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**U.S. Citizenship
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Services**

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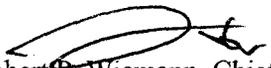
IN RE: Petitioner:
Beneficiary:

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, Texas 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 executive 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 engaged in the import and export of marble art and the design of artwork. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

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 an executive or manager. In support, counsel submits a brief and additional evidence.

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(I)(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 (I)(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 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 is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, and on appeal counsel asserts that the beneficiary could be classified as either an executive or a manager. It is noted that a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is representing the beneficiary as either an executive *or* a manager, it must establish that the beneficiary meets one set of the four criteria set forth in the statutory definition for executive or the statutory definition for manager.

The petitioner described the beneficiary's job duties in a letter dated October 28, 2005. As this letter is in the record, the job description will not be repeated here. The petitioner also asserted in both the Form I-129 and the letter dated October 28, 2005 that it employs two people including the beneficiary. The other employee is allegedly a "designer and artist." Finally, the petitioner provided two letters dated November 7, 2005 indicating that both the beneficiary and the "designer and artist" have received income from the petitioner for services rendered. While these letters indicate that the beneficiary is actually employed on a contract basis, the letters do not clarify the employment relationship with the "designer and artist."

On November 30, 2005, the director requested additional evidence. The director requested, *inter alia*, the following:

Submit a definitive statement describing the proposed U.S. employment of the beneficiary, including:

- Number of employees who will report directly to the beneficiary;
- A brief description of their job titles and duties; give their educational background;
- If the beneficiary will not supervise other employees, specify what essential function within the organization he will manage.

In response, the petitioner submitted a letter dated December 5, 2005 in which it further described the beneficiary's job duties as follows:

Although [the beneficiary] does not and will not immediately supervise laborers themselves

he will establish policies to be followed by the contractors and subcontractors. He oversees the overall expenditures of subcontractors to ensure that projects are being completed as close to the estimated projections as possible. He will make the final decision as to material and customer pricing, although the actual selections of the materials and designs will be made by the designer along with the contracted laborers. With the counsel and input of subcontractors and designers [the beneficiary] has the authority to fire personnel and to recruit other subcontractors and designers.

The key functions performed by [the beneficiary] involve the monitoring of all operational strategies bearing on marketing and the financial performance and profitability of the company. He exercises plenary latitude with regards to discretionary decision making on all day to day activities.

As the Executive Manager of [the petitioner], [the beneficiary] is primarily engaged in executing executive and managerial functions. These include but are not limited to designing and approving financial and operational strategies; setting overall company goals in regards to profitability and marketing; negotiating with contractors, subcontractors in regards to offers submitted by and to the company by subcontractors vendors and vice versa. [The beneficiary] will continue to plan, formulate and implement all administrative and operational policies and procedures for the corporation.

This is an essential position since the success of all the corporations will be dependent on [the beneficiary] properly overseeing the submission and preparation of offers. Additionally, he will use his business acumen, experience and skill with regard to hiring appropriate personnel, implementing standards and ensuring that such standards are complied by all employees, both executive/managerial and non-managerial of the corporation.

[The beneficiary's] engineering background along with his operational & managerial experience within the manufacturing and service enterprises ensures that [the beneficiary] is able to more effectively negotiate service contracts and properly deal with any issues bearing on the aspects of this enterprise: such as quality control; marketing strategies directed at subcontractors and commercial real estate enterprises in order to increase the market share; and any issues which may arise in regards to structural compliance.

Because the company thus far has dealt with licensed and experienced subcontractors structural compliance issues have been rare. However, [the beneficiary's] experience and educational background are essential in communicating with subcontractors in regards to structural problems which cannot be resolved by the designers and laborers; licensing and safety compliance issues; and in negotiating contract terms.

The petitioner also asserts in the December 5, 2005 letter that it employs the beneficiary and the "chief designer," who was previously described as the "designer and artist" in the October 28, 2005 letter. The petitioner explained that the "chief designer," who is actually an independent contractor, and various "subcontractors" all report to the beneficiary, although those laborers having "design or construction issues"

report to the "chief designer." Finally, the petitioner described three other independent contractors currently providing labor services to the petitioner.

The petitioner also submitted a letter dated December 7, 2005 explaining that the petitioner has no "employees." Both the beneficiary and the "chief designer" are compensated as independent contractors.

On December 23, 2005, 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.

On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager. Counsel further argues that the director failed to properly request additional evidence regarding the beneficiary's duties in the United States before denying the petition. Finally, counsel submitted on appeal copies of Forms 1099 indicating that the petitioner compensated the beneficiary, the "chief designer," and two other independent contractors in 2005.

Upon review, the petitioner's assertions are not persuasive.

Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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 job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will monitor, design, and approve all financial and "operational strategies" bearing on marketing and financial performance; will set overall company goals in regards to profitability and marketing; will plan, formulate, and implement all administrative and operational policies and procedures; and will implement standards. However, the petitioner does not specifically define these "operational strategies;" does not explain what goals will be set; and does not explain what policies, procedures, or standards will be implemented. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description does not establish that the beneficiary will actually perform managerial 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 petitioner did not provide a breakdown of how much time the beneficiary will devote to the many duties ascribed to him. This is particularly important in this matter because many of the duties listed by the petitioner appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary oversees expenditures made by contractors; sets prices for contracts; negotiates with contractors; and communicates with contractors regarding structural problems, licensing, issues, and safety compliance matters. However, supervising laborers and negotiating service contracts are administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the record fails to identify any employees or contractors who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to these duties, it must be concluded that he will perform these tasks. Moreover, given that the record is devoid of any evidence that a subordinate staff is available to relieve the beneficiary of performing those administrative or operational tasks inherent to the general management of a small business, e.g., processing invoices, paying bills, keeping records, and answering the telephone, it must be concluded that the beneficiary will perform those non-qualifying tasks as well. As the petitioner has not established how much time the beneficiary will devote to such non-qualifying tasks, it cannot be confirmed that he will be "primarily" employed as a manager. 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 explained in the job descriptions for the subordinate staff members, the beneficiary appears to supervise a staff of one contractor and, intermittently, the provision of certain specialized services by two or three contracted service providers. However, the petitioner has not established that any of the subordinate contractors are primarily engaged in performing supervisory or managerial duties. To the contrary, it appears that these staff members are performing the tasks necessary to produce a product or to provide a service. Also, the supervision or management of independent contractors will not permit a beneficiary to be classified as a managerial employee as a matter of law. See section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). The Act is quite clear that only the management of *employees*, not contractors, will be considered qualifying duties for purposes of this visa classification. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the educational background and skill level of the subordinate contractors would not permit these workers to be classified as professionals, the petitioner has not established that the beneficiary will manage

professional employees.¹ Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.²

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"

¹In evaluating whether the beneficiary manages professional employees, the AAO must also evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

²While the petitioner has not clearly argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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 what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line manager of non-professional employees and/or is engaged in performing non-qualifying operational or administrative tasks. 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 would 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).

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 be acting 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, the beneficiary appears to be primarily employed as a first-line supervisor and to be performing 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.³

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).

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

Beyond the decision of the director, the petitioner has not established that it has been "doing business" for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). "Doing business" is defined in pertinent part as "the regular, systematic, and continuous provision of goods and/or services." In this matter, the original "new office" petition was approved on or about December 23, 2004. However, as admitted by counsel on appeal, the petitioner "was not fully operational until April 2005" because the beneficiary "was unable to travel to the

³As indicated above, counsel asserts on appeal that the director failed to properly request additional evidence regarding the beneficiary's duties in the United States before denying the petition. Specifically, counsel argues that the director never requested more information regarding the beneficiary's purported executive duties in the United States and, if he had, "perhaps the response would have reiterated or further explained or expanded its previous submission in this category." Upon review, the AAO disagrees with counsel's observation. First, the director's Request for Evidence requests a "definitive statement describing the proposed U.S. employment of the beneficiary." While this Request for Evidence may not have specifically requested further evidence regarding the beneficiary's purported executive duties, the Request for Evidence was certainly specific enough to put the petitioner on notice that the beneficiary's job description was inadequate. The purpose of a Request for Evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Second, even assuming that the director had failed to request evidence before denying the instant petition, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner had an opportunity to supplement the record on appeal if it felt that additional reiteration, explanation, or expansion was necessary. However, the petitioner has chosen not to provide any additional evidence regarding the beneficiary's purported managerial or executive duties on appeal. It would serve no useful purpose to remand a case simply to afford a petitioner an opportunity to supplement a record with new evidence when a petitioner has this opportunity on appeal in situations where the director denies a petition for insufficiency of evidence without first providing a petitioner with an opportunity to supplement the record through a Request for Evidence.

US until April, 2005." The petitioner also explained in its letter dated December 5, 2005 that it "was only actively generating income for 8 months" before filing the instant petition. Finally, the lease submitted by the petitioner as evidence of its business activities is not for a commercial space. Rather, the submitted lease is for a residence. Therefore, as the petitioner and its counsel have both indicated that the petitioner had not been doing business for the previous year and because the petitioner has not established that it has maintained physical premises sufficient for the petitioner's business operations, the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has not established that it still has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

Evidence that the United States and the foreign entity are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section[.]

Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." A "subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity."

In this matter, the petitioner asserts that it is 60% owned, and thus controlled, by the foreign entity. In support of this assertion, the petitioner submitted organizational documents and a stock certificate purporting to represent the issuance of 60 shares of stock to the foreign entity. However, the petitioner also submitted a copy of its 2004 Form 1120, U.S. Corporation Income Tax Return, in which the petitioner avers that it is not a subsidiary, that no individual or corporation owns 50% or more of its voting stock, and that no foreign person owns 25% of its stock. All three of these averments in the Form 1120 are inconsistent with the petitioner's assertion in the Form I-129 that it is 60% owned by the foreign entity. The petitioner offers no explanation for this fundamental inconsistency in the record. 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).

In view of this inconsistency, the petitioner has not established that it has a qualifying relationship with the foreign entity, and the petition may not be approved for this additional reason.

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ.*, 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.

