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U.S. Citizenship  
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File: EAC 07 032 51043 Office: VERMONT SERVICE CENTER Date: **DEC 17 2008**

IN RE: Petitioner:   
Beneficiary: 

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

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 Administrative Appeals Office (AAO) subsequently withdrew the director's decision and remanded the petition for further action and entry of a new decision. The director, after requesting and reviewing additional evidence, once again denied the petition, and the matter is now before the AAO on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its marketing manager as 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 Florida corporation, is described as a real estate developer. The petitioner states that it is a subsidiary of American Service Market, C.A., located in Cabimas, Venezuela. The beneficiary was previously granted a one-year period in L-1A classification in order to be employed in the petitioner's new office in the United States, and the petitioner now seeks to extend his status for two additional years.

The director denied the petition on March 29, 2007, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The petitioner appealed the director's decision, and the AAO, in a decision dated October 4, 2007, withdrew the director's decision, remanded the matter to the director, and instructed him to request certain required initial evidence, including a position description for the beneficiary. The director issued a request for additional evidence on November 29, 2007, and the petitioner submitted a response on January 14, 2008.

On March 19, 2008, the director denied the petition, once again concluding that the petitioner had failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. The director acknowledged the position description submitted in response to the request for evidence, but determined that the petitioner had not demonstrated that its two-person real estate development company requires a full-time marketing manager to perform the listed duties. The director considered whether the beneficiary qualifies as a function manager, but found that the petitioner failed to demonstrate that the beneficiary does not directly perform the petitioner's marketing function.

On appeal, the petitioner asserts that "the case is again denied for the same reasons the officer stated on the first denial," and that "both decisions are a copies [sic] of each other." The petitioner asserts that it appears that the director failed to follow the AAO's recommendations, and requests that the AAO approve the petition.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The sole issue in this matter is whether the petitioner established that 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 filed the nonimmigrant petition on November 15, 2006. The petitioner stated on Form I-129 that the beneficiary would continue to serve as the marketing manager of the U.S. company, a real estate development business with two employees, the beneficiary and a president/general manager. Where asked to describe the beneficiary's proposed duties, the petitioner indicated: "Continuation of previously approved employment without change." The petitioner submitted a letter in support of the petition, but it did not include a description of the duties the beneficiary performs as marketing manager of the United States entity. The letter included a position description for the beneficiary's previous role as marketing manager of the foreign entity, which operates a department store.

The petitioner noted that during its first year of operations, the company purchased a total of four vacant lots, and completed the construction and sale of a single family home on one of the lots. The petitioner stated that two multi-unit dwellings are also under construction. The petitioner provided project summaries and copies of its agreements with a contract company, Gruveco Development Company, LLC, which was retained to perform the construction of the buildings.

The director issued a request for evidence on December 11, 2006. The director instructed the petitioner to submit an organizational chart for the U.S. company which clearly specifies the beneficiary's proposed subordinates. The director also requested a complete position description for the beneficiary's proposed subordinates in the United States, including a breakdown of the number of hours devoted to each of the subordinates' job duties on a weekly basis. The director requested that the petitioner explain how the duties of the beneficiary's subordinates are "truly managerial or require the expertise of a professional." Finally, the director requested copies of educational credentials for the beneficiary's subordinates.

In a response received on February 15, 2007, the petitioner stated that the beneficiary does not have any direct subordinate employees, but noted that he "manages more than 28 different companies and hundreds of employees." The petitioner provided a letter dated January 25, 2007 from its primary contractor, Gruveco Development Co., LLC, which provided a list of all subcontractors utilized by the petitioner's three construction projects. The list identifies 28 companies specializing in roofing, windows, flooring, air conditioning, painting, stucco, plumbing, electrical, carpentry finishing, security systems, architecture and design, masonry, surveying, roofing, etc. The petitioner submitted an organizational chart indicating that the beneficiary reports to the company president and supervises all independent contractors.

The director denied the petition on March 29, 2007, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that the beneficiary does not have any workers employed subordinate to him, and therefore it had not been established that he would be supervising managerial, professional or managerial employees who could relieve him from providing the services of the corporation. The director further stated: "[A] company comparable to yours in size and nature would normally contract out for the services of a marketing manager on an as-needed basis. Therefore, it appears that the beneficiary would not be employed in a managerial or executive capacity."

The petitioner appealed the director's decision on April 27, 2007. On appeal, the petitioner asserted that it provided evidence of the U.S. company's use of a large number of independent contractors, emphasizing that such staffing is typical in its line of business. The petitioner emphasized that the company has invested more than \$1 million in real estate property in Central Florida and is profitable. In addition, the petitioner objected to the director's reference to the beneficiary salary as being "incongruous" with a managerial or executive position. The petitioner notes that the U.S. company is a family business in its first year of operation which "freely decided to have low salaries." Finally, the petitioner objected to the director's conclusion that the petitioner does not

require a marketing manager, noting that the company requires marketing policies "due to the real estate situation."

On October 4, 2007, the AAO withdrew the director's decision and remanded the matter to the director with instructions to request additional evidence and to issue a new decision. In its decision, the AAO noted that the record contained no description of the beneficiary's proposed job duties, and that no determination could be made regarding his employment capacity without this required initial evidence. The AAO further found that the director's decision reflected an incomplete application of the statute and regulations to the facts of this case, as the director restricted his analysis of the beneficiary's eligibility as a manager or executive to whether the beneficiary would supervise subordinate professionals or managers, and considered irrelevant factors, such as the beneficiary's salary.

Therefore, the AAO instructed the director to request that the petitioner provide: (1) a comprehensive, specific description of the beneficiary's duties; (2) an explanation regarding the beneficiary's role with respect to the supervision of contractors; and (3) evidence of payments made to the claimed contractors during the petitioner's first year of operation.<sup>1</sup>

The director issued a request for additional evidence on November 29, 2007. The director requested a copy of the petitioner's 2006 federal income tax return, copies of all IRS Forms W-2 issued in 2006, and a more detailed explanation regarding the beneficiary's duties and how such duties qualify as managerial in nature. The director instructed the petitioner to provide an hour-by-hour breakdown of the duties performed by the beneficiary during a typical workweek.

In a response received on January 14, 2008, the petitioner provided a position description for the beneficiary, and an accompanying chart indicating the amount of time allocated to each duty during a typical week. The position description is as follows:

1. Design, implement and facilitate annual marketing plan for the firm. Support and facilitate development and implementation of section business/marketing plans. (4 hours/week)
2. Plan and administer the firm's Marketing Operation budget development of regional and local marketing budgets. (4.5 hours/week)
3. Organize and implement client relations (3 hours/week), including:
  - Client satisfaction surveys
  - Client development activities

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<sup>1</sup> The AAO also found evidentiary deficiencies in the record with respect to the following issues: (1) whether the petitioner was doing business in the United States for the previous year, as required by 8 C.F.R. 214.2(l)(14)(ii)(B); (2) the financial status of the company, as required by 8 C.F.R. 214.2(l)(14)(ii)(E); and (3) whether the petitioner maintains a qualifying relationship with the foreign entity, as required by 8 C.F.R. 214.2(l)(14)(ii)(A). However, the director did not specifically address these issues in the request for evidence issued on November 29, 2007.

- Client skill training
  - Special event
4. Supervise firm's RFP (Request for Proposal) protocol process including soliciting RFP's from desirable prospective clients and writing proposals for new business, participate in planning and presentation session, when assigned. (7.5 hours/week)
  5. Oversee business development activities (3.5 hours/week) including:
    - Offer coaching for prospective client meetings, presentations, etc.
    - Work with regional and local offices on designing and implementing prospecting and client contact systems.
  6. Specifying market requirements for current and future products by conducting market research supported by on-going visits to customers and non-customers. (6 hours/week)
  7. Oversee corporate communications activities (2 hours/week) through:
    - External communications and systems
    - International communications and systems
    - Public relations efforts
    - External vendors and consultants
  8. Develop and administer marketing database which includes client and prospect information, mailing list application, access to financial reports, etc. (5.5 hours/week)
  9. Assist with and support firm's involvement in various legal networks including coordinating business development and marketing activities via these relationship[s]. 2.5 hours/week)
  10. Oversee firm's electronic marketing efforts including supervision of Web site design, flyers and maintenance. (1.5 hours/week)
  11. Analyze [sic] and report the success/effectiveness of targeted advertising campaigns, special events, promotions. (3 hours/week)
  12. Develop and execute effective customer loyalty programs. (2 hours/week)

The petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2006, which shows assets of \$1,159,757, and no gross, receipts, sales or income of any type. The petitioner explained that the company was in the construction process for the entire year, and the value of the projects is reflected in its total assets. Although the petitioner explains that it was involved in construction activities during the entire year, no payments to the contractors conducting the alleged activities were reflected on the petitioner's tax return. The petitioner paid \$62,334 in salaries to the beneficiary and the company president, \$5,840 in taxes and licenses, and had other deductions totaling on \$7,097 for the year.

The director denied the petition on March 19, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director acknowledged the position description submitted, but determined that the petitioner had not demonstrated that the beneficiary would carry out the listed duties on a full-time basis. The director found that the petitioner failed to establish that the beneficiary would primarily manage a function

within the business, or that he would supervise a subordinate staff of supervisory, professional or managerial employees.

On appeal, the petitioner asserts that the director did not follow the AAO's recommendations but rather denied the petition once again for the same reasons stated in the first denial. The petitioner asserts that the two decisions issued by the director are "copies of each other." The petitioner requests that the AAO approve the petition.

Upon review, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

As a preliminary matter, the AAO acknowledges the petitioner's contention that the director failed to follow the AAO's instructions and erred by issuing two similar decisions. The director did, in fact, comply with the AAO's instructions to request a detailed description of the petitioner's duties, which was the key initial evidence missing from the record of proceeding, and the primary reason the AAO remanded the petition rather than simply dismissing the petitioner's appeal. Despite any similarities in language between the two decisions issued by the director, the decision dated March 19, 2008 clearly takes into account the petitioner's description of the beneficiary's duties, and the decisions are not mere "copies of each other" as suggested by the petitioner. Although the petitioner expresses surprise that the petition was denied a second time, the AAO did not recommend that the petition be automatically approved if the petitioner complied with the request to provide a position description for the proffered description. The petitioner is still required to establish that the beneficiary will be employed in a managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner's description of the beneficiary's duties, while quite detailed, is comprised primarily of non-managerial marketing functions. For example, the stated responsibilities for developing and implementing a marketing plan and administering a budget may have managerial components, but almost all of the other activities listed have not been shown to be managerial in nature. Such duties include organizing client relations, determining market requirements for products through market research and customer visits, administering a marketing database, analyzing advertising campaigns and promotions, developing customer loyalty programs and coordinating involvement in "legal networks." 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 Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, as noted by the director, the position description is comprised of duties that are simply not credible considering the totality of the evidence in the record, including the nature of the

petitioner's business, and its current stage of development. First, the description refers to a number of functions that appear to have nothing to do with the petitioner's operation as a real estate developer. According to the petitioner, its business consists of purchasing land, hiring contractors to build houses on the land, and selling the houses or condominiums at a profit. It is unclear why it would require a "Request for Proposal" protocol process to solicit RFPs from desirable prospective clients, offer client coaching, training or "skill development," undertake advertising campaigns, offer "customer loyalty programs," maintain a database of clients' and prospects' financial reports, develop corporate communications systems, or engage in on-going visits to customers and prospects, which are among the beneficiary's claimed duties.

Furthermore, at the time of filing, the petitioner was a one-year old company operating as a real estate developer. It claimed to have purchased land for the development of four different housing construction projects, and indicated that one project, a single-family home, had been completed. According to the agreement dated November 1, 2005 between the petitioner, as owner, and Gruveco Development Co., the contractor, the agreed contractor fee for construction of the single family home was \$170,459 to be paid in installments according to a set schedule based on the contractor's progress. The petitioner's tax return clearly shows that as of the end of 2006, the company had not made any payments to contractors. Similar contracts with even larger contractor fees were signed by the petitioner in early 2006. The petitioner has provided no probative evidence to show that it has actually paid any contractors for services. If it is not utilizing contractors to build houses on the property it owns, and it has no other source of income, it is reasonable to conclude that the company is essentially inactive and does not require the beneficiary to perform the duties listed. The petitioner has not indicated that it produces a product or provides a service that requires the attention of a full-time marketing manager. The AAO concurs with the director's conclusion that the job duties provided in response to the November 2007 RFE are not plausible.

Furthermore, in response to the initial RFE, the petitioner stated that the beneficiary "manages more than 28 different companies and hundreds of employees." Such supervisory functions are conspicuously absent from the position description submitted in response to the RFE issued in November 2007. 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). The petitioner has not shown that the beneficiary supervises any employees or contractors.

Absent a clear and credible description of the beneficiary's duties, the AAO cannot conclude that he will be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, and as discussed briefly above, the evidence of record does not establish that the petitioner has been doing business for the previous year *See* 8 C.F.R. §§ 214.2(l)(14)(ii)(D). The petitioner states that it has purchased a total of four vacant lots and has developed or is developing residential buildings on three of them. While the petitioner's tax return

indicates that the company owns land valued at more than \$1 million, the record lacks evidence to establish that the petitioner is actively engaged in developing this land. Although the petitioner has submitted copies of signed agreements with a contractor, the record contains no other documentary evidence of business activity, and the fact that the petitioner reported no income and only minimal expenses for 2006 supports a conclusion that the company is not doing business as defined in the regulations. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H). For this additional reason, the petition cannot be approved.

Finally, the record contains inconsistent evidence regarding the petitioner's ownership that precludes a finding that the petitioner maintains a qualifying relationship with the foreign entity, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner claims to be a wholly owned subsidiary of American Service Market, C.A., and has submitted a copy of its stock certificate number 1, issuing all 500 of the company's 500 authorized shares to the foreign entity. However, the petitioner has indicated on its 2005 and 2006 IRS Forms 1120 at Schedule K, that no foreign person or corporation owns 25% or more of its stock. 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). For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.