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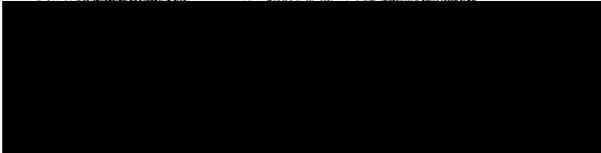


U.S. Citizenship  
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Services

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FILE: SRC 02 041 51196 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

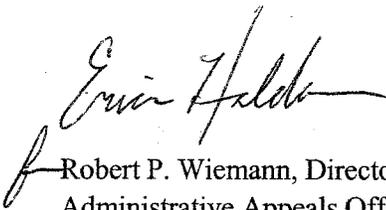
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner [REDACTED] endeavors to classify the beneficiary as a manager or executive 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 claims to be a branch of Burgos Vinos y Productos SA located in Argentina and is in the business of selling wines and bakery products from Argentina. The beneficiary was initially granted a one year period to open a new office in the United States. The petitioner now seeks to extend the petition's validity and the beneficiary's stay for one year as the U.S. entity's vice president and general manager. The petitioner was incorporated in the State of Florida on April 26, 2000 and claims to have two employees.

On May 16, 2002, the director denied the petition concluding that the beneficiary will not serve in a primarily managerial or executive capacity.

On appeal, the petitioner provides additional descriptions of the beneficiary's duties and the petitioner's operations, and requests reconsideration of the decision to deny the petition. The petitioner submits a letter and additional evidence in support of the appeal.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. 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. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(14)(3) state 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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii), if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation requires:

A visa petition under section 101(a)(15)(L) 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 issue in this proceeding is whether the beneficiary will be primarily performing managerial or executive duties for the United States entity.

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.

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.) 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.

On November 14, 2001, the petitioner filed Form I-129. On Form I-129, the petitioner described the beneficiary's U.S. entity duties as "oversee the entire activities of the start-up operation including employee negotiations, sales and marketing including inventory." In addition, in a November 13, 2001 supporting letter, the petitioner described the beneficiary's U.S. duties as:

[The beneficiary] shall bring her expertise and vast in depth knowledge associated with this industry. . . . Her duties shall include overseeing the hiring and firing of employees, employee negotiations, overseeing receiving, heavy customer interaction, the sale of our products, shall instruct independent contractors and company personnel. She shall interact with banks and vendors. She shall apply marketing strategies to continue to introduce our products in Florida; shall oversee inventory control and moreover, she shall be the liaison between Argentinean parent company and Miami based corporation, including traveling to Argentinean [sic] for the above-mentioned purpose. She shall be responsible for all negotiations with U.S. retail stores, setting price, shipping and all customs related issues. . . . [The beneficiary] shall also establish policies and objectives beneficial for the growth and development for the company.

On January 19, 2002, the director requested additional evidence. In particular, the director requested a description of the beneficiary's duties for the initial year of operations. The director also requested that the petitioner submit the hours of operation and work schedule for the U.S. employees and evidence of the wages paid to the U.S. employees listed on the organizational chart, including Forms W-2 for 2000 and the company's last two federal quarterly tax reports

In response to the request for additional evidence, the petitioner submitted a March 8, 2002 letter describing the beneficiary as continuing to "bring her expertise and vast in-depth marketing knowledge associated with this industry." The petitioner stated that it employs a salesman and provided a 2001 Form 1099-MISC evidencing payments of \$6,450.00 to this individual. The petitioner also submitted its quarterly tax returns which show that the beneficiary was the sole payroll employee.

On March 16, 2002, the director denied the petition. The director determined that the beneficiary will not be employed in a primarily executive or managerial capacity. The director stated that the requested hours of operation of the petitioner's market and work schedule were not submitted. The director concluded that the beneficiary is the only full-time employee and is involved in carrying out the day-to-day operations of the company.

On appeal, the petitioner asserts that the beneficiary's "knowledge and talent, based on her prior and actual experience with our company, give us an irreplaceable background to pursue the development and introduction of our cutting line of products into EEUU and abroad." In addition, the petitioner describes the beneficiary's duties as:

[The beneficiary] is now in charge of the completion, marketing and distribution of the final face [sic] of our start-up operation of our corporation in Florida. . . . In addition, we now opened a new showroom in the city of Miami, copy of lease and licenses hereby enclosed. The hours of operation are at the present time from Monday to Saturday from 8:30 am to 8:30 pm, and Sundays from 10:00 am to 6:00 pm. The hours of our employees are the same as the market. We are also in the process of interviewing and hiring three or four American employees and salesmen to pursue our development, so [the beneficiary] may properly supervise our personnel. . . . [REDACTED] . . . who was working as our independent contractor is now our fully bilingual salesman and will be hired on a permanent basis. . . . [The beneficiary] is working with a web design company in Argentina on the creation of all database necessary to store on our own web pages. . . .

The AAO notes that the petitioner submits evidence on appeal that the director requested in his January 16, 2002 request for evidence letter. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

In 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). On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to establish what the beneficiary does on a day-to-day basis. For instance, the petitioner states that the beneficiary's duties include establishing policies and objectives, overseeing inventory control, and overseeing the distribution of the final phase of the company's start-up operation. The petitioner did not, however, define the beneficiary's policies or objectives, explain how the beneficiary will oversee inventory control or describe any specific managerial duties she will perform to complete the final phase of the company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22

I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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).

In addition, the petitioner claims that the beneficiary shall bring her expertise and vast in depth knowledge associated with this industry. However, the petitioner fails to identify how the beneficiary will specifically draw upon this in depth knowledge. Although the petitioner claims that the beneficiary is a "vice president and general manager" with in depth knowledge, the AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title.

Further, the petitioner generally paraphrased the statutory definition of managerial capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as "overseeing the hiring and firing of employees." However, 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.).

Moreover, the petitioner describes the beneficiary as interacting with banks and vendors and applying marketing strategies to continue to introduce products into Florida. The beneficiary also is responsible for all negotiations with retail stores including setting prices, receiving shipping and handling activities, and customs. The petitioner also indicates that her duties include "heavy customer interaction" and "the sale of our products." Since the beneficiary actually markets and sells the products, negotiates with vendors, and coordinates shipment and delivery of goods, she is performing tasks necessary to provide a service or product. 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). Based on the record, the beneficiary is primarily engaged in non-qualifying tasks which preclude her from performing duties which are predominantly managerial or executive in nature.

Additionally, on appeal, the June 8, 2002 letter stated that "[w]e are also in the process of interviewing and hiring three or four American employees and salesmen to pursue our development, so [the beneficiary] may properly supervise our personnel. . . . given the needs of [the petitioner], we anticipate that two to four years of employment will be sufficient to develop the current start-up operation." The petitioner must establish eligibility at the time of filing the nonimmigrant visa 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).

In addition, the petitioner indicated on Form I-129, that the beneficiary was coming to the United States to open a new office. However, the regulations 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. There is no provision in 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

After careful consideration of the evidence, the AAO concludes that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, there are discrepancies in the record concerning the qualifying relationship between the petitioner and foreign company. On Form I-129, the petitioner described the U.S. entity as a branch of the foreign entity and indicated that the foreign entity owns 51 percent of the U.S. entity. The regulation at 8 C.F.R. § 214.2(I)(ii)(G) defines the term "qualifying organization" as follows:

(G) Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (I)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, branch, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(I)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(I)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. See *Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); see also *Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982) (stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick, supra* at 649-50.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer. The petitioner was incorporated in the State of Florida on April 26, 2000 and is not considered a branch of the foreign company. 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 evaluating whether the petitioner qualifies as a subsidiary or affiliate of the foreign entity, the AAO will examine the ownership and control of the petitioner and foreign entities. 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 immigrant 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)(in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)(in nonimmigrant visa proceedings). 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.

On Form I-129, the petitioner indicated that the foreign entity owns 51 percent of the petitioner's stock and [REDACTED] owns 100 percent of the foreign entity's stock. The petitioner submitted a copy of a document from an Internet website for corporations' online showing the date the petitioner was incorporated. The petitioner also submitted copies of the petitioner's business checking account showing an \$8000 wire transfer from [REDACTED] to the petitioner. However, the U.S. Corporation Income Tax Return 2001, Form 1120, Schedule K, indicated that no individual or corporation owned at least 50 percent of the petitioner's voting stock. Form 1120 also indicated that one foreign person did not own directly, or indirectly at least 25 percent of the total voting power of all classes of stock of the corporation or the total value of all classes of stock of the corporation. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. In addition, the U.S. entity's balance sheet's liabilities and shareholder's equity as of July 31, 2001 shows \$200.00 in common stock. However, Form 1120, U.S. Corporation Income Tax Return for 2001, Schedule L, liabilities and shareholder's equity shows common stock valued at \$100.00. 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, supra*. In addition, the petitioner did not submit its articles of incorporation, by-laws, stock certificates, or any documents to show ownership and control of either entity. In sum, there is inconsistent and insufficient evidence to

determine who owns and controls the petitioner and foreign entity. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, in order for the U.S. entity to meet the requirements of a qualifying organization, the claimed foreign entity must also be doing business abroad. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term “doing business” as the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad. *Id.* The AAO finds insufficient evidence in the record to establish that the foreign entity has been doing business. The director requested additional evidence that the foreign entity was doing business. In response to the director’s request, the petitioner submitted a license to sell food and drinks. Although the petitioner submitted what appeared to be sales tax returns, they were not translated. However, the petitioner is required to translate any foreign language documents submitted for the record. The regulation at 8 C.F.R. § 3.33 requires, in pertinent part, that “any foreign language documents offered by a party in a proceeding shall be accompanied by an English language translation and a certification signed by the translator that must be printed legibly or typed.” *Id.* For this additional reason, the petition may not be approved.

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 appeal will be dismissed.

**ORDER:** The appeal is dismissed.