

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. A3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

D7

PUBLIC COPY

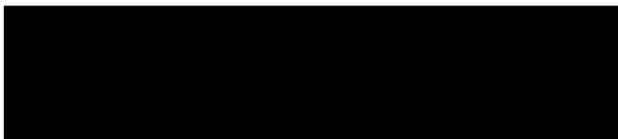


File: EAC 05 215 52400 Office: VERMONT SERVICE CENTER Date: **AUG 06 2007**

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

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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 visa petition seeking to employ the beneficiary as its director of sales 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 2003 under the laws of the State of New York and is allegedly in the business of real estate construction and sales. The petitioner claims a qualifying relationship with Provienda del Caribe, S.A. (Provicasa), of the Dominican Republic.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) the petitioner has a qualifying relationship with the foreign employer.

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 to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager. Counsel also asserts that the petitioner and the foreign entity are qualifying organizations because the same three stockholders collectively own a majority of the stock of both entities. In support of this assertion, the petitioner submits a 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 first 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.

The petitioner does not clarify in the initial petition whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. 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 is indeed representing 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 petitioner described the beneficiary's proposed job duties in a letter dated July 13, 2005 as follows:

As Director of Sales [for the petitioner], [the beneficiary] will be our highest ranking officer in New York and will direct and manage our efforts to market and sell the parent company's housing starts both in the Dominican Republic and in the United States. He will be based at our company's office at 4250 Broadway, Suite 4-W, New York, NY 10033. His staff in New York will include a Chief Sales Representative and two other sales representatives, all of whom are licensed real estate salespersons, an accountant who is a CPA, an office administrator, and a secretary.

On August 5, 2005, the director requested additional evidence. The director requested, *inter alia*, job descriptions for the petitioner's staff, including the beneficiary; a breakdown detailing the number of hours devoted to each of the employees' job duties; an organizational chart; wage reports; and tax records.

In response, the petitioner submitted an organizational chart for the United States operation. The chart shows the beneficiary, the director of sales, reporting to the president of the corporation. The beneficiary is also shown directly supervising a "chief" sales representative who, in turn, supervises two sales representatives. The beneficiary is also shown directly supervising an office administrator who supervises a "personnel officer" and an accountant.

The petitioner also provided wage reports for the first two quarters of 2005. The reports indicate that the petitioner employed three people during the first half of 2005 (the "chief" sales representative, one of the sales representatives, and the "personnel officer"). There is no evidence that the other people listed on the organizational chart were engaged by the petitioner in 2005 as either employees or independent contractors.

Finally, the petitioner provided brief job descriptions for each of the purported staff members. The beneficiary is described as directing marketing and sales activities, creating sales packages, developing training packages, promoting the business, and hiring and training personnel. The "chief" sales representative is described as supervising the sales representatives, assisting in setting sales targets and sales terms, and selecting territories. The sales representative identified as an employee in the wage reports is described as being engaged in sales activities. Finally, the "personnel officer" is described as a clerical employee administering the petitioner's employment and compensation systems.

On November 3, 2005, the director denied the petition. The director concluded that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel argues that the beneficiary's duties are primarily those of an executive or manager. Counsel asserts that the beneficiary will manage supervisory and/or professional employees.

Upon review, the petitioner's assertions are not persuasive.

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. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description does not establish that the beneficiary will actually be performing managerial 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, the petitioner did not provide a breakdown of how much time the beneficiary will devote to the many duties ascribed to him even though the director specifically requested this information. 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). This lack of evidence is particularly important in this matter because the duties listed by the petitioner appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary will direct marketing and sales activities, create sales packages, develop training packages, and promote the business. However, these marketing and sales duties constitute non-qualifying administrative or operational tasks when performed by the beneficiary. As the petitioner has not established how much time the beneficiary devotes to such non-qualifying tasks or whether subordinate staff members will be performing some or all of these tasks, it cannot be confirmed that he will be "primarily" employed as a manager. 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).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As a threshold issue, the organizational chart, wage reports, and job descriptions allege that the beneficiary directly supervises two staff members and indirectly supervises three staff members. However, the record only confirms the current employment of three of the individuals listed on the organizational chart (the "chief" sales representative, one of the sales representatives, and the "personnel officer"). There is no

objective evidence that the other people listed on the organizational chart were engaged by the petitioner in 2005 as either employees or independent contractors. Therefore, these additional staff members cannot be taken into consideration in determining whether the beneficiary will be supervising and controlling the work of other employees. Regardless, as the supervision or management of independent contractors will not permit a beneficiary to be classified as a managerial employee as a matter of law, the beneficiary's purported management of non-employees such as the "office administration" is not relevant to this particular analysis. See section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

In view of the above, the petitioner has not established that the beneficiary will supervise and control the work of other managerial or supervisory employees. While the petitioner has given the "chief" sales representative a lofty title and has described him as having supervisory or managerial functions, the petitioner has not established that this employee is primarily engaged in performing supervisory or managerial duties. To the contrary, the "chief" sales representative appears to be engaged in performing tasks related to providing a service or producing a product, i.e., sales. Inflated job titles and artificial tiers of subordinate employees are not probative and will not establish that an organization is sufficiently complex to support a managerial position. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Moreover, the petitioner has not established that the beneficiary will manage professional employees. 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 to perform the duties of any of the beneficiary's subordinate employees. Also, the AAO need not address the petitioner's assertion that the beneficiary is also a professional. The beneficiary's classification as a "professional" is generally irrelevant to a petition filed pursuant to section 101(a)(15)(L) of the Act. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>1</sup>

---

<sup>1</sup>While the petitioner has not specifically argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, the beneficiary appears to have been offered a position primarily performing non-qualifying sales and marketing tasks and/or working as a first-line supervisor. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

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).

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily

---

manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(1)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary is primarily performing non-qualifying sales and marketing tasks and/or is a first-line manager of non-professional employees. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

performing managerial or executive duties, and the petition may not be approved for that reason.

The second issue in this matter is whether the petitioner has established that it has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that an individual petition filed on Form I-129 shall be accompanied by:

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.

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section." An "affiliate" is defined in pertinent part as "[o]ne of two legal entities owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2).

In this matter, the petitioner has submitted evidence that the foreign entity and the petitioner have three common stockholders who, collectively, own a majority of the stock in each entity. The ownership percentages alleged by the petitioner are summarized as follows:

Foreign Entity:

Stockholder	Number of Shares	Percentage
[REDACTED]	480	24%
[REDACTED]	480	24%
[REDACTED]	580	29%
[REDACTED]	380	19%
[REDACTED]	20	1%
[REDACTED]	40	2%
[REDACTED]	20	1%

Petitioner:

Stockholder	Number of Shares	Percentage
[REDACTED]	68	34%
[REDACTED]	66	33%
Beneficiary	66	33%

The petitioner asserts that, since the three shareholders of the petitioner also own 77% of the shares of the foreign entity, the two companies are affiliates in that both entities are owned and controlled by the same group of individuals.

On November 3, 2005, the director denied the petition. The director concluded that the petitioner and the foreign entity are not owned and controlled by the same group of individuals with each individual owning and controlling approximately the same share or proportion of the entities.

On appeal, counsel to the petitioner asserts that "[o]ver 400 shares of the stock of other shareholders had been purchased back by the [the foreign entity], and retired, thus making ownership and control of both entities squarely in the hands of the three major stockholders."

Upon review, the petitioner's assertions are not persuasive.

As a threshold issue, counsel's assertion on appeal that some or all of the shares of the minority shareholders of the foreign entity have been "retired," thus altering the ownership structure of the foreign entity, is entirely unsupported by evidence. 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 Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, counsel does not explain whether the "retirement" of the minority shareholders' stock occurred before or after the filing of the petition. Given that counsel first made this assertion on appeal, and that this assertion is inconsistent with the ownership structure described in the petition, it must be concluded that this change in ownership likely occurred after the filing of the instant petition. 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). Therefore, the AAO will adjudicate the appeal based on the ownership structure described in the record before the director.

The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the petitioner has asserted that its three shareholders, who each own approximately 1/3 of the petitioner's stock, also own 77% of the foreign entity's stock in similar proportions. The petitioner's description of the ownership structure of the two entities, however, does not meet the definition of an "affiliate" in 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). As explained in the regulations, an affiliate is "[o]ne of two legal entities owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity." *Id.* (emphasis added). In this matter, the two entities are not owned and controlled by the same group of individuals each owning and controlling approximately the same share or proportion of each entity. Therefore, the two entities are not qualifying organizations as affiliates and, for this additional reason, the petition may not be approved.

