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File: WAC 04 206 50226 Office: CALIFORNIA SERVICE CENTER Date: FEB 01 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)

ON 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, 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 employ the beneficiary in the position of president, business development 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, a California corporation, states that it is engaged in export and construction projects. The petitioner claims to be a wholly-owned subsidiary of Procon S.A. located in Ecuador. The petitioner seeks to employ the beneficiary for a period of one year to open a new office in the United States.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary has been employed in a managerial or executive capacity by the foreign entity.

On appeal, counsel for the petitioner asserts that the beneficiary's position with the foreign company was indeed a position of primarily managerial and executive capacity. In support of this claim, counsel attempts to clarify the duties performed by the beneficiary for the foreign company, and explains that the beneficiary supervises "professional, managerial or supervisory personnel who relieve him from performing non-qualifying duties." Counsel for the petitioner submits a brief and a letter from the president of the foreign company in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been employed in a primarily managerial or executive capacity by the foreign entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 instant petition was filed on July 19, 2004. On the Form I-129, the petitioner described the beneficiary's duties for the foreign company as follows:

Executive, Production/Business Expansion: Oversee special business developments [sic] projects under Construction division of company. Directs the management of this department and establishes the goals and policies. Specifically, in charge of overseeing the implementation of Master-Planned residential community "Urbanization of Esteros;" oversee infrastructure as well as the houses during construction, obtaining the necessary permits, budgeting, controlling the process of concrete products, and supervising the factory of prefab concrete products. Oversee all aspects of department from budget to personnel. Maintaining relations and meetings with different people and city supervisors that will allow the acceleration of the jobs in the urbanization and the factory of prefab concrete. Supervising the leases and rental agreements of the different real estate that the company owns.

In addition, the petitioner submitted a document outlining the organizational scheme of the foreign company. The petitioner described the production department, the department headed by the beneficiary, as follows:

This dept. is in charge of two areas; on one hand it will be directly responsible for the Legal Consultation; on the other hand it will have to coordinate together with the chief of work and construction, the design structure, and housing scheme of the work.

The said dept. will also coordinate and take decisions together with the Manager, to make feasible the normal development of the constructions.

It will plan, design and make decision having to do with urbanization; the chief of work will be in charge of all that, and he will also plan, together with the storage room dept., the requirements for materials, and an opportune supply with them.

On July 27, 2004, the director determined that the petitioner did not submit sufficient evidence to process the petition. The director requested that the petitioner submit additional evidence in support of its petition. In part, the director requested: 1) the total number of employees at the foreign company; 2) an organizational chart for the overseas office, including the beneficiary's current position, and all the employees' job titles and duties; and, 3) a detailed description of the beneficiary's duties abroad and the percentage of time spent on each duty.

In a response to the director's request, the petitioner submitted an organizational chart of the foreign company, as well as an organizational chart for the production department. The chart indicates the beneficiary as an employee of the production department and he supervises a "design and planning" employee, a "construction-control" employee, a "storage-inventory-equipment" employee, and a subcontractor, who in turn supervises painters, plumbers, electricians, handymen and machine operators. The organizational chart for the foreign company does not indicate that the beneficiary directly supervises any employees. The petitioner also submitted brief job descriptions for the positions the beneficiary supervises.

In addition, the petitioner re-submitted the job description previously submitted and added the following:

As a Civil Engineer is in charge of: planning of sewer system, road, street design, sidewalks, curbsides, urban design, planification [sic] home construction plan, approvals, construction permits, job coordinations [sic] with different City Departments and in the first. Attend construction conference or related. Time on the job averages 6 hours daily, percentage of time spent on each activity or duty varied accordingly.

The director denied the petition on October 28, 2004 on the ground that the petitioner did not establish that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign company. The director stated that the petitioner provided "minimal documentation describing the beneficiary's position overseas." The director determined that the petitioner had failed to establish that the beneficiary supervised managerial, professional or supervisory employees, or that he managed a function of the foreign entity.

The petitioner filed the instant appeal on November 24, 2004. On appeal, counsel for the petitioner asserts that the beneficiary held a key position for the foreign company and primarily performed managerial and executive duties. Counsel cites from a letter, submitted by the foreign company, further

explaining the duties performed by the beneficiary for the foreign company. Counsel for the petitioner asserts that the beneficiary has been employed by the foreign company in a primarily managerial or executive capacity since he was in charge of a "key and essential" department of the company, and the beneficiary assisted in negotiating an important contract to help further the company's growth, and the beneficiary is a permanent member of the board of directors and thus has an "important role in establishing the goals and policies of the Company." Counsel further asserts that the beneficiary supervises the work of five employees of professionals, managers or supervisory personnel who relieve the beneficiary from performing non-qualifying duties.

The petitioner submitted a letter from the president of the foreign company that further clarifies the duties performed by the beneficiary for the foreign company, and the percentage of time spent on each duty. The letter also indicated that the beneficiary supervised five employees: one employee in construction and control, one employee in design and planification, one employee in "construction field", one employee in storage, supplies, inventory, and one subcontractor in charge of hiring. The petitioner re-iterated the brief job descriptions previously submitted for these employees, and included their educational background.

Counsel and petitioner's assertions are not persuasive. Upon review, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily 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(1)(3)(iii).

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, 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).

On review, the petitioner 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 vague duties such as the beneficiary "oversees special business developments projects under Construction division of the company," "directs the management of this department and establishes the goals and policies," and he is "in charge of overseeing the implementation of Master-Planned residential community "Urbanization Los Esteros." The petitioner did not, however, define the petitioner's goals and policies, or clarify the role of the operational and development functions that the beneficiary will supervise. 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 provide any detail or explanation of the beneficiary's activities in the course of her daily routine. 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). The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary "negotiates substantial contracts with professionals;" "maintain relations and meetings with different people and city

authorities that will coordinate and allow the acceleration of the jobs in the urbanization and the factory of prefab concrete;" "oversee infrastructure as well as the houses during construction, obtaining the necessary permits, budgeting, controlling the process of concrete products, and supervising the factory of prefab concrete products;" and is "responsible for the budget of his division." It appears that the beneficiary will be providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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).

As noted above, in the request for evidence the director requested that the petitioner submit a definitive statement describing the foreign employment of the beneficiary. The petitioner failed to submit this document in its response. This evidence is critical as it would have established if the beneficiary held a position of managerial or executive capacity by the foreign company. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The 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). In the instant matter, the petitioner did not submit a detailed job description of the duties performed by the beneficiary at the foreign company and did not clarify the percentage of time the beneficiary spends on each duty, and thus AAO cannot determine if the beneficiary was employed by the foreign entity in a managerial or executive capacity. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

In addition, 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. The petitioner claims that the beneficiary supervises one employee in construction and control, one employee in design and planification, one employee in construction field, one employee in storage, supplies, inventory, and one subcontractor in charge of hiring. 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 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 design, inventory and project coordination functions of the subordinates supervised by the beneficiary.

As noted above, the petitioner submitted an organizational chart of the foreign company, as well as an organizational chart for the production department. The chart for the production department indicates the beneficiary as an employee of the production department who supervises a "design and planning" employee, a "construction-control" employee, a "storage-inventory-equipment" employee, and a subcontractor, who in turn supervises painters, plumbers, electricians, handymen and machine operators. However, in reviewing the company-wide organizational chart, that chart indicates that the beneficiary is in the production department and he does not directly supervise any employees. In addition, the company-wide organizational chart indicates that the above-mentioned employees, supervised by the beneficiary according to the production department organization chart, are in fact supervised by the production controller and the health department according to the company organizational chart. 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).

Based upon the petitioner's failure to submit the requested comprehensive job description, it cannot be concluded that the beneficiary has been employed by the foreign entity in a managerial or executive capacity. For this reason, the appeal will be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 appeal will be dismissed.

ORDER: The appeal is dismissed.