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

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U.S. Citizenship and Immigration Services

[redacted]

D7

File: SRC 04 074 50492 Office: TEXAS SERVICE CENTER Date: AUG 2 6 2005

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)

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, a Florida corporation, claims to be the subsidiary of Constructora del Salto, C.A., located in Caracas, Venezuela and claims to be engaged in the real estate business. 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 for an additional two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director also found that the petitioner did not establish that it had been doing business during the previous year as required by the regulations.

The petitioner filed an appeal in response to the denial. On appeal, the petitioner asserts that the director erroneously relied on the fact that the beneficiary was the petitioner's sole employee in concluding that the beneficiary was not a qualified manager or executive. In support of this contention, the petitioner submits a brief statement.

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 managerial or executive capacity; and

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

The primary issue in this 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 the initial petition, the petitioner submitted an undated statement from the petitioner, prepared by the beneficiary in his capacity as president and general manager, which discussed the U.S. entity's business and the beneficiary's role within this structure. With regard to the beneficiary's duties, the petitioner stated:

> [The beneficiary] will continue filling the position of President and General Manager for the corporation. He will be responsible for: 1. the general and active discretionary decision making of the business and affairs of the corporation; 2. presides [over] all the meetings of the shareholders and all the meetings of the board of directors; 3. shall execute bonds, mortgages and other instruments; 4. shall sign certificates of stocks; 5. represent all the interests of [the petitioner]. He is qualified to fill the position on the basis of his past experience with the foreign and US corporation.

On February 21, 2004, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit evidence with regard to the beneficiary's title, his duties, and the percentage of time he devoted to each. The director also requested information with regard to the number of managerial and/or supervisory employees employed by the petitioner, as well as a brief description of their duties. In the event that the beneficiary did not supervise other employees, the director requested a description of any essential function managed by the beneficiary. Finally, the director requested evidence establishing the beneficiary's position in the organizational hierarchy of the petitioner, as well as an explanation as to who was responsible for providing the petitioner's products or services. In a response received on May 26, 2004, the petitioner submitted an updated description of the beneficiary's duties, which is set forth below.

The duties of the President and General Manager are: organize, develop and administrate the corporation conforming with the acts of licit commerce permitted by the laws, as well as the general commercial and administrative practices accepted.

Within these duties are the following:

a. Represent the corporation in its activities;
b. Administer and manage the personnel of the corporation;
c. Administer and manage all business and operations (sales, purchasing, invoicing, collection);
d. Identify new opportunities of business;
e. Comply with the legal obligations of the corporation;
f. Others, indispensable for the good functioning of the corporation;
g. Present statements on the results of this operation (monthly and yearly)

With regard to the percentage of time the beneficiary devoted to each duty, the petitioner stated:

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| a. | Represent the corporation in its activities | 10% |
| b. | Administer and manage the personnel of the corporation | 10% |
| c. | Administer and manage all business and operations [sales, purchasing, invoicing, collection] | 50% |
| d. | Identify new opportunities of business | 15% |
| e. | Comply with the legal obligations of the corporation | 5% |
| f. | Others, indispensable for the good functioning of the corporation | 5% |
| g. | Present statements on the results of this operations [sic] [monthly and yearly] | 5% |

The petitioner further stated that it was still in a start-up phase, and thus only employed the beneficiary. The petitioner noted, however, that it intended to hire five additional employees within the coming year and provided a description of the proposed positions.

On June 4, 2004, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would be primarily employed in a managerial or executive capacity. In addition, the director concluded that the evidence did not establish that the beneficiary was supervising managerial, professional, or supervisory employees such that he could be deemed primarily a manager.

On appeal, the petitioner submits a brief statement on Form I-290B and asserts for the first time that the beneficiary manages an essential function within the organization. The petitioner further claims that the fact that the petitioner employs only the beneficiary does not warrant a conclusion that the beneficiary is not acting in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The description of duties provided by the petitioner in the initial petition did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a generic description of the nature of his duties, and at times merely paraphrased the regulatory definitions. As previously stated, the initial evidence submitted was insufficient to warrant approval and, consequently, the director requested more specific information, including an updated description of the beneficiary's duties and details with regard to the petitioner's organizational structure. The petitioner submitted this requested evidence, which the director found to be insufficient to establish that the beneficiary's duties qualified under the requested classification.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary will not be employed in either a primarily managerial or executive capacity. First, the petitioner failed to specifically articulate the nature of the beneficiary's duties. While the petitioner did identify the overall business goals of the petitioner and the beneficiary's role in reaching those goals, it failed to specifically discuss what the beneficiary did during an actual workday. 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). Although the petitioner provided descriptions of the beneficiary's duties in both the initial petition and the response to the request for evidence, these descriptions did not articulate of what a specific day in the role of the beneficiary would consist. Instead, the descriptions merely provided a brief synopsis of the beneficiary's overall duties, such as "represent the corporation in its activities" and "administrate and manage the business and operations," and failed to discuss or identify job-specific tasks or obligations the beneficiary was required to perform. These statements fail to discuss the details of the beneficiary's actual duties despite the fact that the percentage of time she devotes to such duties is provided. The petitioner basically equates managerial and executive capacity with the beneficiary's title of president and general manager, yet fails to provide solid examples of how this capacity is actually attained. 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. v. Sava,* at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Second, whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner provides virtually no detail or discussion of the beneficiary's actual duties. Instead, the petitioner merely claims that the services of the beneficiary are essential to the petitioner's development. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. As previously stated, 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. at 1103.

The AAO notes that in response to the request for evidence, the petitioner claimed that the beneficiary devoted 10% of his time to overseeing personnel, but also claimed to employ no one but the beneficiary. The director requested the petitioner to provide a statement regarding the beneficiary's subordinates and the positions they filled, or, in the alternative, to provide a statement discussing the essential function the beneficiary managed if no personnel were being supervised. In response, the petitioner provided a description of the proposed positions it planned to implement in its organizational hierarchy and discussed the beneficiary's supervision over these employees. On appeal, however, the petitioner changes its position and now claims that the beneficiary manages a function of the petitioner. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Consequently, the AAO will continue to base its decision in this matter on the evidence contained in the record prior to adjudication.

The petitioner's main contention is that the director erred in denying the petition on the basis that the beneficiary was the petitioner's sole employee. The petitioner correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this case, the petitioner indicates that it is still in a start-up phase and that most of the previous year was devoted to researching the market. It confirms that the beneficiary is its sole employee and that the majority of his time (50%) is devoted to the administration and managing of the business and its operations. Since there are no other employees to relieve the beneficiary, it must be concluded that the beneficiary is performing all tasks necessary to promote the business so that it can become operational. While the beneficiary's undertaking of all of the necessary tasks essential to the business is commendable, it does not qualify him for the requested classification. 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 indicates that it plans to hire additional managers and employees in the future. However, 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. For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner has been doing business as required by the regulations for the previous year. 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."

In this matter, the petitioner claims that it is engaged in the real estate business. The director denied the petition, finding that the petitioner had failed to satisfy the regulatory requirements for doing business.

With the initial petition, no evidence of the petitioner's business practices was submitted. Consequently, in the request for evidence issued on February 21, 2004, the director requested documentation establishing that the petitioner had been doing business during the previous year as required by the regulations. Specifically, the director requested evidence in the form of financial records, tax records, employee rosters, annual reports, and evidence of business conducted, such as invoices, bills of sale, and/or product brochures of goods and services sold or produced by the company. In the response received on May 26, 2004, the petitioner submitted numerous invoices, showing that the petitioner performed services as of September 15, 2003 and thereafter. There was no documentation establishing that any goods or services were provided by the petitioner from the valid date of the initial L-1A petition, January 24, 2003, through September 14, 2003. The relevant invoices, therefore, were for the months of September, October, November, and December 2003, and January 2004. On appeal, the petitioner does not address this basis for the director's denial.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the previous year. The record indicates that the beneficiary was granted a one-year period of stay from January 24, 2003 to January 24, 2004 to open a new office. The record further indicates that the petitioner would engage in the real estate business. However, there is no indication of any business activities whatsoever until September 2003.

Based on this limited information, it is clear that the petitioner was not doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO acknowledges the petitioner's claim that business was slow to start and is still in the developmental phase. However, the record is devoid of an explanation as to what the petitioner did between January 2003 and September 2003, and further lacks any explanation or documentation regarding other activities engaged in by the petitioner to promote its business during this period. The fact that the petitioner did not commence operations until September 2004, four months prior to the visa expiration, does not excuse the petitioner from meeting the regulatory requirements.

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 establish the new office. Furthermore, at the time the petitioner seeks an extension of a new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) require the petitioner to demonstrate that it has been doing business for the previous year. In the present matter, the evidence

submitted at the time of filing confirmed that the petitioner had not been conducting business as required. The fact that it will hire more employees and expand the business in the future does not automatically entitle the petitioner to an extension of the visa, for it fails to change the fact that the petitioner failed to conduct business during the previous year. 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.

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

**ORDER:** The appeal is dismissed.