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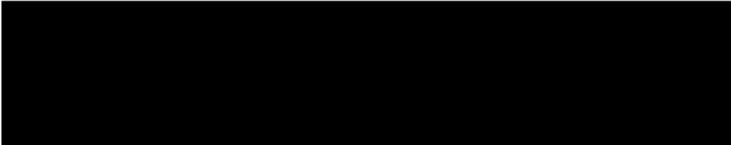
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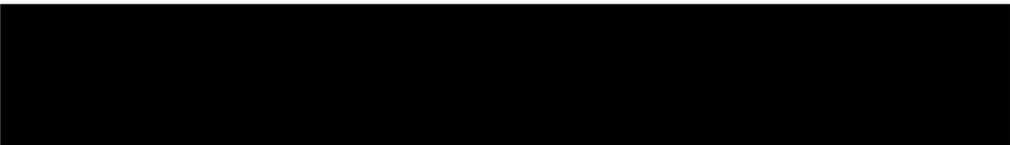
File: EAC 07 077 52413 Office: VERMONT SERVICE CENTER Date: FEB 28 2008

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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its sales manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of Florida and is allegedly in the mining products and equipment business. The beneficiary was previously granted two two-year periods of stay, and the petitioner now seeks to extend the beneficiary's stay for two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of a manager.

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 primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner does not clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, although counsel on appeal appears to limit the beneficiary to the managerial classification. Given the lack of clarity, the AAO will assume that the petitioner is claiming that the beneficiary will be employed as either an executive *or* a manager and will consider both classifications.

The petitioner describes the beneficiary's duties in an undated letter appended to the Form I-129 as follows:

1. Directs and coordinates activities involving sales of mining equipment;
2. Directs, coordinates and reviews activities in sales accounting and record keeping and receiving and shipping operations;
3. Analyzes marketing potential and expenditures to formulate policy;
4. Reviews operational records and reports to project sales and determine profitability;
5. Confers with potential customers regarding equipment needs and advises customers on types of equipments to purchase;
6. Resolves customer complaints regarding sales and services;
7. Directs product research and development[.]

Based on [the beneficiary's] unsurpassed experience and knowledge in this field, he will exercise the authority in regard to hiring, firing, delegation of assignments according to capabilities, preferences and technical goals, discipline, promotions and remuneration. He will conduct performance reviews and ensure that his staff follows the corporate procedures.

The petitioner also asserts that, although the beneficiary has been "the only Sales Department personnel, [the petitioner] has decided to implement a growth initiative." According to the petitioner, these future employees will report to the beneficiary.

Finally, although the petitioner asserts that the beneficiary "has been employed as the Sales Manager for [the petitioner]" from July 2003 until the present, the petitioner's 2005 Form 1120S, U.S. Income Tax Return for an S Corporation, reports no salaries and wages for that year other than \$43,000.00 in officer compensation. The record does not indicate that the beneficiary has been or is a corporate officer.

On February 6, 2007, the director requested additional evidence. The director requested, *inter alia*, a more detailed job description for the beneficiary, complete position descriptions for all employees, evidence documenting the number of contractors utilized and the duties performed, and copies of the petitioner's 2006 quarterly tax returns.

In response, counsel submitted a letter dated March 6, 2007 in which she further describes the beneficiary's duties as follows:

Please note that [the beneficiary] has supervisory responsibility for the key function of the company's Sales Department, as described in previously submitted Petitioner's Letter in Support. [The beneficiary] functions at a senior level within [the petitioner's] hierarchy. Please see the company's documents bearing [the beneficiary's] name. [The beneficiary] manages an essential function within the organization, in particular within the Sales and Marketing Department. [The beneficiary] does not directly manage a subordinate staff of professional personnel, due to the fact that [the petitioner] uses contractors rather than employees to perform the company's functions. Please see attached invoices for the subcontractors' services along with descriptions of the companies and work performed. [The beneficiary] plans, organizes, directs, and controls the company's major functions and works through the subcontractors to achieve the company's goals. In his position, [the beneficiary] uses his independent discretion and authority over the day-to-day operations of the Sales and

Marketing Division of [the petitioner].

The petitioner also submitted its federal and state quarterly tax returns. While these reports consistently list four employees, the beneficiary does not appear on any of the reports. Therefore, it does not appear as if the beneficiary has been, or presently is, an employee of the petitioner. The petitioner also did not describe the duties of the four employees listed in the wage reports or list the names and duties of the claimed contractors through which the beneficiary allegedly manages the petitioner's sales and marketing division.

On March 22, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary's duties are primarily those of a manager.

Upon review, counsel's assertions are not persuasive.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

As a threshold issue, it must be noted that a petitioner's future hiring plans will not establish that a beneficiary will be employed in a primarily executive or managerial capacity. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. Therefore, the petitioner's assertion that it plans to hire a subordinate staff in the future that will be supervised or managed by the beneficiary is not relevant.

In view of the above, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary manages the marketing and sales function through the use of independent contractors. However, the record is devoid of evidence describing these contractors and fails to clearly explain how, exactly, these contractors relieve the beneficiary of the need to perform the non-qualifying tasks inherent to the sales and marketing duties ascribed to him. Furthermore, broad, non-specific duties such as "plans, organizes, directs, and controls the company's major functions" and "[d]irects and coordinates activities involving sales of mining equipment" are not probative of the beneficiary actually performing qualifying duties, especially in the absence of any evidence establishing that a subordinate staff is available to be directed and coordinated. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated

job duties does not establish that the beneficiary will actually perform managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, the duties ascribed to the beneficiary appear to be non-qualifying administrative or operational tasks which will not rise to the level of being managerial or executive in nature. For example, the petitioner asserts that the beneficiary devotes his time primarily to sales and marketing tasks, e.g., dealing with customers, analyzing data, and product research. However, these duties are non-qualifying administrative or operational tasks, and the petitioner has not explained how the beneficiary will be relieved of the need to perform these tasks. Therefore, it has not been established that he will be "primarily" employed as a manager or an executive. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As asserted in the record, the beneficiary will directly supervise independent contractors. However, as these workers are neither specifically identified nor described even though this evidence was specifically requested by the director, the petitioner has failed to establish that he will supervise any subordinates. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. 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). Regardless, the supervision of independent contractors will not qualify a beneficiary as a managerial employee. The Act is quite clear that only the management of *employees* may be considered a qualifying managerial duty for purposes of this visa classification. See section 101(a)(44)(A)(ii) of the Act.

Furthermore, the petitioner has failed to establish that the beneficiary will manage an essential function of the organization. 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(1)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. As explained above, the record establishes that the beneficiary will primarily perform non-qualifying operational or administrative sales and marketing tasks. Consequently, the record indicates that the beneficiary will perform the function rather than manage the function. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform 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). Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

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

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (CIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9<sup>th</sup> Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the petition contains serious inconsistencies regarding its staffing. For example, the petitioner asserts in the undated letter appended to the Form I-129 that the beneficiary "has been employed as the Sales

Manager for [the petitioner]" from July 2003 until the present. However, both the petitioner's 2005 Form 1120S, U.S. Income Tax Return for an S Corporation, and the petitioner's 2006 federal and state quarterly tax returns indicate that no employee compensation was paid to the beneficiary in those years. The petitioner does not attempt to resolve this serious and fundamental inconsistency in the record. Overall, the record is devoid of any credible evidence establishing that the beneficiary has been or will be a bona fide employee of the petitioner. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad for at least one continuous year in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii), (iv), and (v)(B).

In this matter, the record is devoid of evidence establishing that the beneficiary was employed abroad by a qualifying organization and, if he was, that this employment was managerial or executive in nature. The petitioner failed to specifically describe the beneficiary's job duties abroad. Specifics are clearly an important indication of whether a beneficiary's duties were primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, *aff'd*, 905 F.2d 41. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad, if any. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. See sections 101(a)(44)(A) and (B) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Accordingly, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition, and the petition may not be approved for this reason.

The previous approvals of L-1A petitions do not preclude CIS from denying an extension based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act, 8 U.S.C. § 1361.

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); *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 of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

Finally, given that it appears that the beneficiary ceased being a bona fide "employee" of the petitioner as early as 2005, a review of the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary is warranted to determine whether they should be revoked in accordance with 8 C.F.R. § 214.2(1)(9)(iii)(2).

**ORDER:** The appeal is dismissed.

**FURTHER ORDERED:** The director shall review the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary for possible revocation pursuant to 8 C.F.R. § 214.2(1)(9).