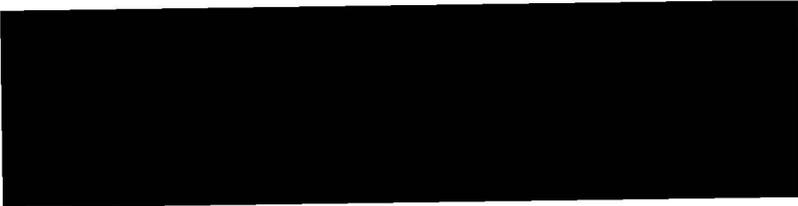


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services



DF

NOV 22 2006

File: SRC 05 023 51231 Office: TEXAS SERVICE CENTER Date:

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)

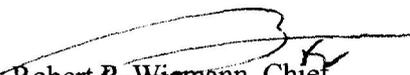
IN BEHALF OF PETITIONER:

~~PHOTIC COPY~~

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, 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 employ the beneficiary as its chief executive officer. Accordingly, the petitioner endeavors to classify the beneficiary 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 electronics and computer retail sales. The petitioner claims that it is the subsidiary of El Banna Contracting Company in Cairo, Egypt.

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.¹ The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the U.S. entity was undergoing an expansion that the beneficiary is overseeing. 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.

¹ Although the petition and the appeal are each accompanied by a Form G-28, Notice of Entry of Appearance by an Attorney or Representative, the claimed attorney/representative in this matter has not established that he is a licensed attorney or an accredited representative authorized to undertake representations on the petitioner's behalf. See 8 C.F.R. § 292.1. In fact, the individual only indicates on Form G-28 that his company is an immigration consulting firm. Accordingly, this individual's appearance will not be recognized, and any assertions made by this person will not be considered in this proceeding.

- (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.

At issue in the present matter is whether the beneficiary would be employed in the United States 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 25, 2004 submitted with the initial petition, the petitioner described the beneficiary's intended job duties with the U.S. entity as follows:

[The beneficiary] will be charged with leading the sales and marketing campaigns for the company. He intends on launching a large scale marketing campaign targeting tourist[s] and encouraging them to buy the latest technology in camera's [sic] and video recorders. He will also be directed to expand the company's current sales base and increase employees and sales.

[The beneficiary] will be ultimately responsible for the day-to-day operations of the company. He will conduct market analysis, budget, hire, and fire, and manage all sales staff. His new position in the company shall be as the Chief Executive Officer of BCC Investments, Inc. He will utilize the knowledge and skills he had gained as a technologies [sic] manager to gather the latest technology in computers and drafting equipment for consumption by the Egyptian parent company.

On November 15, 2004, the director requested additional evidence. Specifically, with respect to the staff of the U.S. company, the director requested (1) a description of the duties and educational background of its employees (including an evaluation from an accredited evaluator to determine foreign equivalency to U.S. baccalaureate degrees); (2) the company's organizational chart, with the names and titles of all employees; (3) evidence that the beneficiary would not engage in the day to day operations of the business but instead would be primarily engaged in managerial or executive duties or managing a function, and (4) evidence that the beneficiary would be managing other managers and professionals.

In a letter dated December 1, 2004 responding to the request for further evidence, the petitioner indicated that the U.S. company currently employs four employees (presumably not including the beneficiary) -- two sales representatives, a sales manager, and a branch director. The petitioner described the duties of these employees as follows: (1) the sales representatives report to the sales manager and are responsible for meeting daily and weekly sales quota, reporting sales statistics to the sales manager, and customer relations; (2) the sales manager reports to the branch director and is responsible for the upkeep and hiring and firing of the sales staff, ensuring sales targets are set and met, and conducting quarterly performance evaluation of the sales team, and (3) the branch director reports to the chief operating officer and is responsible for direct supervision of the branch office and managing all international shipments and coordinating sale import and export logistics. The petitioner did not describe the actual educational background of these employees, but stated that the sales representative positions require a minimum of an associate's degree or its equivalent in sales, marketing or a related field, and the sales manager position requires a minimum of a bachelor's degree in sales, marketing or an equivalent field of study. No information was provided with respect to the educational requirements for the branch director position. The petitioner submitted an organizational chart setting forth the position titles described above but did not state the names of the individuals occupying these positions. With respect to the beneficiary's position, the petitioner repeated the same job description submitted with the original petition, adding that because the beneficiary is still in Egypt, there is no evidence that the beneficiary is managing other managers in the United States.

In a decision dated December 20, 2004, the director denied the petition, concluding that the evidence provided is insufficient to establish that the beneficiary would be employed by the U.S. entity in an executive or managerial capacity. Specifically, the director observed it does not appear that the beneficiary's executive duties would exceed his duties relating to the routine tasks of the business. The Director noted that based on the figures stated as salary expense on the U.S. company's Form 941 for the fourth quarter of 2003 and its income statement for the first quarter of 2004, two of the three employees listed must be employed part-time only. The director concluded that, absent evidence that the U.S. company has sufficient personnel to relieve the beneficiary of his non-qualifying duties, the beneficiary could not be found to be performing primarily executive duties. The director further found that the petitioner has not established that there is sufficient work in the U.S. company at the executive level for the beneficiary to be employed primarily in that capacity.

On appeal, the petitioner asserts that the U.S. company is undergoing an expansion, and that the beneficiary would be spearheading the expansion. The petitioner submits documents purportedly evidencing the expansion, including office leases, sales contracts, and marketing materials. The petitioner also asserts that the company plans to hire five additional employees who will be charged with the day-to-day tasks of the company, thus allowing the beneficiary to perform primarily executive and managerial duties. With respect to the U.S. company's low payroll, the petitioner asserts that it is due to the fact that the company's employees are all paid a small base salary and receive further compensation in the form of sales commissions, which are not reflected as salary in the pay records.

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 the United States 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 job description the petitioner has provided for the beneficiary is vague and non-specific and fails to demonstrate what the beneficiary would do on a day-to-day basis. For example, the petitioner stated that the beneficiary would "be charged with leading the sales and marketing campaign for the company," "[launch] a large scale marketing campaign targeting tourist[s]," "be directed to expand the company's current sales base and increase employees and sales," in addition to being "ultimately responsible for the day-to-day operations of the company." It is not sufficient simply to recite the beneficiary's vague job responsibilities or broadly-cast business objectives; the regulations require a detailed description of the beneficiary's daily job duties. *Id.* The petitioner has failed to answer a critical question in this case: What will 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).

Moreover, the job description provided by the petitioner indicates that the beneficiary is engaged in significant marketing activities for the company (*i.e.*, "leading the sales and marketing campaign for the company," "launching a large scale marketing campaign targeting tourist[s]," and "conduct market analysis"). Even though the petitioner claims that the beneficiary would "lead" the company's marketing campaign, the record does not indicate that any of the other employees of the U.S. company would be involved in any aspect of the company's marketing campaign. As such, it would appear that the beneficiary would not only "lead"

the company's marketing campaign, but would directly carry out the day-to-day tasks relating to marketing as well. In addition, the petitioner indicated that the beneficiary would be procuring "the latest technology in computers and drafting equipment for consumption by the Egyptian parent company." These day-to-day marketing and equipment procurement activities would be considered tasks that are necessary to provide the company's services or product, and therefore would not be considered managerial or executive in nature. Because the beneficiary's job involves tasks that are not executive or managerial in nature, as described above, and the petitioner did not specify how much of the beneficiary's time would be spent on each duty, the Citizenship and Immigration Services (CIS) cannot determine what proportion of the beneficiary's duties would be managerial or executive in nature and what proportion would not qualify as such. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). Accordingly, the AAO cannot conclude that the evidence is sufficient to establish that the beneficiary's job duties are "primarily" managerial or executive in nature.

The AAO also concurs with the director's finding that the evidence fails to demonstrate that the U.S. company has sufficient personnel to relieve the beneficiary of his non-qualifying duties. The petitioner described the U.S. company's staff as consisting of four positions subordinate to the beneficiary. However, the petitioner failed to indicate whether all of those positions are filled. Specifically, the petitioner failed to provide the names of the employees holding those positions as requested by the director, and the Florida State Employer's Quarterly Reports for the last quarter of 2003 and the first quarter of 2004 show that the U.S. company only had three employees during that time.² Moreover, as the director noted, the salary amounts paid to those individuals, particularly in the last quarter of 2003, are too low to support a conclusion that those individuals were employed full-time. The petitioner claims on appeal that the employees in question were paid commission based on sales made, and refers the AAO to the "Cost of Goods Sold" line item in the U.S.

² It is noted for the record that the quarterly reports submitted actually belong to Digital USA, LLC, a separate legal entity, and not to the petitioner. In addition, based on the conflicting evidence in the record regarding the actual ownership of Digital USA, LLC, the AAO cannot conclude that this separate company has any relation to the petitioner. Specifically, the petitioner submitted the following documentation relating to the ownership of Digital USA, LLC: (1) records from the Florida Secretary of State showing that the beneficiary is Digital USA's sole member and manager; (2) the organizational minutes and records, dated September 18, 2003, showing that membership is shared between the petitioner and Sunrise Electronics, Inc.; (3) an Operating Agreement, dated September 24, 2003, showing that membership is shared between the petitioner and N & M International Enterprises, Inc., and (4) membership certificate number three, which indicates that the petitioner has 1,000 units, without revealing the issuance history of other membership certificates, namely certificates number one and two. The petitioner provided no explanation for the conflicting information regarding the ownership of Digital USA, LLC in the above documentation. 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).

company's income statement for January through October 2004. However, that figure reveals nothing more than the total cost of goods sold during that period, and sheds no light on the issue of compensation paid to employees, or the amount of time these employees actually worked during that period of time. Finally, as noted above, the record fails to show that these employees were employees of the petitioner and that the beneficiary would actually have any subordinate employees. Given these deficiencies in the record, the AAO cannot find that the petitioner has established that the U.S. company has sufficient personnel to relieve the beneficiary from having to perform non-qualifying tasks relating to the day-to-day operations of the company.

Finally, it is noted that the petitioner claims on appeal that the U.S. company is undergoing an expansion and will soon hire five additional employees who would perform the non-qualifying day-to-day tasks of the company in lieu of the beneficiary. However, that information regarding future hiring plans is not sufficient to qualify the beneficiary for the benefit sought. 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).

In light of the foregoing, the AAO concurs with the director's conclusion that the record is insufficient to support the conclusion that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity, as required under 8 C.F.R. § 214.2(l)(3)(ii).

Beyond the director's decision, the AAO also finds that the petitioner has failed to establish that the beneficiary was employed by the foreign entity in a managerial or executive capacity, as required under 8 C.F.R. § 214.2(l)(3)(iv). In the letters dated October 25 and December 1, 2004, the petitioner stated that the beneficiary has been employed by the foreign entity since 1992, and since 2000, he has been working as the vice president of business development. In that capacity, the petitioner stated, the beneficiary "has been directly serving the President of the company providing financial analysis, marketing services, technology implementation, and bid supervision." The petitioner asserted that all of the beneficiary's positions with the foreign entity "required that he conduct system analysis, meet company objectives, and direct employees," and therefore the beneficiary has served in a managerial capacity. The AAO notes, however, that the petitioner failed to provide any evidence to show that the beneficiary actually manages a function, or is managing other managers and professionals, for the foreign entity, as the director requested. The petitioner submitted, both initially and in response to the director's request for further evidence, an alphabetical list of all of the foreign entity's employees with the name, title, employment status, and date joined for each employee. However, despite the director's request, the petitioner failed to provide an organizational chart, or any similar document that would reveal the corporate hierarchy of the foreign entity and the beneficiary's place within it, such that it could be determined whether the beneficiary indeed supervises other managerial, supervisory, or professional employees, or otherwise occupies a managerial or executive role within the company. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Moreover, it is noted that on the list of employees of the foreign entity that the petitioner did provide, the beneficiary is listed as an accountant, and not a manager, division head, or vice president, as the petitioner claimed in its letters. The petitioner has not provided any explanation for this discrepancy. 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). In light of these deficiencies in the record, the AAO finds the petitioner has not established that the beneficiary was employed overseas in a managerial or executive capacity, as the regulations require. For this additional reason, the petition will be denied.

In addition, the lack of documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. In response to the director's request for further evidence showing that the U.S. entity has been doing regular and systematic business for the previous year, the petitioner submitted a number of invoices and sale receipts documenting transactions that had taken place during the time period in question. However, all of the receipts and invoices submitted relate to transactions involving Digital USA, LLC rather than the petitioner itself. As previously noted, the evidence of record is insufficient to support the conclusion that Digital USA, LLC has any relation to the petitioner. As such, the submitted invoices and receipts cannot be considered evidence demonstrating that the petitioner itself has been engaged in the regular, systematic, and continuous provision of goods or services, pursuant to the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). 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.

ORDER: The appeal is dismissed.