

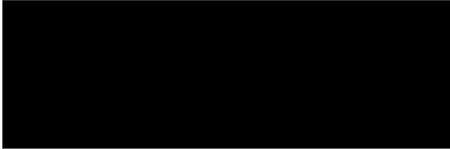
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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
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Services

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File: SRC 05 154 50238 Office: TEXAS SERVICE CENTER Date: **MAY 01 2007**

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

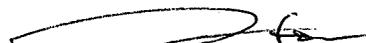
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

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 "director of operations" to open a new office in the United States 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 corporation organized under the laws of the State of Florida, claims to be engaged in the cabinetry and natural stone business and alleges a qualifying relationship with [REDACTED]

The director denied the petition concluding that the petitioner failed to demonstrate that sufficient physical premises have been secured to house the new office.

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, the petitioner asserts that it adequately established that it has secured sufficient physical premises to house the United States operation. In support of the appeal, counsel submitted a letter and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

In addition, the regulation at 8 C.F.R. § 214.2(I)(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, 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 (I)(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 primary issue in this matter is whether the petitioner has established that sufficient physical premises to house the new office have been secured as required by 8 C.F.R. § 214.2(I)(3)(v)(A).

In the initial petition, the petitioner provided a "rental agreement" dated March 31, 2005 with AA Alpine Storage – LW II. This month-to-month agreement purports to rent a 9 foot by 20 foot "storage space" to the petitioner to be used "only for the storage of property wholly owned by Tenant" for \$169.81 per month plus tax. The petitioner also provided a business plan in which it states its goal of hiring three employees during its first year in operation and that it "will be engaged in the design, production, installation, maintenance and restoration of general purpose cabinetry and natural stone complimentary products." The petitioner described its location needs only as "a single facility over an industrial district near to I-95 in Lake Worth, FL."

On June 11, 2005, the director requested additional evidence. The director requested, *inter alia*, "a copy of the lease or other evidence that [shows] premises sufficient to house the new operation have been secured." In response, the petitioner simply resubmitted the identical "rental agreement" appended to the initial petition. The

petitioner provided no other evidence regarding the sufficiency of the "storage space" or clarifications regarding its proposed use of the space.

On October 19, 2005, the director denied the petition concluding that the petitioner had not established that sufficient physical premises to house the new office had been secured. The director stated the following:

With the initial petition, the petitioner submitted a copy of [a] rental agreement for a 9 [by] 12 space in a self storage facility. It was unclear how the U.S. company could conduct business on a daily basis out of a storage unit. It was unclear how that could be viewed as sufficient physical space to house the operations which the petitioners [sic] states will include hiring 4 additional workers. In response to a Request for Additional Evidence, the petitioner again submitted a copy of that same rental agreement. As stated, that is not sufficient evidence that [the] petitioner has secured sufficient physical space.

On appeal, the petitioner asserts that the location in question is not a "self storage facility" and that the premises "allow people to safely and appropriately work inside." In support of the appeal, the petitioner submits additional evidence, including photographs and a letter from the landlord.

Upon review, the petitioner's argument is not persuasive.

As a threshold issue, the additional evidence submitted for the first time on appeal regarding the sufficiency of the "storage space" will not be considered. The petitioner was put on notice of a deficiency in the evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit additional evidence regarding the sufficiency of the secured premises in response to the Request for Evidence and now submits it for the first time 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). If the petitioner had wanted this evidence to be considered, it should have submitted it in response to the director's Request for Evidence. The appeal will be adjudicated based on the record of proceeding before the director.

As explained above, the petitioner has submitted a lease for a 9 by 12 self-storage unit as evidence that it has secured sufficient physical space to house the new office. This lease is for a month-to-month term and limits the use of the space to the storage of the petitioner's property. As the petitioner has submitted no evidence that this space would sufficiently house its cabinetry and stone business, which will employ approximately four people, the petitioner has not established that it has secured sufficient physical premises. 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)). It is simply not credible that the space as described in the "rental agreement" could sufficiently house the business as described by the petitioner.

Accordingly, the petitioner has not established that sufficient physical premises to house the new office have been secured as required by 8 C.F.R. § 214.2(l)(3)(v)(A), and the petition may not be approved for that reason.

Beyond the decision of the director, another issue is whether the petitioner has established that the beneficiary had been employed primarily as a manager or executive abroad as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

Title 8 C.F.R. § 214.2(l)(3)(v)(B) requires that the petitioner establish that 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."

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 have been 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. However, in the letter dated September 2, 2005, the foreign entity describes the beneficiary's position abroad as "managerial." Regardless, a beneficiary may not claim to have been 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. Given the ambiguity, the AAO will assume that the petitioner is asserting that the beneficiary has been primarily employed as a manager *or*, alternatively, as an executive, and will consider both classifications.

In response to the director's Request for Evidence which sought further information regarding the beneficiary's employment abroad, the foreign entity provided a letter dated September 2, 2005 which described the beneficiary's duties overseas as follows:

- Working cooperatively with lawyers and accountants in the implementation and structure of the company since its inception, for which he dedicates 10% of his time;
- Responsible for hiring and training sales, technical personnel for customer oriented service: in charge of hiring, firing, and applying disciplinary measures as situation arises, for which he dedicates 10% of his time[;]
- Prepare and analyze internal and technical reports. This includes identifying time frames for employees' task and preparing times [sic] sheets for the payroll, analyzing employee's performance, for which he spends 25% of his time[;]
- Developing strong relationships with suppliers, VAR partners and executive decision makers of Ecuadorian and international companies, for which he spends 10% of his time;
- Implementing sales and marketing plans including the organization and deployment of country level trade shows and technology expositions, for which he dedicates 5% of his time;
- Compliance with normative qualification level of the company, for which he dedicates 5% of [his] time;
- Sales opportunity analysis including developing of the sale plan to which he dedicates 20% of his time;
- Attending sales meetings with management to set and adjust established goals for which he dedicates 10% of his time;
- Attending new products and technologies awareness seminars for which he dedicates 5% of his time[.]

The foreign entity also asserts that the beneficiary supervises nine people. In support of this assertion, the petitioner provided an organizational chart showing the beneficiary supervising a sales staff, a technical manager, and technicians. The petitioner also provided brief job descriptions for the subordinate employees.

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 has failed to establish that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization. As explained in the organizational chart and the job descriptions for both the beneficiary and the subordinate employees, the beneficiary appears to primarily be engaged in supervising a four-person sales staff. While one of the beneficiary's subordinate employees, the "senior sales" employee, has been described as a "supervisor," the petitioner failed to establish that this employee is primarily engaged in performing supervisory or managerial duties. To the contrary, the "senior sales" employee appears to be engaged in performing the same tasks related to providing a service or producing a product as the other sales representatives, and the beneficiary's supervision of the "senior sales" employee cannot be distinguished from his supervision of all of the other sales employees. Therefore, the beneficiary appears to be a first-line supervisor of a sales staff. 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. 593, 604 (Comm. 1988). As the record is devoid of evidence regarding the educational or skill levels of the sales staff, it also cannot be concluded that these employees are professionals.¹

Moreover, while the organizational chart describes the beneficiary as supervising a "technical manager," who, in turn, supervises four employees, the beneficiary's job description does not specifically include any duties related to this purported function. As explained above, the beneficiary appears primarily dedicated to supervising a sales staff, and his supervision of the "technical department" is either an immaterial part of his job or was invented for purposes of this petition. Also, as implied by the dotted line on the organizational chart labeled [REDACTED] it appears that the "technical manager" and his staff are not even employees of the foreign entity. This is confirmed by the absence of the "technical manager" from the payroll rosters appended to the initial petition. As the supervision of independent contractors cannot be used to fulfill the requirement that the beneficiary manage employees, the beneficiary's supervision of the

¹In 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).

"technical manager" and his staff, even if accurate, would not establish that he supervises and controls the work of other supervisory, professional, or managerial *employees*. Therefore, it has not been established that the petitioner has been working primarily in a managerial capacity.²

Similarly, the petitioner has failed to establish that the beneficiary has been employed abroad 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 has been acting primarily in an executive capacity. As explained above, the beneficiary appears to be primarily employed as a first-line supervisor. Therefore, the petitioner has not established that the beneficiary is employed primarily in an executive capacity.

Accordingly, the petitioner did not establish that 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 as required by 8 C.F.R. § 214.2(l)(3)(v)(B), and for this 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

²While the petitioner has not specifically argued that the beneficiary manages an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function 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(l)(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 manages an essential function. As explained above, the record establishes that the beneficiary is primarily a first-line supervisor of non-professional employees. Therefore, the AAO cannot conclude that 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).

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 it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.