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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D7

[Redacted]

DATE: JUL 23 2012 Office: VERMONT SERVICE CENTER FILE: [Redacted]

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:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. 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 approval of the beneficiary's employment as a 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, states that it operates a property management business. It claims to be an affiliate of [REDACTED] located in London, U.K. The petitioner seeks to extend the beneficiary's stay so that she may continue to serve as the General Operations Manager for an additional two years.

The director denied the petition, concluding that the record does not establish that the beneficiary has been and will be employed in an executive or managerial position.

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 for the petitioner asserts that the director came to erroneous conclusions of law and fact in the denial. Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

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 the 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.

II. The Issues on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States 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 Form I-129, Petition for a Nonimmigrant Worker, on June 24, 2009. In a letter dated June 15, 2009, the petitioner stated that the beneficiary is responsible for "overseeing the operations of [REDACTED]"

The petitioner described the beneficiary's duties to include the following: implementation of the petitioner's mission, goals, and policies; overseeing company finances; ensuring compliance with ordinances and laws; daily decision making on behalf of the member manager; management and recruitment of middle management; training staff; recruiting, interviewing, and hiring sub-contractors; directing and advising the CPA; implementation of advertising campaigns; implementation and review of sales goals; evaluation of competitors; and implementation of marketing materials. The petitioner provided a percentage of time spent by the beneficiary on each duty as follows:

- Reviewing budgets and cash flow reports by Accountant...20%
- Reviewing advertising policies and implementation thereof for [REDACTED] activities...15%
- Reviewing weekly and daily operational plans and discussing any issues with mid management...20%
- Reviewing marketing plan for increasing ownership base of home owners as clients...10%
- Review plans for real estate acquisitions and development...5%
- Review plans for diversification of business activities with review and analysis of pro formas...5%
- Programming monthly reports of [REDACTED] performance for review by [REDACTED]...10%
- Holding daily meetings with Realtor, Office Administrator and Accountant to discuss company's performance in relation to business plan and marketing strategies...15%

The petitioner provided an organizational chart. Reporting directly to the beneficiary are a realtor, Certified Public Accountant, and office administrator. Reporting to the realtor and the office administrator are cleaners, maintenance staff, pool technicians, and lawn maintenance staff. The petitioner provided position descriptions for the realtor, accountant, office administrator, cleaners, lawn maintenance personnel, and pool technicians.

The realtor's responsibilities were listed as executions of contracts for sale or lease of rental homes and reporting to the General Operations Manager. The accountant's responsibilities were listed as daily computer accounting, collection of accounts, paying of approved invoices, bank reconciliation, banking, preparing financial reports, and reporting to the General Operations Manager. The office administrator's responsibilities were listed as daily administration, meeting and greeting renters, handling renter problems, and reporting to the General Operations Manager.

The director issued a request for evidence ("RFE") on July 7, 2009, in which he instructed the petitioner to submit *inter alia*: (1) a comprehensive description of the beneficiary's proposed duties indicating how the duties have been and will be managerial or executive in nature and (2) a complete position description for all of the current and proposed employees in the United States including educational credentials and breakdown of the number of hours devoted to each duty.

Counsel for the petitioner submitted a letter dated July 22, 2009 in response to the director's RFE. Counsel for the petitioner provided the beneficiary's proposed job duties with an explanation for how each duty was managerial and executive in nature. The job duties were the same as those submitted with the initial petition. The petitioner further explained that the beneficiary "exercises managerial and executive discretion with the Realtor and Office Manager" to create and implement the following: advertising campaigns, sales goals,

competitor analysis and marketing goals, networking, reviewing the creation of additional business services, supervising financial aspects of the company, and setting policies and objectives for the company.

Counsel for the petitioner asserted that there was a "mid-management team" composed of the accountant, realtor, and office manager. Counsel for the petitioner further states that these three positions are professional-level positions. The petitioner submits position descriptions for the CPA, office administrator, principal cleaner, and cleaner. The position descriptions did not include the educational requirements for each position. The petitioner also submitted resumes for the CPA, office administrator, realtor, and beneficiary.

The director denied the petition on August 6, 2009, concluding that the record does not establish that the beneficiary has been or will be functioning in an executive or managerial capacity. The director stated that the petitioner did not establish that the beneficiary "oversees a subordinate staff of professionals." The director also determined that based on the duties outlined by the petitioner, the beneficiary's position was not executive or managerial in nature other than in position title. The director found that it is likely that the beneficiary is providing the goods and services of the United States operation to its customers and clients.

On appeal, counsel concludes that the record supports a finding that the beneficiary's duties are managerial and executive in nature. Specifically, the beneficiary oversees three mid-level managers including the realtor, CPA, and office administrator. Counsel for the petitioner further contends that the CPA, realtor, and office administrator are professional-level positions. Furthermore, counsel asserts that the previous L-1A approval of the beneficiary was not given deference as required by a USCIS "Interoffice Memorandum."

In support of the appeal, the petitioner submits: the same organizational chart submitted with the initial petition and in response to the RFE; affidavits of the CPA, office manager, beneficiary, and member managers of the LLC; and the same breakdown of percentage of time for the beneficiary as submitted with respect to the RFE.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary has been and will be employed in an executive or managerial 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.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner's 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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

Counsel and the petitioner have described the beneficiary's duties in very broad terms. In the initial filing, the petitioner described the beneficiary's duties as "overseeing company finances," providing "strategic guidance for company," "daily decision making," and implementation of "principal's mission, goals and policies." These duties merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). 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. at 1108.

Furthermore, with respect to the beneficiary's breakdown of time, the petitioner stated that the beneficiary "reviews" the following: weekly and daily operational plans; marketing plans; plans for real estate acquisitions and development; plans for diversification of business activities; and advertising policies. The petitioner's description does not clearly identify the managerial or executive duties to be performed with respect to the "review" of marketing, advertising, business development, and operational plans of the proposed real-estate operations. 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. at 1108.

While such responsibilities generally suggest that the beneficiary is responsible for oversight of the company, it provides little insight into how she would actually allocate her tasks on a day-to-day basis. 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 failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other

employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The petitioner indicated that it will operate a real estate business and that the beneficiary will manage a number of subordinate staff. Specifically, the beneficiary will supervise a realtor, CPA, office manager, cleaners, pool technicians, maintenance staff, and a lawn maintenance crew.

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

Counsel asserts on appeal that the realtor, CPA, and office manager are professional-level positions. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). The petitioner's job description for the office administrator does not support a conclusion that this position is a professional-level position. Specifically, the position was described as the "[d]aily administrator." Additionally, the position description for the real estate agent lacks the specificity required to determine whether the position is professional. According to the Florida Department of Business and Professional Regulation, the preliminary requirement to obtain a real estate license in Florida is a high school diploma or its equivalent. See <https://www.myfloridalicense.com>, accessed July 18, 2012.

Assuming that the CPA is a professional-level position, the beneficiary's supervision of this position does not support a finding that the beneficiary is functioning in a managerial or executive capacity. According to the petitioner's breakdown of duties, the beneficiary spends only 20% of her time supervising the CPA. The petitioner must establish that the beneficiary will be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of her time on non-qualifying duties. Here, the 20% of her time that the beneficiary spends supervising a professional-level position does not meet the requirements of the Act.

Furthermore, the record does not support a finding that the beneficiary supervises a team of mid-level managers as asserted by counsel in response to the RFE and on appeal. The organizational chart shows that the office administrator and realtor have cleaners, maintenance crew, lawn care, and pool technicians reporting to them. The job descriptions provided for the realtor and office administrator in the initial filing and in response to the RFE to not have any job duties relating to the supervision of subordinates. Only on appeal does the office manager's job description reflect some reporting structure with respect to these other workers. On appeal, a petitioner cannot offer a new position to an employee, or materially change a position's

title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

When examining the managerial or executive capacity of a beneficiary, U. S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary and her subordinates perform the actual day-to-day tasks of operating the property management business. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in an executive or managerial capacity. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.