U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 077 52379 Office: TEXAS SERVICE CENTER Date: OCT 14 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:

SELF-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, Director
Administrative Appeals Office

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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 administration and finance manager as an L-1A nonimmigrant intracompany transferee pursuant to § 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 operates as a retail store. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Montevideo, Uruguay. The petitioner now seeks to extend the beneficiary's stay for two years.

The director denied the petition concluding that the petitioner had failed to demonstrate that the beneficiary would be employed by the U.S. entity 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 it to the AAO for review. On appeal, the petitioner states that the beneficiary's employment in the United States in a primarily managerial or executive capacity is supported by such evidence as the petitioner's gross sales and personnel structure, and the beneficiary's job duties of managing and directing the administration and finance department. The petitioner submits a brief 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.
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> (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 in this proceeding is whether under the extension of the nonimmigrant petition, the beneficiary would be employed by the petitioner 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 January 17, 2003. In an attached letter, dated December 24, 2002, the petitioner provided the following outline of the beneficiary's job duties as the petitioner's administration and finance manager:

1. She is in charge of all administrative and financial operations of the company. She is the contact person between the company in Uruguay and the company in the United States. She plans, develops, and establishes policies and objectives of the business organization and operation, as well as organizational policies to coordinate functions and operations of the company (Dedicating 20% of her time to this duty)

2. She coordinates the formulation of financial programs to provide funding for new and continuing operations that can maximize returns (Dedicating 20% of her time to this duty)

3. She [m]anages, controls and coordinates our projects. Participation with other members of the organization, [m]anages and organizes the work of the employees under her supervision (Dedicating approximately 10% of her time to this duty)

4. She hires employees for the correct functioning of the Enterprise, she names and fixes salaries and bonuses. (dedicating 10% of his [sic] time to this duty)

5. She reports to the Board of Directors her yearly actions, and presents the Balance Sheet and a project of the distribution of the utilities (dedicating %10 [sic] of his [sic] time to this duty)

6. She supervises a team of top management personnel who run the day-to-day operations at the Corporation in the United States. (Dedicating 10% of his [sic] time to this duty)

7. She develops, directs financial policies and practice of the organization: budgeting and forecasting, expense analysis, financial flash preparation, balance sheet analysis and operating company balance sheet reviews (Dedicating 10% of her time to this duty)

8. She plans and develops planning. Provides sales reporting support to financial planning. Generates ad hoc reports and manages weekly reporting. Prepares recommendations based on financial statements, income statements, pro formas and cash flow analysis (Dedicating 10% of her time to this duty)

The petitioner explained that the beneficiary's prior work experience as the foreign company's administration manager qualifies her to successfully perform in the proffered position.

The petitioner submitted an organizational chart of the U.S. corporation in which the beneficiary was identified as the supervisor of the certified public accountant and was listed as subordinate to the company's president.

The director subsequently issued a request to the petitioner to submit a list of its employees and their job titles. The petitioner responded in a letter dated February 21, 2003, noting that it had a staff of six employees: president, administration and financial manager, operations manager, certified public accountant, sales person, and driver. The petitioner submitted the following job description for the beneficiary:

> Duties: In charge of all administrative and financial operations of the company. She plans, develops, and establishes financial policies of the business organization, as well as organizational policies to coordinate functions and operations of the company (20%); Coordinate the formulation of financial programs (20%); manages, control and coordinate projects. Manages the work of the employees under her supervision (CPA – [redacted] hires employees (20%); report to the board of directors and President (10%); supervises a team of top management personnel who run the day to day operations (10%); Develops, directs financial policies and practice of the organization: budgeting and forecasting, expense analysis, financial flash preparation, balance sheet analysis (10%); provides sales reporting support to financial planning. Prepare recommendations based on financial statements, income statements, pro formas and cash flow analysis (10%).

The petitioner provided a second organizational chart, in which the beneficiary was identified as supervising an accountant and a sales person. The petitioner also submitted its Employer's Quarterly Report for the quarter ending December 31, 2002, which reflected the employment of five employees.

In a decision dated February 28, 2003, the director concluded that the petitioner had failed to demonstrate that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director noted the existence of an unexplained discrepancy in the number of employees the petitioner claimed to employ, stating that the nonimmigrant petition indicates four employees, while the petitioner later claimed to have six employees. The director concluded that regardless of the exact number of personnel, "it is not realistic for a corporation to have fifty percent of its' [sic] workforce employed in strictly executive and/or managerial functions."

The director also stated that the petitioner had failed to demonstrate that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization, and did not establish that the beneficiary would supervise supervisory, managerial, or professional employees who would relieve the beneficiary from performing the daily services of the business. The director determined that the U.S. organization was not able to support the beneficiary in a primarily managerial or executive position, and concluded that the beneficiary would spend the majority of her time performing the non-managerial operations of the business. Accordingly, the director denied the petition.

On appeal, the petitioner challenges the director's findings and claims that neither a fluctuation in the petitioner's number of employees nor the petitioner's employment of a large managerial or executive workforce dictate whether the beneficiary would be employed in a qualifying capacity. The petitioner outlines the regulatory requirements for managerial capacity and restates the job duties for the beneficiary previously provided in its response to the director's request for evidence. Specifically, the petitioner states that the beneficiary establishes the petitioner's financial policies and objectives, coordinates and reviews financial programs, meets with the company's president to coordinate new projects, hires personnel to perform the company's financial and accounting functions, and supervises and meets with the accountant on a monthly basis to review financial matters. The petitioner also noted that the beneficiary reports directly to the president and the board of directors. The petitioner further claims that the beneficiary's position as administration and finance manager is one "that can be held in any [c]ompany no matter the size of same."

On review, the record does not support a finding that the petitioner would employ the beneficiary 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. 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.

In the present matter, although the petitioner provided a detailed description of the beneficiary's job duties, the petitioner has not demonstrated the beneficiary supervises a supervisory, managerial, or professional staff that would support the beneficiary in a primarily managerial capacity. *See* section 101(a)(44)(A)(ii) of the Act. The petitioner claimed throughout the record that the beneficiary "supervises a team of top management personnel" and manages the work of the accountant and sales person, yet provided no documentation that: (1) the beneficiary actually supervises these employees; and (2) the lower-level employees, specifically the sales person, is employed in a supervisory, managerial or professional position.

The petitioner has not explained how the beneficiary actually "supervises" or "manages" the accountant. The petitioner's quarterly reports do not identify the accountant as an employee of the petitioning organization. Rather, it would appear that the relationship between the petitioner and accountant is contractual. If the petitioner uses the accountant's services on a contractual basis, there is no evidence demonstrating that the beneficiary maintains control over the accountant's work or dictates the manner in which the work is performed. Moreover, the petitioner has not explained how its sales person, who is subordinate to the beneficiary, can be considered to be employed as a supervisory, professional or managerial employee. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary is primarily supervising a non-professional salesperson, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

In addition, the record demonstrates that the beneficiary will likely be performing non-managerial and non-executive functions of the business. Even though the petitioner states that the beneficiary is in charge of all administrative and financial operations and that she directs the financial policies of the organization, the petitioner does not claim to employ anyone who specifically handles the company's finances. While the petitioner asserts that the accountant is responsible for the organization's daily accounting and finances, the petitioner's profit and loss statement, which reflects a payment of $1,455.00 in legal fees for the year 2000, indicates that the accountant is likely hired on an as-needed basis. It does not seem plausible that the accountant would perform the petitioner's daily billing and would be responsible for preparing its financial reports and taxes for a fee of less than $1,500.00. The AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. 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 (BIA 1988). If the beneficiary is performing the financial functions of the organization, the AAO notes that 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).

Moreover, although the petitioner states in its December 2002 letter that it has two contractual employees, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. The petitioner also fails to indicate on Schedule A of its 2001 U.S. Corporation Income Tax Return any payments made for contract labor. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Again, without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Based on the foregoing discussion, the AAO cannot conclude that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

Beyond the decision of the director, an additional issue is whether the petitioner has demonstrated the existence of a qualifying relationship between the beneficiary's foreign employer and the petitioning organization as required in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and 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.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control.

In the present matter, the petitioner submitted only a stock certificate as evidence of a parent-subsidiary relationship. Schedule L of the petitioner's 2001 U.S. Corporation Income Tax Return does not reflect a value for the petitioner's common stock, thereby indicating that the foreign entity did not contribute funds in exchange for its ownership interest. Additionally, the record does not indicate the number of authorized shares as compared to the number of shares issued. This information is relevant in confirming whether the foreign entity is the sole shareholder of the petitioner's stock, as implied by the documentary evidence in the record, and therefore the parent. 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. 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. at 193. Absent additional evidence, the AAO cannot determine whether the petitioning organization is a subsidiary of the beneficiary's foreign employer. 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.