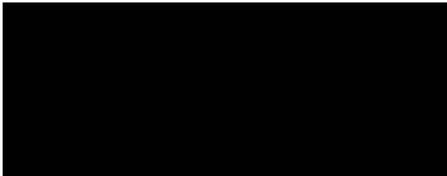


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FILE: EAC 08 071 50992 Office: VERMONT SERVICE CENTER Date: DEC 16 2008

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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting 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 appeal will be dismissed.

The petitioner is a Florida corporation that claims to be engaged in computer software development and marketing. The petitioner states that it is an affiliate of Ovasys, S.A. de C.V., located in El Salvador. Accordingly, the United States entity petitioned United States Citizenship and Immigration Services (USCIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act as an executive or manager to fill the position of president and general manager. 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 on two separate and alternative grounds. Specifically, the director concluded that the record contains insufficient evidence to demonstrate: (1) that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position; and, (2) that sufficient physical premises to house the new office have been secured.

On August 6, 2008, the petitioner timely filed the instant appeal. On appeal, the petitioner asserts that it has met the requirements for a “new office” petition. The petitioner states that it “can not invest in hiring employees unless the beneficiary is certain that he would be approved and be able to stay in the United States directing the company.” In addition, the petitioner stated that “now days many top 500 companies in the United States have offices in some cities that are home based offices, even further the Internal revenue Service acknowledge and allow these business[es] to deduct expenses [from] such offices.” The petitioner also explained that it submitted a lease agreement with the initial filing for an office space. The petitioner submits a brief 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 first issue addressed by the director is whether the petitioner has demonstrated that the intended U.S. operation, within one year of the approval of the petition, will support an executive or managerial position, as required by 8 C.F.R. 214.2(l)(3)(v)(C).

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a

variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

In addition, if a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). If approved, the beneficiary is granted a one-year period of stay to open the "new office." 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when the petitioner seeks an extension of the "new office" petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business "for the previous year" through the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.*

The nonimmigrant petition was filed on January 10, 2008. The petitioner indicated on the Form I-129 that the beneficiary will be employed in the position of president and general manager. In the support letter, the petitioner described the beneficiary's proposed duties in the United States as the following:

He will be responsible for: 1. the general and active discretionary decision making of the business and affairs of the corporation; 2. presides all the meetings of the shareholders and all the meetings of the board of directors; 3. shall execute bonds, mortgages and other instruments; 4. shall sign certificates of stocks; 5. manage the short and long term financial planning; 6. hire and fire employees; 7. establish general guidelines which must be followed by employees; 8. represent all the interests of [the petitioner].

On March 18, 2008, the director determined that the petitioner did not submit sufficient evidence to process the petition, and therefore requested that the petitioner submit additional evidence in support of its petition. Specifically, the director requested: (1) a copy of the petitioner's business license; (2) a comprehensive description of the beneficiary's duties, and how the duties will be managerial or executive in nature; (3) evidence that the beneficiary will function at a senior level within an organizational hierarchy other than in position title; (4) evidence that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties; (5) a complete position description for all of the

proposed employees, and the required educational credentials for each proposed position; and, (6) evidence that establishes the financial status of the United States operation.

In response, the petitioner described the beneficiary's proposed duties in the United States as the following:

The duties of the President and General Manager are: organize, develop and administrate the corporation conforming with the acts of licit commerce permitted by the laws, as well as the general commercial and administrative practices accepted.

Within these duties are the following:

Represent the corporation in its activities;
Administer and manage all business and operations (sales, purchasing, invoicing, collection);
Identify new opportunities of business;
Comply with the legal obligations of the corporation;
Manage the short and long term financial planning;
Establish general guidelines which must be followed and executed by employees;
Manage the organization, primarily supervises and controls the work of other employees;
Others, indispensable for the good functioning of the corporation;
Present statements on the results of this operations (monthly and yearly);
Determines the demand for services offered by the firm and its competitors and identify potential customers; develop pricing strategies with the goal of maximizing the firm's profits or share of the market while ensuring the firm's customers are satisfied

Percentage of time spent of each duty (Estimated)

Represent the corporation in all its activities 10%
Administrate and manage the business and operations 10%
Identify new opportunities of business 15%
Comply with the legal obligation of the corporation 5%
Manage the short and long term financial planning 20%
Establish general guidelines which must be followed and executed by employees 10%
Manage the organization, supervise and control the work of other employees 10%
Others indispensable for the good functioning of the corporation 5%
Present statements on the results of this operations 5%
Determines the demand for products and services offered by the firm and its competitors and identify potential customers; develop pricing strategies with the goal of maximizing the firm's profits or share of the market while ensuring the firm's customers are satisfied. 10%

The petitioner also provided evidence of the proposed staffing level which will include the president and general manager, one marketing manager, one administrative assistant, one secretary and three sales representatives, computer parts and software. The petitioner also explained that all of the proposed positions, except for the secretary, will require the individual to have work experience and a bachelor's degree. The petitioner does not clearly set a timetable of when the proposed positions will be filled.

The director denied the petition on July 15, 2008, on the ground that insufficient evidence was submitted to demonstrate that the beneficiary would be employed in a primarily executive or managerial capacity by the U.S. company within one year of commencing operations.

On appeal, the petitioner asserts that it has met the requirements for a "new office" petition. The petitioner states that it "can not invest in hiring employees unless the beneficiary is certain that he would be approved and be able to stay in the United States directing the company."

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity within one year. 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 definitions of executive and managerial capacity each 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).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary will primarily perform non-managerial, administrative, or operational duties by the end of the petitioner's first year of operations. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

On review, the petitioner 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. For example, the petitioner states that the beneficiary will "represent the corporation in its activities"; "establish general guidelines which must be followed and executed by employees"; "comply with legal obligations of the corporation"; and, "identify new opportunities of business." 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 (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 will "determine the demand for services offered by the firm and its competitors and identify potential customers"; "develop pricing strategies with the goal of maximizing the firm's profits or share of the market while ensuring the firm's customers are satisfied"; and "administer and manage all business and operations (sales, purchasing, invoicing, collection)." It appears that some portions of the beneficiary's time will be devoted to non-executive duties associated with developing and marketing the services and developing the products of the business rather than directing such activities through subordinate employees. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

In addition, although the beneficiary is not required to supervise personnel, if it is claimed that he will be employed in a managerial capacity based on his or her supervisory duties, the petitioner must establish that the proposed subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary will manage 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, for example, to perform the sales functions of the proposed sales representatives and the administrative functions of the proposed secretary and administrative assistant. A bachelor's degree may be required for the proposed position of the marketing manager but the AAO cannot determine this since the petitioner provided a brief and vague job description for the proposed marketing manager.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the instant matter, as discussed above, the petitioner states that it plans to hire a marketing manager, an administrative assistant, a secretary and three sales representatives. However, the petitioner did not indicate a firm date of hiring the employees. Therefore, the petitioner does not present sufficient evidence to establish that the U.S. company can employ the beneficiary in a predominantly managerial or executive position after the initial year of operations.

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, 8 U.S.C. § 1101(a)(44)(B). 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 managerial 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-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.* As discussed above, the beneficiary will supervise one administrative assistant, one secretary, one marketing manager, and three sales representatives and the petitioner has not demonstrated that the beneficiary will be primarily focused on the broad goals and policies of the company within one year. Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily executive capacity.

Furthermore, as contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. See *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should

explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

The petitioner did not submit a business plan for the U.S. entity. The petitioner indicated in the support letter that the purpose of the U.S. entity is the “purchase, sale and distribution of computers equipment, computer parts; the develop[ment] and distribution of software; import and export of computers, computer parts and software for diverse applications, and all other legal trade activities.” The petitioner also stated that “we expect for the first year of operations in the United States a gross income of \$500,000.00.” However, the petitioner failed to submit a business plan detailing how the petitioner will reach this goal. 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)). In addition, the petitioner failed to submit evidence of contracts for sale, or proof of inventory. The petitioner has failed to identify the scope of the U.S. company and the feasibility of achieving the goals discussed in the support letter.

Upon review, the petitioner has not submitted sufficient evidence to establish that the intended United States operations, within one year of approval, will support an executive or managerial position. For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has secured sufficient physical premises to house the new office in the United States as required under the regulations 8 C.F.R. § 214.2(l)(3)(v)(A).

At the time of filing the original petition, the petitioner submitted a document entitled “Commercial Lease.” The agreement states that the United States company will lease space for one year, with an option to renew for an additional twelve months. The lease does not indicate the size of the leased space. The lease indicates that the space can be used for “normal business operations” and the premises “shall be used for no other purpose.”

On March 18, 2008, the director requested additional information regarding the physical premises to house the new office. In particular, the director requested: (1) photographs of the interior and exterior of the office which clearly depict the organization and operation of the entity; and, (2) a list of addresses and detailed directions to each facility.

In response, the petitioner submitted photographs of the premises. The photographs indicate a small office. The petitioner did not submit photographs of the exterior of the office as requested by the director.

In the denial decision dated July 15, 2008, the director noted that the photographs submitted by the petitioner of the U.S. office, “show what appears to be an empty office within a residential dwelling.” The director also noted that no exterior photographs were submitted.

On appeal, the petitioner states that “now days many top 500 companies in the United States have offices in some cities that are home based offices, even further the internal revenue Service acknowledge and allow these business[es] to deduct expenses [from] such offices.” The petitioner also explains that it submitted a lease agreement with the initial filing for an office space.

The petitioner did not submit sufficient evidence to describe the office space even though the director specifically requested additional documentation. It is not clear if the office space is the space described in the commercial lease agreement or if its an office space in a residence. Since the petitioner did not submit photographs of the exterior of the office and the address and directions to the office address, it is not clear if the office space is the same office described in the lease agreement. 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).

Moreover, the petitioner has not described its anticipated space requirements for the new business. The initial lease agreement submitted by the petitioner did not indicate the size of the leased office space. The photographs indicate a small office that fits one to two desks. The proposed staffing level for the U.S. entity is seven individuals but the office space is not large enough to accommodate seven individuals. In addition, the petitioner states that it will sell and distribute computers, computer parts and software. Thus, the petitioner will require additional space to store its inventory. It appears that the office space secured by the petitioner is not sufficient for the petitioner’s anticipated goals. Thus, it cannot be concluded that the petitioner had secured sufficient space to house the new office as of the date of filing. For this additional 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.