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

(b)(6)

[redacted]

DATE: APR 18 2013 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

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,

Ron Rosenberg
Acting 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 to employ the beneficiary 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 Texas limited liability company established in November 2011 stating that it is involved in providing professional services necessary to operate and maintain a border crossing at the between the United States and Mexico.[1] It claims to be an affiliate of a Mexican company and seeks to employ the beneficiary as General Manger for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary had been, or would be, employed in a managerial or executive capacity. Specifically, the director found that the petitioner had not shown that the beneficiary would manage subordinate supervisory, professional or managerial employees. The director also noted discrepancies between the number of employees claimed as employed and submitted payroll documentation.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner asserts that the beneficiary is a manager under the Act because all four of the beneficiary's subordinates are considered managers and professionals within the company. The petitioner submits additional evidence related to the credentials of the beneficiary's claimed subordinates, including degree information for two of the subordinates. Further, the petitioner offers additional evidence related to the petitioner's claimed business operations in the United States and maintains certain evidence was not previously submitted due to ineffective assistance of counsel.

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 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.

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[1] The AAO notes that the petitioner will not be treated as a "new office" as defined by the regulations despite it being created in the State of Texas approximately 3 months prior to submitting the petition, since nothing on the record suggests that the petitioner will be a new venture in the United States. In fact, the petitioner reveals that it has been doing business in the United States as a sole proprietorship since 1998, d/b/a which is owned and operated by is also the majority owner of the petitioner, foreign employer and affiliated companies (a Mexican company) and (a Texas corporation). All companies are engaged in the provision of professional services and maintenance related to the between the United States and Mexico.

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. Analysis:

A. Managerial or executive capacity in the United States

As stated, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity as defined by the Act.

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.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will primarily perform executive or managerial duties with the petitioner as required by the Act.

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 offered the following explanation of the beneficiary's duties in response to the director's Request for Evidence (RFE), which instructed the petitioner to provide a more comprehensive duty description including percentages of time spent on his various duties:

- Formulate policies, manage daily operations, and plan the use of materials and human resources (Principal, all-encompassing duty);
- Responsible for supervising the programming, customer service and human resources departments in El Paso, Texas (Principal, all-encompassing duty);
- Direct and coordinate the activities of [redacted] related to developing new business strategies and opportunities; 20%
- Review financial statements, sales activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement; 20%
- Provide training to staff regarding customer services and sales management; 5%
- Determine staffing requirements. Has full authority to interview, hire and train new employees, or oversee those personnel processes; 20%
- Establish and implement policies, goals and objectives and procedures for the Petitioner based on top executive plans. Write and present reports to the President of the company; 10%
- Continuous training in the custom design software for the control of the [redacted] and [redacted] 5%

- Supervise the preparation of monthly statistics related to the number of procedures served, income earned, waiting times, sales of prepaid cards, among others; 10%
- Responsible for overseeing the growth of the company through innovations in technology in order to increase efficiency; 10%

On appeal, the petitioner further elaborates on the beneficiary's duties in the United States explaining them as follows:

> [The beneficiary] has the technical experience to install computer system nets as well as the knowledge of electric systems and handle [sic] of remote connection between the principal office in Cd. Juarez, Chih (Frontster)- the [redacted] and the office located in El Paso, Texas- the [redacted] [The beneficiary] has all the trustiness [sic] of our company, which can only be obtained with the pass of years. The seniority of the employee in a Management level is between 20 to 10 years and the rest of the staff has an average of 6 years of seniority.
>
> The development of the new technology's installation (access control through a radio frequency RFID) will be the stage that [the beneficiary] will conclude in the offices located at El Paso, Texas, with said technology and customers will be able to access through the web and monitor their statements of account and crosses through the [redacted] this part of the goals that we wish to accomplish during 2012, to fasten the access to the [redacted], the pilot plan begins with the [redacted] and will conclude with the access of trailers at the import/export area of the maquiladora industry.

The definitions of executive and managerial capacity 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).

However, although the beneficiary's duties submitted in response to the director's RFE list various general managerial or executive duties; the duties presented on appeal stress operational duties in a contradictory fashion thereby casting doubt on whether the beneficiary will be spending a majority of his time on high-level responsibilities. For instance, the duties submitted in response to the RFE accentuate the performance of general managerial or executive duties such as formulating and implementing policies, goals, objectives and procedures; managing departments; developing new business opportunities; and reviewing finances to determine cost reductions. The petitioner provides little in the way of specifics regarding the nature of the policies, goals, objectives and procedures for which the beneficiary will be responsible or new business opportunities that will be explored by the beneficiary. 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. Indeed, detail has only have been provided regarding the beneficiary's performance of day-to-day operational duties, suggesting these will consistent of the majority of his duties. For instance, the duty description submitted on appeal stresses the performance of day-to-day operational duties; specifically, the installation of new technology to facilitate communication between the petitioner and foreign employer in Mexico and account access by customers.

Further, the petitioner offers the beneficiary on the record as a personnel manager, asserting that the beneficiary's subordinates are considered managers and professionals within the greater foreign employer and petitioner organizational structure. 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). The petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. 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). 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."

However, various discrepancies related to the beneficiary's claimed subordinates casts material doubt on whether the beneficiary will act as a personnel manager as asserted. For instance, on appeal the petitioner offers that the beneficiary has four subordinates who are considered supervisors, managers or professionals; two of which are claimed to have bachelor's degrees. But, the petitioner fails to identify the positions in which these offered employees work thereby making it impossible to determine whether these employees act as supervisors or managers, or in positions that require an advanced degree as defined above. The petitioner also submits degree information on appeal for two of the aforementioned employees, but these degrees are not translated. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Further, other educational credentials submitted on appeal are not relevant to concluding that the beneficiary's subordinates will be professionals as they only reflect the completion of high school diplomas and enrollment in some college level courses. As noted, to be a professional consistent with the Act, a subordinate must at minimum be shown to have a baccalaureate level degree.

Additionally, discrepancies on the record related to the beneficiary's subordinates and the petitioner's organizational structure cast doubt on whether the beneficiary will be supervising other managers, supervisors, or professionals. For example, in direct contradiction to the claimed four subordinates listed above, the petitioner offers in a support letter submitted on appeal that the beneficiary will be responsible for ten employees, including a Customer Service Supervisor, a manager of a department of called "Programming," one person responsible for "everything related to clients who make applications through the internet," and seven other employees managing various day-to-day service related duties. However, the record does not support that the petitioner has ten employees and three direct subordinates. In fact, as noted

above, the petitioner states that the beneficiary has four direct subordinates. Further, the most recent IRS Form 941 employer tax return documentation for the 1st quarter of 2012 reflects that the petitioner only has five employees, not the ten offered on appeal. The petitioner also submitted inconsistent information on the beneficiary's proposed subordinates in response to the director's RFE, noting the following subordinates for the beneficiary: (1) a Sales Manager; (2) a Maintenance Manager; (3) and IT Manager; (4) an undetermined number of Sales Representatives; and (5) two Customer Service representatives. All of the aforementioned positions are listed as "to be hired" with the exception of two identified Customer Service representatives [redacted] and [redacted] suggesting the petitioner only had two employees as of April 2012. In contrast, the petitioner's employer tax documentation for the 1st quarter of 2012 reflects five employees, which are not identified in the above referenced organizational structure submitted in response to the director. In short, the petitioner provided inconsistent and incomplete response to the director's request for a detailed list of U.S. employees identified by name and position, and only further confuses this on appeal by submitting additional contradictions related to the beneficiary's claimed subordinates. 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). 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, the petitioner suggests that their failure to respond appropriately regarding the beneficiary's claimed subordinates was due to ineffective assistance of counsel. Specifically, the petitioner claims that it was not appropriately advised on the director's requests for additional information. However, any appeal based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). As the petitioner has not produced any of the aforementioned evidence related to its claims of ineffective assistance of counsel, the AAO will not give any weight to these claims.

In sum, the petitioner has provided inconsistent and incomplete information on the beneficiary's claimed subordinates. Therefore, it is not possible to determine with any certainty whether or not the beneficiary will manage other managers, supervisors, or professionals as required of a personnel manager. Additionally, the beneficiary's duties suggest that the beneficiary will be primarily engaged in day-to-day operational duties related to running the petitioner's business, and will not be primarily performing managerial or executive duties as defined by the Act. As such, the appeal must be dismissed.

B. Managerial or executive capacity with the foreign employer

The director also determined that the petitioner failed to establish that the beneficiary has acted primarily in a managerial or executive capacity with the foreign employer, as required by the Act.

As noted, 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 offered an explanation of the beneficiary's foreign employer duties, including percentages of time spent on various duties, as follows:

- Responsible for supervising the programming and customer service departments in Ciudad Juarez, Mexico (Principal all-encompassing duty);
- As the head of Human Resources, provide training in both software management and customer service in order to increase efficiency; 10%
- Resolve problems emerging from paperwork or process delivered to the customers of [redacted]; 10%
- Direct the preparation of monthly statistics related to sales, income, customer behavior, and new system inputs; 10%
- Responsible for management of inventory as well as contact with suppliers; 10%
- Supervise the creation and maintenance of website and other online tools; 10%
- Direct the installation and supervise the continuous operation of sales software designed exclusively for the [redacted]; 10%
- Review operational records and reports to project sales and determine profitability; 10%
- Determine price schedules and discount rates; 10%
- Monitor customer preferences to determine focus of sales efforts; 10%
- Confer or consult with department heads to plan advertising services and to secure information on equipment and customer specifications; 10%

The director found the above duties insufficient to establish that the beneficiary was acting primarily in a managerial or executive capacity and requested that the petitioner submit additional evidence to establish this requirement. In response, the petitioner submitted duties nearly identical to those listed above; except 75% the beneficiary's time was allocated to being responsible for supervising the Programming and Customer Service Departments in Ciudad Juarez, Mexico, and the beneficiary's remaining duties were allocated as taking up only 2.5% of the beneficiary's time as opposed to the previous 10%.

Lastly, on appeal, the petitioner further elaborates on the beneficiary's foreign duties describing them as follows:

> [The beneficiary], who has several years in our companies as expert in the installation of Computer Systems nets, as well as to the installation and operation of the principal software for Corporate Control . . . For almost 3 years, [the beneficiary] has had the position as Manager of the Express Line within the sales system known as "Corporate Control." Giving installation, communications and systems solutions, as well as being responsible to deliver financial statements, growth statistics and other reports related with the Express Line. He is also responsible for the creation

and design of the web page and the communications through facebook and blogs, giving continuous information to the users and responding all their questions.

The definitions of executive and managerial capacity 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).

First, the petitioner submitted two directly inconsistent job duty descriptions, one in support of the original petition and one in response to the director's RFE. This discrepancy is of particular importance since the latter duty description was modified in order to stress the beneficiary's performance of managerial duties, and the earlier duty description includes many duties focused on the day-to-day operations of the enterprise such as; providing software training to employees, resolving customer service issues, preparing monthly reports, managing software and directing the installation of software. When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its 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). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather questionably re-allocated the percentages in order to accentuate managerial duties. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition. As noted, the original job duties are made up of primarily non-qualifying operational duties. Further, the petitioner's duty description on appeal only reinforces the conclusion that the beneficiary primarily performed non-qualifying duties with the foreign employer as it primarily stresses operational duties such as installing and operating of software; providing systems solutions; creating reports of upper management; updating and designing facebook pages and blogs; and responding to customer inquiries.

As such, the record does not sufficiently support that the beneficiary primarily performs managerial or executive duties with the foreign employer as defined by the Act. In fact, the preponderance of the evidence supports that the beneficiary primarily performs non-qualifying operational duties with the foreign employer; and therefore, has not met the burden of establishing that the beneficiary acts in a managerial or executive capacity with the foreign employer as required by 8 C.F.R. § 214.2(l)(3)(iv). For this additional reason, the appeal will be dismissed.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

III. Conclusion

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. 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.

ORDER: The appeal is dismissed.