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U.S. Citizenship
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File: SRC-02-158-50013 Office: TEXAS SERVICE CENTER Date:

AUG 17 2005

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)

IN 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 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 and General 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 in the State of Florida that provides cleaning and maintenance solutions. The petitioner claims that it is the affiliate of [REDACTED] located in Caracas, Venezuela. 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, the petitioner asserts that the beneficiary will be employed in a primarily managerial or executive capacity, and that the Act is not intended to prohibit petitioners with a small staff size from establishing L-1A eligibility. In support of this assertion, the petitioner submits a statement 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(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 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.

In a letter submitted with the initial petition on April 25, 2002, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] will continue filling the position of President and General Manager for the [petitioner]. His duties are among others: the discretionary decision making of the business and affairs of the corporation; presides of all the meetings of the shareholders and all the meetings of the Board of Directors; execute bonds, mortgages and other instruments requiring seal; sign certificates of stocks; represent all the business and interest of [the petitioner]; hire and fire employees; manage the short and long [term] financial planning; establish general guidelines which must be followed and executed by employees

The petitioner indicated on Form I-129 that it employed four individuals as of the date of filing the petition.

On August 14, 2002, the director requested additional evidence. Specifically, the director requested evidence that the beneficiary will be employed in a primarily managerial or executive capacity. The director further instructed the petitioner to submit a list of employees that the beneficiary will manage, including their job titles, duties, and evidence of their employment such as copies of Forms W-2.

In a response received on October 8, 2002, in part the petitioner submitted copies of 2001 Forms W-2 for five employees, and a letter further discussing the petitioner's staffing and the beneficiary's duties. The petitioner provided that it employs the beneficiary and an administrative assistant, yet it has three positions available for prospective workers. The petitioner restated the beneficiary's job description as submitted with the initial petition, and indicated that the beneficiary's duties include "manag[ing] the organization, [and] primarily supervis[ing] and control[ing] the work of other employees." The petitioner described the duties of the administrative assistant as follows:

Plan, direct and coordinate supportive services of an organization, such as record keeping, mail distribution, invoicing and collection, file keeping, oversee facilities planning and maintenance and custodial operations, coordinates activities of clerical and administrative personnel, analyzes and organizes office operations, etc.

Education: work experience, plus degree.

(Emphasis in original).

On October 24, 2002, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director stated the following:

Since the office only has the beneficiary and one administrative assistant, [Citizenship and Immigration Services (CIS)] is not persuaded that the beneficiary's duties in this position will be primarily those of an executive or manager. Rather it would appear that the beneficiary will be engaged primarily in the day-to-day operations of the business itself.

On appeal, the petitioner asserts that the beneficiary will be employed in a primarily managerial or executive capacity. In an attached letter, the petitioner repeats the previously submitted description of the beneficiary's duties, and adds the following:

[The beneficiary] is not a first line supervisor and he is not engaged primarily in the day-to-day operations of the business. The fact that at the time of the filled [sic] the petition, the entity had three(3) vacant positions, does not mean that the beneficiary is not an executive or manager. We provided evidence that those positions were filled before and we were in a recruitment period. Moreover, [the beneficiary] supervises professionals, the "Finance manager".

The petitioner references the decisions in *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570 (N.D. Ga. 1988), to stand for the proposition that "[t]he [Act] was not intended to limit managers or executives to persons who supervise a large number of persons or large enterprise[s]."

Upon review, the petitioner's assertions are not persuasive. 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(1)(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 must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

The beneficiary's job description submitted by the petitioner is brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the statements that the beneficiary's duties include "the discretionary decision making of the business and affairs of the corporation" and "represent[ing] all the business and interest of [the petitioner]" do not indicate what tasks the beneficiary will perform on a daily basis. The petitioner indicates that the beneficiary "presides [over] all the meetings of the shareholders and all the meetings of the Board of Directors." However, the petitioner stated that there is only one shareholder, thus the evidence of record suggests that there are no shareholder meetings. The petitioner has not discussed its board of directors or described the nature or frequency of meetings with them, such that CIS can understand the nature of the beneficiary's responsibility for such referenced meetings. The petitioner indicates that the beneficiary will "sign certificates of stocks," yet the petitioner has failed to submit copies of any of its stock certificates, or to establish that such duty would require a significant amount of the beneficiary's time.

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). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job description does not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

The petitioner provides that that beneficiary will have supervisory authority over subordinate employees, including an administrative assistant. The petitioner states that it has a total of five positions in its company, although three were vacant at the time the petition was filed and recruitment efforts are underway to fill them. It is noted that 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). The fact that the petitioner intends to hire additional workers in the future is not probative of its eligibility as of the filing date. Accordingly, CIS will only consider the beneficiary's subordinate who was employed as of the date of filing the petition, namely the administrative assistant.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must 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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that a bachelor's degree is actually necessary to perform the duties of its administrative assistant. While the petitioner suggests that the administrative assistant holds a degree, it has failed to specify the subject studied, the degree held, and the relevance of the training to the required tasks. Thus, contrary to the petitioner's assertion, the petitioner has failed to show that the beneficiary's subordinate is a professional.

Nor has the petitioner shown that the administrative assistant supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that this employee could be classified as a manager or supervisor. Accordingly, the petitioner has not shown that the beneficiary's subordinate employee is supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. The petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp. v. Pasquarell* or *Mars Jewelers, Inc. v. INS*. It is noted that both of the cases cited relate to immigrant visa petitions, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, the cases cited by the petitioner are distinguishable based on the applicable regulations. See 8 C.F.R. § 214.2(l)(14)(ii). Additionally, regarding *Mars Jewelers, Inc. v. INS*, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. As the petitioner has not discussed the facts of any of the cited matters, they will not be considered in this proceeding.

Yet, the petitioner correctly observes that a company's size alone may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 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 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.

While the petitioner has not clearly described its business operations, it indicates that it provides cleaning and maintenance solutions. A review of the petitioner's invoices for goods sold reflects that the petitioner sells floor mats and cleaning supplies. Thus, it is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive tasks such as taking orders and specifications for goods, answering questions about merchandise from customers, tracking the petitioner's inventory, managing a checking account and paying bills, answering telephones, receiving and shipping merchandise, and conducting sales transactions. As one of two employees of the petitioner, it appears that the beneficiary must share in these non-qualifying tasks. Thus, the reasonable needs of the petitioner suggest that the beneficiary must spend a significant amount of time performing the tasks necessary to provide the petitioner's products and services. 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 petitioner has failed to establish that these non-managerial and non-executive tasks do not constitute the majority of the beneficiary's time. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has failed to provide any independent evidence to show who owns or controls it or the foreign entity. As evidence of a petitioner's claimed qualifying relationship, CIS must examine documents such as stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings 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. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. 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)).

Further, the petitioner has failed to establish that the foreign entity is a qualifying organization engaged in the regular, systematic, and continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). The regulation at 8 C.F.R. § 214.2(l)(ii)(G)(2) reflects that, in order for an entity to be considered a qualifying organization, the petitioner must show that it:

Is or will be doing business (engaging in international trade is not required) as an employer in the United States and 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

The regulation at 8 C.F.R. § 214.2(l)(ii)(H) defines the term "doing business" as:

[T]he 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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) requires the petitioner to submit “[e]vidence that the United States and foreign entities are still qualifying organizations.” The only evidence the petitioner submitted to show that the foreign entity continues to do business consists of untranslated documents and brief, general letters from two of the company’s vendors. These documents do not serve as sufficient evidence that the foreign entity is engaged in “the regular, systematic, and continuous provision of goods and/or services.” See 8 C.F.R. § 214.2(l)(ii)(H). Thus, the petitioner has failed to show that the foreign entity is a qualifying organization. See 8 C.F.R. § 214.2(l)(ii)(G)(2). Accordingly, the petitioner has not established that it has a qualifying relationship with the foreign entity. See 8 C.F.R. § 214.2(l)(14)(ii)(A). 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.