D7

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 199 53136 Office: TEXAS SERVICE CENTER Date: DEC 13 2004

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:

[redacted]

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, Director
Administrative Appeals Office

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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 petition seeking to extend the employment of its president 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 is a corporation organized in the State of Florida that is operating as both an exporter of medical supplies and a publisher of a health magazine. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Portuguesa, Venezuela. The petitioner now seeks to employ the beneficiary for three years.

The director denied the petition determining that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director concluded that the majority of the beneficiary's time would be devoted to performing non-executive day-to-day operations of the business.

On appeal, counsel claims that the director misunderstood the facts of the instant matter and misapplied the statute and regulations in her denial of the petition. Counsel submits a brief on appeal explaining the petitioner's "second division" of the business, a Spanish language health magazine, and contends that as president, the beneficiary supervises and manages the petitioning organization's marketing strategies and the publishing of its magazine. Counsel submits additional documentary evidence in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issue is whether the beneficiary would 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), provides:

The term "managerial capacity" means 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(i) Directs the management of the organization or a major component or function of the organization;

(ii) Establishes the goals and policies of the organization, component, or function;

(iii) Exercises wide latitude in discretionary decision-making; and

(iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the nonimmigrant petition on July 11, 2003, stating that as president, the beneficiary would be involved in the management and supervision of business operations. In an attached letter from the petitioner, dated July 9, 2003, the petitioner provided the following description of the beneficiary's job duties in the United States entity:

> [The beneficiary's] duties as President/General Manager include, among others: managing the U.S. entity and hav[ing] the discretion over operation decisions for the company, negotiate [sic] contracts on behalf of the corporation and deal[ing] with the U.S. supplier of goods. She manages the essential functions within the organization of overseeing the organization and selling the products to be distributed in the U.S., Venezuela, and others [sic] regions in Latin America. She directly supervises and 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.
>
> [The beneficiary] also is responsible for management and direction of the daily activities and investments of the business with an emphasis on implementing the operating policies, as well as the selection, placement and supervision of departmental staff. She also is responsible for, entering into and managing sub-contracting of staff and support services, controlling budget-operating expenses, and supervising of the company's operations, purchases approval, handling of banking accounts, and to define strategies of trade. She has been compensated at an annual salary of $32,000.00 per year plus standard benefits.

The petitioner submitted Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, for March 31, 2003, which identified six employees. The petitioner also provided an organizational chart identifying the beneficiary as president/general manager plus ten employees, including a magazine director, two magazine advisors, a columnist, a magazine designer, an import and export manager, a sales manager, and three sales executives.

On July 17, 2003, the director issued a request for evidence asking that the petitioner provide a list of job titles for its employees and a copy of its federal quarterly tax return for the quarter ending June 2003. The director noted that the salaries for four of the petitioner's workers during the first quarter of 2003 were small, and asked that the petitioner explain the low compensation.

Counsel responded in a letter dated July 18, 2003, noting that the employees reported on the petitioner's March 2003 quarterly tax return included the beneficiary, three sales executives, a sales manager, and an import and export manager. Counsel explained that since that time, the petitioner's sales manager and import and export manager have been replaced by new employees. Counsel also noted that since April 2003 the petitioner has employed a magazine director. Counsel submitted payroll charts for the first and second quarters of 2003 as evidence of the salaries paid during these periods. Counsel also submitted the petitioner's quarterly tax return for the quarter ending June 2003, which identified seven employees, five of which were employed in June 2003.

In a decision dated July 24, 2003, the director determined that the petitioner had not established that the beneficiary would be employed under the extended petition in a primarily qualifying managerial or executive capacity. The director stated that the beneficiary would not manage or direct the management of a department, subdivision, function or component of the organization, and would not supervise or control the work of other supervisory, managerial or professional employees who would relieve her from performing the business' non-qualifying operations. The director further stated that the petitioning organization had not grown to a point where the services of a full-time, bona fide president would be required, and consequently concluded that the majority of the beneficiary's time would involve performing the non-executive tasks of the organization. The director stated that this conclusion is further reinforced by "the fact that it would not be the norm in the corporate world to have fifty percent of a company's workforce employed in a mostly managerial and/or executive capacity." Accordingly, the director denied the petition.

Counsel filed a timely appeal on August 25, 2003 claiming that the director erroneously misapplied the facts and standards in her denial of the petition. In a brief subsequently submitted on appeal, counsel states that an inaccurate picture of the petitioner's operations was presented, and explains that the petitioner has a "second division" of its business which includes publishing a bi-monthly Spanish language health magazine. Counsel provides the following with regards to the beneficiary's job duties in the United States:

> As President of [the petitioning organization], [the beneficiary] directs the day-to-day operations and management of [the petitioning organization]. She evaluates trends, directs and establishes polices [sic] and objectives of [the petitioning organization]. She is responsible for the hiring and firing of the company employees, as well as with independent contractors used by the organization. She developes [sic] further business objectives and organizational policies. She is responsible for establishing responsibility and procedures for attainment of sales objectives.
>
> * * *
>
> [The beneficiary] is also responsible for [the petitioning organization], including directing the company's marketing strategies and ensuring its success. [The beneficiary] meets clients and vendors to cultivate and maintain these relationships.

Counsel explains that the beneficiary presently supervises and manages the following four employees: magazine director, administrative coordinator, director of sales, and graphics designer. Counsel states that the petitioning organization also utilizes independent contractors for printing and distribution.

On review, the petitioner has not demonstrated that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. *See* 8 C.F.R. §§ 214.2(l)(14)(ii)(C) and (D). There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

While the petitioner provided a description of the tasks to be performed by the beneficiary as president, it appears the beneficiary would be performing non-qualifying tasks of the organization. According to the petitioner's July 9, 2003 letter, the beneficiary would be responsible for the following non-managerial and non-executive job duties: negotiating contracts for the petitioner, interacting with U.S. suppliers for medical goods, controlling the company's budget and operating expenses, approving purchases, and maintaining the petitioner's bank accounts. As the petitioner has not indicated the amount of time the beneficiary would dedicate to these non-qualifying tasks, it cannot be determined whether the beneficiary is employed in a primarily managerial or executive capacity.

Additionally, the record does not support a finding that the beneficiary would be relieved of performing the non-qualifying operations of the business by subordinate employees. The record contains many inconsistencies regarding the workers employed by the petitioner at the time of filing the petition. The petitioner noted on the nonimmigrant petition that it employed six workers, yet submitted an organizational chart reflecting ten employees. Conversely, the petitioner's June 2003 federal quarterly tax return, subsequently submitted by counsel in response to the director's request for evidence, identified five employees during the month of June, which is the time period most applicable to the date on which the instant petition was filed. While it appears that at the time of filing the petition the petitioner employed the beneficiary, two sales executives, a magazine director and an import and export manager, this conclusion cannot be confirmed by the evidence 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). As the AAO is unable to ascertain the petitioner's staffing at the time of filing the petition, it cannot be determined whether the beneficiary would be relieved from performing non-qualifying operations of the business by subordinate workers. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO recognizes the evidence submitted by counsel on appeal identifying the petitioner's four employees who are currently supervised by the beneficiary. This information however will not be considered, as the petitioner must establish the beneficiary's eligibility as a manager or an executive at the time of filing the petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Although the appeal will be dismissed, the AAO notes that the director based her decision, in part, on an improper standard. The director's comments are inappropriate. The director should not hold a petitioner to her undefined and unsupported view of "the norm in the corporate world." The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although CIS must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some rational basis for finding a petitioner's staff or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that fifty percent of the petitioner's workforce is employed in a mostly managerial or executive capacity will not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act. For this reason, the director's decision will be withdrawn, in part, as it relates to the staffing of the petitioning business.

Based on the foregoing discussion, the record does not support a finding that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the petitioner demonstrated the existence of a qualifying relationship between the United States entity and the beneficiary's foreign employer as required in the Act at section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

Here, the petitioner provided its articles of incorporation and a stock certificate in support of its claim that a parent-subsidiary relationship exists between the two organizations. The stock certificate identifies the beneficiary's foreign employer as the sole owner of the petitioner's 1,000 authorized shares of stock. However, Schedule K and the attached Statement 5 of the petitioner's 2002 corporate income tax return identifies the beneficiary as the sole shareholder of the United States corporation. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. As the petitioner offered no explanation as to the discrepancy in its ownership, the AAO cannot conclude that a qualifying relationship exists between the two organizations. 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.